IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WIVES AND MOTHERS OF PRISONERS OF THE STATE, a Washington Non-Profit Corporation, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, a Subdivision of the State of Washington, Respondent.	No. 39014-1-II UNPUBLISHED OPINION

Armstrong, J. — Wives and Mothers of Prisoners of the State, a Washington nonprofit corporation, appeals the dismissal of its lawsuit against the Department of Social and Health Services. Wives and Mothers argues the trial court erred in dismissing the lawsuit because (1) the Department's motion to dismiss did not contain any citations to legal authority, (2) the case had already been set for trial, and (3) dismissal for failure to comply with a court order was not warranted by law. Wives and Mothers also argues that the trial court erred in deciding the sanctions against the corporation's sole officer could not be paid by a third party. Although we

agree with the basis of the trial court's dismissal of the action and therefore affirm, we are obligated to remand for the court to enter its findings on the record.

FACTS

Wives and Mothers is a nonprofit corporation registered in Washington State. Richard Scott is the sole incorporator and officer of the corporation. Scott is also a sexually violent predator committed to the Special Commitment Center (SCC), a state facility operated by the Department of Social and Health Services.

In March 2008, Wives and Mothers filed a complaint against the Department, alleging violations of the Public Records Act, chapter 42.56 RCW. After filing the complaint, the attorney representing Wives and Mothers, Michael Kahrs, withdrew at Scott's request. Before withdrawing, Kahrs advised Scott by letter that "[Wives and Mothers] cannot be represented pro se. You might want to consider changing the plaintiff to you so you can pursue the claim pro se." Clerk's Papers (CP) at 81.

Scott signed and filed a motion to proceed pro se on behalf of Wives and Mothers. In addition to opposing the motion, the Department requested attorney fees and costs under CR 11. The trial court denied the motion and stayed the proceedings, ordering Scott to reimburse the Department $500 in attorney fees and costs under CR 11. The court also warned Scott that if the sanction was not paid, the court would dismiss the action. Wives and Mothers moved for reconsideration.[1] The trial court denied the motion and granted the Department an additional

[1] Kahrs signed and filed the motion for reconsideration, returning to representing Wives and Mothers in the matter.

$175 in attorney fees and costs.

Four months after the court order, Scott had still not paid the sanctions. The Department moved to dismiss the lawsuit for failure to prosecute and failure to comply with a court order.[2] Days before the hearing on the motion, Kahrs deposited a check for $675 with the Pierce County Superior Court registry. At the hearing, Kahrs admitted he did not receive the money he deposited from Scott. Holding that the order required Scott to personally pay the sanctions, the trial court dismissed the case with prejudice.

ANALYSIS

I. Standard of Review

We review an order of dismissal for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684-85, 41 P.3d 1175 (2002); *see also Woodhead v. Discount Waterbeds, Inc*., 78 Wn. App. 125, 129, 896 P.2d 66 (1995) (a court has the discretion to dismiss an action based on a party's willful noncompliance with a reasonable court order). A court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

[2] In its motion to dismiss, the Department requested the court to "(1) dismiss this matter for failure to prosecute and (2) enter judgment in the amount of $675.00 in favor of defendant and against Mr. Scott and [Wives and Mothers]." CP at 10. In its reply to Wives and Mothers' response to the motion to dismiss, the Department clarified that it was also requesting dismissal for Scott's failure to comply with the trial court's order. In its brief to this court, the Department acknowledges that its initial request for dismissal based on failure to prosecute was "inartfully" phrased, but contends the trial court and parties were aware that the basis for the motion was Scott's failure to pay the court ordered sanctions. Br. of Respondent at 7 n.7.

II. Failure to Provide Legal Authority

Wives and Mothers argues the trial court abused its discretion by granting the Department's motion to dismiss where the Department cited no legal authority. Wives and Mothers further argues the Department violated CR 11(a) when it failed to support its motion with legal authority.[3]

First, the Department's motion cannot be considered frivolous under CR 11(a). The purpose behind CR 11 is to deter baseless filings and curb the abuses of the judicial system. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). A motion violates this rule if it is not warranted by existing law. CR 11(a). Although the Department did not cite to specific authority, with regard to substance, the motion was clearly warranted by existing law. *See* CR 41(b) ("[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal . . . ."); *Rivers*, 145 Wn.2d at 686 (under CR 41(b) a trial court has the authority to dismiss an action for noncompliance with a court order or court rules). CR 11, by its plain terms, requires only that the challenged pleading is based on relevant law.

