

# Nelson & Dahle, P.C.

316 North 26th Street Billings, Montana 59101 p: 406.867.7000

## MONTANA SUPREME COURT

Morris v. Big Sky Thoroughbred Farms, Wauer, Childness, and Clark , 98-257, 9/10/98

SANCTIONS: Joint/several sanctions against client and lawyer proper under Rule 11, not Rule 37(c)... no appeal sanctions... Christensen affirmed (other grounds). John Morris sued Big Sky Thoroughbred Farms, Sherren Wauer, Matt Childness, and Judith Basin Dep. Raymond Clark asserting malicious prosecution, defamation, intentional & negligent infliction of emotional distress, and (Count V) §1983 civil rights violation. Only Clark was named liable for §1983 violations. However, Morris asked for "damages from Defendants" at the end of Count V, and his prayer for relief reiterated that he was seeking recovery on Count V of "damages caused by Defendants' violation of Plaintiff's civil rights." During discovery BSTF and Wauer asked Morris to admit that Count V does not apply to them because they had not acted under color of state law. Morris "denied" this request for admission without explanation or qualification.

His lawyer Craig Holt signed the responses after Morris had checked the answers against the facts. BSTF and Wauer subsequently sent a safe harbors letter to Holt again asking Morris to admit that Count V did not apply to them and advising that fees & costs would be sought if a motion became necessary to correct the complaint's deficiencies. 2 months later they moved for judgment on the pleadings and for fees & costs in bringing the motion pursuant to Rule 37(c). Judge Christensen granted the motion and assessed \$1,000 fees & costs against Morris and Holt jointly & severally. Holt appeals from the joint & several sanctions.

Christensen reached the right result for the wrong reason. He erred in assessing joint & several sanctions under Rule 37(c), which by its plain language only allows a judge to order that a "party" pay sanctions. However, he could --- and should --- have imposed joint & several sanctions against Morris and Holt pursuant to Rule 11, which provides that where a pleading, motion, or other paper is signed in violation of Rule 11, "the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction," including "reasonable expenses incurred ... [and] reasonable attorney's fees." By his signature Holt certified that he had investigated the law and facts upon which he based Morris's claim under Count V and the denial that it was not applicable to BSTF and Wauer.

Whether the deficiency in Count V was due to careless drafting or crafty lawyering, there is ample evidence that Holt was on notice of the request to admit that Count V did not apply to BSTF and Wauer and the potential for sanctions for failure to admit or explain the denial.

We decline to award damages to BSTF and Wauer under Appel. Rule 32. The appeal was not taken solely for delay or harassment. Whether Rule 37(c) sanctions could be imposed jointly and severally against both party and lawyer was a meritorious question.

Leaphart, Turnage, Regnier, Trieweiler.

Nelson specially concurred: Rule 37(c) should be amended to conform to other subsections in allowing the judge to impose discovery sanctions against the party, the lawyer, or both. Holding the lawyer liable where, as here, the request for admission calls for application of legal principles of which the party would have no independent knowledge would comport with the spirit of the rules and penalize the one actually responsible for the abuse.

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Craig Holt, Billings , for Morris; Randall Nelson & Elizabeth Honaker (Nelson Law Firm), Billings , for BSTF and Wauer; Mark Higgins (Ugrin, Alexander, Zadick & Higgins), Great Falls , for Clark .