STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

LOUIS PAOLINO and MARIE ISSA	:	
	:	
v.	:	**C.A. No. PC 06-5973**
	:	
JOSPEH FERREIRA, LKQ CORPORATION, JOSEPH A. FERREIRA TRUST, and J.F. REALTY, LLC	:	

DECISION

HURST, J. The instant Super. R. Civ. P. 11 ("Rule 11") proceedings arose as a result of the plaintiffs,' Louis Paolino and Marie Issa ("Plaintiffs"), attempts to spin the jury interrogatory responses in this case into facts that the jury may never have found. The case has a complicated travel and history.

Facts and Travel

Plaintiffs' property is known as Lot 362 in the Town of Cumberland, Rhode Island. Lot 362 is contaminated with various pollutants. Plaintiffs commenced the instant action to recover damages against multiple defendants in connection with that contamination. Plaintiffs' original complaint contained five counts brought against Mobil Oil Corporation, Mark Diamond, Phillip Diamond, Joseph Ferreira d/b/a Advanced Auto Recycling Inc. and LKQ Corporation. Plaintiffs variously alleged that these defendants negligently sold them a contaminated property or caused or contributed to the contamination of the subject property. Thereafter, Plaintiffs filed a First Amended Complaint to add a claim for continuing trespass. According to Plaintiffs, Defendant Joseph Ferreira ("Mr. Ferreria" or "Joseph Ferreira"), the owner of an adjacent automobile salvage yard property that Plaintiffs contend is the source of the contaminants found on their property, had intentionally redirected water from his property into an intermittent stream located

on Plaintiffs' property. They further alleged that the stream was fed by pond water and water run off from Mr. Ferreira's property, with contaminated materials being carried into the stream and deposited into the stream bed by that water. In addition, they complained of structural and related encroachments that were extending over the property line. Both the original and First Amended Complaint sought damages at law only.

Plaintiffs then filed a Second Amended Complaint that contained thirty-five counts including the addition of claims for public and private nuisance and federal and state environmental violations. The Second Amended Complaint added two new defendants: Joseph A. Ferreira Trust and J.F. Realty LLC. Like Joseph Ferreira, Joseph A. Ferreira Trust was a previous owner of the adjacent salvage yard property. J.F. Realty LLC is the current owner. All but two of the thirty-five counts alleged damages at law, which included the cost of environmental remediation of the contaminants located on Plaintiffs' property. In two Counts, 34 and 35, of their Second Amended Complaint, Plaintiffs sought mandatory orders requiring J.F. Realty LLC to abate the continuing trespasses and nuisances caused by the encroaching structures, water discharges, and any contaminants that had been deposited on the property. (The structural encroachments ultimately identified at trial consisted of a metal and cinderblock building and a portion of the headwall and riprap that form a part of a storm water remediation system located on J.F. Realty LLC's property.) The Second Amended Complaint did not request injunctive relief, mandatory or otherwise, against any of the other defendants.

For various reasons, the claims against all but four of the various defendants were dismissed prior to trial. The remaining four defendants—Joseph Ferreira d/b/a Advanced Auto Recycling Inc., LKQ Corporation, the Joseph A. Ferreira Trust, and J.F. Realty LLC (collectively, "Ferreira Defendants" or "Defendants")—are the past and present owners and

operators of the adjacent salvage yard property.

The case was tried before a jury in July 2012. During the trial, Plaintiffs went forward on their nuisance and trespass claims against each of the Ferreira Defendants. Consistent with their Second Amended Complaint, they sought damages at law including the estimated cost of remediating environmental contamination that the Defendants had allegedly deposited in two locations on Plaintiffs' property: an area upon which Joseph Ferreira had allegedly deposited contaminated fill—known as the "GZA" site— and the intermittent stream bed. They also sought orders requiring defendant J.F. Realty LLC to abate the structural encroachments and, also, any water discharge that was flowing onto their property from its storm water treatment system. Importantly, however, when it came to the contaminants that Plaintiffs claim the Ferreira Defendants had deposited on their property over the previous years, Plaintiffs elected to proceed only on their damage claims including costs of environmental remediation—as opposed to seeking orders of abatement requiring J.F. Realty LLC to accomplish the remediation.