Second, Pierce County rules do not require legal citations in motions before the superior court; accordingly, the trial court acted within its discretion in addressing the merits of the

[3] Wives and Mothers also claims the Department improperly advanced a different theory of dismissal after receiving Wives and Mothers' response to its motion to dismiss. But we generally will not review a claimed error the appellant did not raise below unless it falls under an enumerated exception. RAP 2.5(a). Wives and Mothers did not object to any aspect of the Department's reply to Wives and Mothers' response to the motion to dismiss, and does not argue that an exception under RAP 2.5(a) applies. We decline to review the claimed error.

motion. *See* Pierce County Local Civil Rules 7, 10 (no specific content requirements for motions), *compare* King County Local Civil Rule 7(b)(5)(B)(v) ("[a]ny legal authority relied upon must be cited."). Wives and Mothers cites to case law that allows appellate courts to ignore arguments made without citation to authority. *See* RAP 10.3. But the rules of appellate procedure do not govern the courts below. Wives and Mothers also invokes GR 14.1 (stating that a party may not cite as authority an unpublished opinion of the Court of Appeals) and CR 7(b)(1) (that a motion shall state with particularity the grounds therefor). Likewise, these rules have no bearing on the issue of whether a party must cite legal authority in a motion. And although the Department did not cite the relevant rule, it explained with particularity the factual basis for why dismissal was warranted. The trial court exercised its discretion in ruling on the defendant's motion to dismiss.

III. Dismissal Under CR 41(b)

Wives and Mothers contends that dismissal was improper under CR 41(b)(1) because the case had been noted for trial. The Department responds that CR 41(b)(1) was not a basis for the trial court's ruling and that dismissal was properly based on Scott's failure to comply with the court's orders. Wives and Mothers counters that dismissal was improper under CR 41(b)(2)(D), because Scott complied with the terms of the court order.

The relevant parts of CR 41 provide:

> (b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court order, a defendant may move for dismissal of an action or of any claim against him or her.
>
> (1) Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff. . . neglects to note the action for trial or hearing within 1 year. . .
>
> . . . .

> (2)(D) Other grounds for dismissal and reinstatement. This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.

CR41(b), (1), (2)(D). Here, the trial court did not dismiss under CR 41(b)(1). Rather, it dismissed the action because Scott had not paid the court ordered terms. The determinative issue is therefore whether Scott failed to comply with the sanctions order.

A. Payment of Sanctions

Wives and Mothers claims it did not violate the court order because the order did not specify who was required to pay the sanctions. According to Wives and Mothers, the court should have accepted third party payment of the sanction as satisfying the court order.

Wives and Mothers relies on *Johnston v. Beneficial Management Corp. of America*, 96 Wn.2d 708, 638 P.2d 1201 (1982), to support its contention that the court order cannot be construed to prohibit third party payment of the sanction. In *Johnston*, the court admonished against expanding a court order beyond the meaning of its terms, stating that strict construction of a court order is required. *Johnston*, 96 Wn.2d at 712-13. While *Johnston* may be applicable, Wives and Mothers' argument still fails because a strict construction of the court order suggests that Scott, and Scott alone, was personally liable to pay the sanctions.

The present CR 11 was modeled after and is substantially similar to the present Federal Rule of Civil Procedure 11 (Rule 11). *See Miller v. Badgley*, 51 Wn. App. 285, 299, 753 P.2d 530 (1988). We may therefore look to federal decisions interpreting Rule 11 for guidance in construing CR 11. *In re Guardianship of Lasky*, 54 Wn. App. 841, 851, 776 P.2d 695 (1989). With respect to Rule 11, the U.S. Supreme Court noted that "[j]ust as the requirement of

signature is imposed upon the individual, we think the recited import and consequences of signature *run as to him*." *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 124, 110 S. Ct 456, 107 L. Ed. 2d 438 (1989) (emphasis added). The Supreme Court reasoned that because Rule 11 establishes a nondelegable duty, one may reasonably expect it to authorize punishment only of the party upon whom the duty is placed. *Pavelic*, 493 U.S at 125.

Here, Scott signed his motion to proceed pro se. Like the federal rule, an attorney or party who signs a pleading, motion, or legal memorandum must therefore comply with CR 11's requirements. *Bryant v. Joseph Tree, Inc*., 119 Wn.2d 210, 218, 829 P.2d 1099 (1992). It follows that Scott alone incurred liability under CR 11. *See Pavelic*, 493 U.S at 125. Moreover, the court specifically named Scott as responsible for paying the sanction. CP at 7 ("That Mr. Scott shall pay the sum of Five Hundred Dollars ($500.00) in terms to reimburse defendant for attorneys' fees and costs incurred to respond to Mr. Scott's Motion to Proceed *Pro Se* as permitted pursuant to CR 11."); Report of Proceedings (Oct. 10, 2008) at 12 ("So I'm going to grant the motion for sanctions for $500 against Mr. Scott personally. That's him personally. I don't know that that affects Wives and Mothers."). Wives and Mothers' argument that the court did not specify who must pay the order is not well taken given the plain language of the order and purpose behind CR 11. *See Johnston*, 96 Wn.2d at 713 (an order cannot be extended beyond the meaning of its terms *when read in light of the issues and the purposes of the proceeding*) (emphasis added). The court clearly intended the order, at least in part, to deter Scott from future frivolous filings. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 891, 912 P.2d 1052 (1996) (CR 11's primary purpose is to deter litigation abuses; it is not meant to act as a fee shifting

mechanism). Thus, the trial court did not abuse its discretion in refusing to accept third party payment of the sanction.