The trial evidence included evidence that in 1982 or 1983, Joseph Ferreira used heavy equipment to deposit contaminated fill at the "GZA" site. Mr. Ferreira denied doing so, and it therefore was undisputed that if he, in fact, had deposited contaminants as alleged, he certainly did not remove them thereafter. Therefore the specific question of whether or not Mr. Ferreira deposited contaminants at the "GZA" site was put to the jury. Specifically, the jury was asked, "Have Plaintiffs proved by a preponderance of the evidence that in 1983 or 1984, Joseph Ferreira both (a) deposited contaminated fill on Lot 362 and (b) committed trespass when he thereafter failed to remove that fill?" (Emphasis in original.) If the jury answered "yes," it would then assess damages for the cost of remediating the "GZA" site. There was sufficient evidence to put

these questions to the jury, and the jury interrogatories were carefully crafted to respond to the trial evidence.

There also was evidence that in the late 1980s, Joseph Ferreira excavated the intermittent stream bed lying on Plaintiffs' property so as to divert water from a pond on his salvage yard property into the stream bed. In addition, there was evidence that because of the natural grade and elevations of the properties, surface water could flow from other areas of Defendants' property toward the stream bed. There was evidence that this pond and surface water could have carried contaminants to the stream bed. Importantly, however, because there was insufficient evidence presented at trial for the jury to consider awarding costs for environmental remediation of the stream bed,[1] different questions were put to the jury. In connection with trespass and nominal damages questions, the jury was only asked whether Plaintiffs had proved by a preponderance of the evidence that one or more of the Defendants had trespassed on Plaintiffs' property by "(a) diverting surface and pond water from [Defendants'] property into the stream bed or channel located on Lot 362 or (b) failing to remove from [Plaintiffs'] property contaminants deposited by that water." (Emphasis in original.) This question was responsive to the evidence such that the jury could find trespass by way of water discharge and award nominal damages even if Plaintiff failed to prove that one or more of the Defendants were responsible for the water borne contaminants found on Plaintiffs' property. Because environmental remediation and apportionment of damages were no longer at issue, the jury was neither asked nor given the opportunity to specify which type of trespass it found or whether one or more of the Defendants, in fact, were responsible for contaminating the stream bed. Accordingly, the questions on the

[1] Although Plaintiffs offered evidence and reports from various experts regarding the nature and extent of the contaminants found on Plaintiffs' property, from where those contaminants originated and the cost of remediation, some of that evidence was precluded at trial. This preclusion impacted the issues and questions that were submitted to the jury.

jury verdict summary sheet relating to trespass and water borne contamination were drafted as an 'either/or' proposition: the inquiry simply did not require the jury to find both types of trespass in order for them to award nominal damages. And, because Plaintiffs were no longer seeking mandatory injunctive relief in the form of orders directing J.F. Realty LLC to perform environmental remediation, the jury was not given special interrogatories pursuant to Super. R. Civ. P. 49. The jury verdict summary sheet was carefully crafted and entirely consistent with the language of Plaintiffs' Second Amended Complaint and the verbal and written instructions to the jury.

Also in response to specific interrogatory questions and again in connection with past trespass and nominal damages, the jury found that until approximately 2008, when the storm water remediation system located on J.F. Realty LLC's property became operational, the Defendants had trespassed on Plaintiffs' property either by diverting surface and pond water into the intermittent stream bed or by failing to remove such contaminants as may have been deposited by that water. The jury also found a present and continuing trespass in that from 2008 up to the present, J.F. Realty LLC has been directing water from its storm water remediation system onto Plaintiffs' property. In keeping with the trial evidence, the jury was not asked whether J.F. Realty LLC was continuing to divert or discharge pond or surface water into the excavated stream bed in the years after 2008 when the storm water remediation system went operational. The jury awarded nominal damages in connection with these trespasses.

In short, except in connection with the "GZA" site and with respect to which the jury answered in the negative, the jury was not required to determine whether the Defendants, in fact, caused contaminants to be deposited on Plaintiffs' property.

Before the Court was able to conduct an evidentiary hearing in connection with Plaintiffs' Counts 34 and 35 requests for abatement of the encroachments,[2] Plaintiffs hired a new attorney, Mr. Brian A. Wagner, and their trial counsel was permitted to withdraw his appearance.

On May 22, 2013, Mr. Wagner filed a separate suit on Plaintiffs' behalf against the Rhode Island Department of Environmental Management ("DEM"): Louis P. Paolino and Marie E. Issa vs. Rhode Island Department of Environmental Management, PC 13-246. The complaint, styled as a request for Writ of Mandamus, sought orders compelling DEM to commence enforcement actions against the Ferreira Defendants—including rescinding the permit allowing the same storm water remediation system that is at issue in the instant case. Indeed, Plaintiffs claimed there were material errors in J.F. Realty LLC's application for the storm water remediation system and, further, that DEM lacked the authority to issue the permit for the system. It was their contention that the storm water remediation system's structures should be removed and J.F. Realty LLC's permit suspended, rescinded, or revoked. They also sought orders compelling DEM to force J.F. Realty LLC to environmentally remediate the contaminants on Plaintiffs' property. In connection with the latter, Mr. Wagner represented in his original complaint that the jury in the instant case made findings of fact that all of the Ferreira Defendants were responsible for having contaminated Plaintiffs' property. Specifically, he misrepresented the jury's interrogatory responses by stating at paragraph 64 of the complaint:

> "On or about July 11, 2012, a jury verdict issued in a Rhode Island Superior Court civil action, *Paolino et al. v. Ferreira et al., C.A. No. PC 06-5973 (see Exhibit "T," attached hereto),* finding as fact that the owner(s) and/or operators of the AAR Property trespassed on the Paolino Property by: . . .

[2] The reasons for the delay in the evidentiary hearing were detailed in the Court's various bench rulings, including those of April 29, 2014; May 20, 2014; and June 25, 2014.

> "(e) Failing to remediate contamination deposited on the Paolino Property by pond, surface and storm waters diverted from the AAR Property and onto the Paolino Property."

On July 2, 2013, the Defendant DEM filed an answer to Plaintiffs' original complaint in which it admitted the truth of paragraph 64. The Ferreira Defendants did not have the opportunity to deny the allegation because they were not named as parties—despite their obvious interests. Eventually, on April 7, 2014, after the Ferreira Defendants had become aware of Plaintiffs' separate action against DEM and were preparing to intervene, Plaintiffs filed their First Amended Complaint in that action. This time, they named the Ferreira Defendants as parties and, at paragraph 89, included the identical misrepresentations concerning the jury verdict in the instant case. DEM then filed an amended answer in which it again admitted the truth of the jury's purported factual findings. For obvious reasons, the Ferreira Defendants denied them. Thus, Mr. Wagner's representations concerning the jury's verdict in the instant case became a contested fact in the separate case.

Meanwhile, on March 4, 2014, Mr. Wagner had submitted and signed a Motion for Entry of Final Judgment in the instant matter. Similar to the complaint filed in Louis P. Paolino and Marie E. Issa v. Rhode Island Department of Environmental Management, PC 13-246, Mr. Wagner stated that the jury found the Defendants were liable for "the disposition of pollutants on Plaintiffs' property by Defendants' water discharges." Further, paragraph 5 of the proposed final judgment attached to the Motion papers proposed findings of fact to include a finding by this Court that "each trespassed on Plaintiffs' property during the specified periods by diverting surface or pond water to a stream bed on Plaintiffs' property and by failing to remove contaminants carried onto Plaintiffs' property by the diverted waters." (Emphasis added.) In addition to using the word "and" instead of "or," Mr. Wagner used the word "each"—thereby

making every one of the Ferreira Defendants a party responsible for water borne contamination of Plaintiffs' property. Paragraph 6 of the proposed final judgment contained similar proposed findings with respect to contaminants allegedly carried onto Plaintiffs' property by discharge from J.F. Realty LLC's storm water remediation system. In this way, Mr. Wagner invited the Court to affirm his version of the jury's findings.