B. Appropriateness of remedy

Scott argues that even if we agree that he was personally responsible for paying the sanction, the trial court erred by not considering lesser sanctions as required by CR 41(b).

As a general rule, courts should not resort to dismissal lightly. *Rivers*, 145 Wn.2d at 686. Dismissal under CR 41(b) is an appropriate remedy where the record establishes that (1) the party's refusal to obey a court order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed. *Will v. Frontier Contractors, Inc*., 121 Wn. App. 119, 129, 89 P.3d 242 (2004). And to enable us to meaningfully review the dismissal, the trial court must explicitly discuss each element on the record. *Will*, 121 Wn. App. at 133.

a. Willful or Deliberate Refusal

The trial court found that Scott ignored the order requiring him to pay sanctions. Wives and Mothers claims the trial court abused its discretion in dismissing the case because the order did not set a deadline for payment. We disagree.

A party's disregard of a court order without reasonable excuse or justification is deemed willful. *Rivers*, 145 Wn.2d at 686-87. We have excused a party's failure to meet a deadline when the failure was the result of confusion. *Will*, 121 Wn. App. at 129 (holding that counsel's failure to understand the requirements under the rules was not willful; rather, it was a product of misunderstanding an unclear law). Unlike the confusion in *Will*, Scott was on notice that failure

to pay the sanctions would eventually result in the dismissal of the lawsuit. Moreover, the record shows beyond any dispute that Scott did not intend to pay the sanctions, deadline or not.

First, in a letter to the Department, dated February 1, 2009, Scott wrote:

> Kahrs mentioned payment of some old filing fees and some old sanctions. I know of none, but if you think you can act as a collection agent for the courts, give it a try. I am of the believe [sic] dismissed cases are closed and the sanctions with them. . . .I'm considering re-filing [Wives and Mothers v. The Department] under R.Scott anyway, withdrawing the original claim. . ."

CP at 18 (Exh. A). Thus, Scott appears to be challenging the Department to attempt collection and stating his intent to simply file another action in his own name. In addition, almost immediately after the trial court denied his motion for reconsideration, Scott filed two additional Public Records Act lawsuits in Pierce County Superior Court. In each, Scott attached affidavits in support of his request to waive the filing fee, stating that neither he nor Wives and Mothers had available funds. Not only does this evidence support the fact that Scott was in no position to pay the sanctions, his filing of additional Public Records Act claims calls into serious question his intent to pursue the pending lawsuit. And finally, both the District Court of Western Washington and the Ninth Circuit Court of Appeals have labeled Scott a vexatious litigant due to numerous, repetitive, frivolous, and harassing motions and tactics.[4] Patterns of disobeying clear court orders or deliberately misleading the court support a trial court's finding of willful noncompliance. *Will*, 121 Wn. App. at 130. Scott's lengthy history of abusive and frivolous litigation undermines Wives and Mothers' position that Scott did not willfully ignore the court order and that a specific

[4] Imposing a pre-filing restriction on Scott, the district court declared him a "vexatious litigant" after having filed 45 lawsuits in that court in four years. Having filed 23 appeals in less than two years, the Ninth Circuit noted Scott's burdening of the court with meritless litigation and ordered a strict pre-filing review order.

deadline would have compelled his compliance. Based on this record, the trial court did not err in finding that Scott willfully ignored the terms of the court order.

b. Prejudice and Lesser Sanctions

The Department argues that Scott's failure to pay the sanctions prejudiced the Department by requiring it to litigate other lawsuits while continuing to invest attorney time in the pending matter. The Department also argues the trial court was aware of several reasons why lesser sanctions would not have been effective. But even if true, the trial court did not explicitly address either issue on the record. Under *Rivers*, the trial court is required to make an affirmative finding of substantial prejudice and consider less severe sanctions on the record before resorting to dismissal. *Rivers*, 145 Wn.2d at 699-700. Although it is almost beyond dispute that both elements will be met, we are obligated to remand to the trial court to enter a finding regarding prejudice and why lesser sanctions would not work.

IV. Attorney Fees

Wives and Mothers claims it is entitled to attorney fees and costs if it prevails on this appeal. Wives and Mothers also urges us to grant attorney fees and costs on equitable considerations and a finding that the defendant's motion to dismiss violated CR 11(a). The Department argues it should be awarded attorney fees and costs incurred to this appeal in accordance with CR 11(a).

Because the issue of whether Kahr's payment of the terms satisfied the court order was not totally devoid of merit, we decline to award the Department attorney fees and costs pursuant to CR 11. *See In re Recall of Feetham*, 149 Wn.2d 860, 872, 72, P.3d 741 (2003) (fees are awarded only if an appeal is frivolous; an appeal is frivolous if there are no debatable issues on which reasonable minds can differ, and is so totally devoid of merit that there was no reasonable

possibility of reversal). And an award of attorney fees and costs to the prevailing party must await further trial proceedings.

Affirmed in part, remanded in part.

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.

Armstrong, J.

We concur:

Van Deren, C.J.

Penoyar, J.