Based upon these proposed findings, Mr. Wagner went on to seek a broad restraining order restraining and enjoining J.F. Realty LLC from: "depositing pollutants on Plaintiff's property through the discharge or diversion of surface or pond water onto Plaintiffs' property;" and "allowing pollutants deposited on Plaintiffs' property through the discharge or diversion of surface or pond water to remain on Plaintiffs' property." Implicit, of course, in such a judgment, was that J.F. Realty LLC must have deposited pollutants on Plaintiffs' property in the first instance.

Remarkably, as the Motion papers suggested, and as Mr. Wagner confirmed during the hearing on the Motion, Plaintiffs also sought orders directing J.F. Realty LLC to conduct environmental remediation of the stream bed—relief that was abandoned at trial in favor of damages at law equivalent to the costs of remediation and, furthermore, which the Court could not have granted due to Plaintiffs' insufficiency of proof at trial. Indeed, Mr. Wagner's proposed final judgment also required J.F. Realty LLC to "identify and remove all pollutants that have been transported to and deposited on Plaintiffs' property by surface or pond water discharges in exceedance of state residential standards; and restore the affected portions of Plaintiffs' property to pre-encroachment conditions." Thus the proposed judgment not only built on the misrepresentations concerning the jury's findings, but it also shifted the burden onto J.F. Realty LLC to prove that which the Plaintiffs had been unable to prove at trial. Finally, it required J.F

Realty to remediate contamination that might have been caused not by itself but by other Defendants.

Mr. Wagner argued that Plaintiffs were entitled to an injunction and environmental remediation, as a matter of law, based on the jury's verdict—or at least what he represented the jury's verdict to be.

In his Motion for Entry of Judgment, Mr. Wagner also urged the Court to make its orders non-specific and to identify its general objectives only. He urged the Court to leave it to the Defendants, their engineers, and the DEM regulators to sort out the technical details. Assiduously ignoring their allegations of improper permitting and the relief Plaintiffs are seeking in the other pending lawsuit, Louis P. Paolino and Marie E. Issa v. Rhode Island Department of Environmental Management, PC 13-246, Mr. Wagner—former Deputy Chief Legal Counsel for the Rhode Island DEM—affirmatively represented that the DEM permitting process would entail nothing more than a ministerial formality. According to Mr. Wagner, doing this would be unlikely to lead to regulatory conflicts because J.F. Realty LLC's storm water discharge is pre-approved under a general permit, and amending the permit would be nearly pro forma. Mr. Wagner urged the Court to let the permitting process run its course.

The Defendants filed a written objection to Plaintiffs' Motion for Entry of Judgment. Included in their objection was a Rule 11 request for sanctions. It was Defendants' contention that Plaintiffs had materially misrepresented the jury's verdict in their Motion papers.

This Court held a hearing on Plaintiffs' Motion for Entry of Final Judgment on April 29, 2014. Among other things, the Court did not agree that Plaintiffs were entitled to an injunction as a matter of law and certainly not under the circumstances of this case. At the close of the hearing, the Court gave a detailed bench ruling. Much as the Court has done herein, the Court's

ruling reminded the parties that the case was tried as a damages case in connection with environmental remediation and that Plaintiffs' Motion for Entry of Judgment was the first time that the question of mandatory environmental remediation was requested.

During that same hearing and in response to the Defendants' request for Rule 11 sanctions, Mr. Wagner, conceded that his arguments were inconsistent with the exact verbiage of the jury interrogatories. There is no dispute that in order to make his arguments contained in the Motion for Entry of Final Judgment, he varied a critical word in the jury interrogatories, the word "or," and had to substitute the word "and" for it. He attributed his arguments to "zealous advocacy."

After hearing the parties, the Court concluded that the arguments and representations contained in the Motion for Entry of Final Judgment that had to do with the ministerial nature of the prospective DEM proceedings were egregious, duplicitous, and dishonest. These arguments and representations, the Court found, were designed to lull the Court into thinking it was reasonable to dispatch J.F. Realty LLC to the DEM permitting process where the mere ministerial formalities of its amended permit would be quickly and efficiently dispensed with, when Plaintiffs were actually seeking quite the opposite. Given the contents of the complaint and amended complaint filed in the separate case of Louis P. Paolino and Marie E. Issa v. Rhode Island Department of Environmental Management, PC 13-246, Plaintiffs plainly had very different ideas about what would be in store for Defendants at the administrative level. Taking the filing of this separate case into account, this Court concluded that although Plaintiffs have every right to pursue alternate legal theories, they do not have the right to intentionally mislead the Court in the process.

This Court also found that whether standing alone or taken together, these two sets of misrepresentations compelled the conclusion that the contents of the Motion for Entry of Final Judgment and the findings contained in the proposed final judgment were interposed for improper purposes including (1) achieving a result that very well could be inapposite to the jury's actual findings and one that is inconsistent with the jury's verdict form responses and (2) influencing by misrepresentation the outcome in other proceedings including Louis P. Paolino and Marie E. Issa v. Rhode Island Department of Environmental Management, PC 13-246. Accordingly, this Court ordered Mr. Wagner to show cause why he should not be personally sanctioned under Rule 11 and thus articulated on the record the basis for issuing the order to give Mr. Wagner the ability to specifically respond.

At the time of the April 29, 2014 hearing on Plaintiffs' Motion for Entry of Final Judgment, the Court also scheduled an evidentiary hearing for Plaintiffs' requests for abatement contained in Counts 34 and 35 of the Second Amended Complaint. In a detailed ruling given on May 20, 2014, the Court granted Plaintiffs' request for injunctive relief, in part, and denied it, in part. Thereafter, the Defendants presented a proposed order, final judgment, and indemnification agreement as had been ordered by the Court. After reviewing them, however, the Court concluded that corrections were needed to bring their language into closer conformity with the Court's actual findings and orders.

Plaintiffs thereupon objected to both the Defendants' proposed order and the Court's. On June 17, 2014, Mr. Wagner signed and filed a Motion for Clarification/Modification of Ruling on Plaintiffs' Motion for Entry of Final Judgment. In it, Plaintiffs sought substantially different rulings from what the Court had ordered on April 29, 2014 and May 20, 2014. Mr. Wagner argued that the Court overlooked the question of injunctive relief in connection with the

discharge of pond water into the intermittent stream bed. He reminded the Court that the question of pond water is an entirely different animal than the issue of the surface water discharge associated with the storm water remediation system. He argued that Joseph Ferreria recklessly excavated the stream bed which resulted in pond water being discharged onto Plaintiffs' property. He obliquely suggested that this condition continues to the present time such that orders of abatement and injunction are warranted against all of the Defendants.

Apparently unfazed by the specter of Rule 11 sanctions, Mr. Wagner, in his new motion, pointed to the jury's answers to the interrogatory questions in connection with his latest arguments. Specifically, section 1 of Plaintiffs' motion papers is entitled "The Court's Ruling Requires Modification Because It Overlooks Defendants' Trespass by Discharge of Pond Water as Found by the Jury in Paragraphs 4, 6, 11, and 13 of the Jury Verdict Summary Sheet." From there, Mr. Wagner went on to present a heavily edited version of the jury interrogatories—a new and different version which now suggested that the jury found each of the Defendants liable for a presently existing trespass with respect to pond and surface water flowing into the stream bed. However, it only takes a cursory review of the actual jury interrogatories 4, 6, 11, and 13 to see that Mr. Wagner's newest presentation of the jury's findings is as misleading as those contained in his Motion for Entry of Final Judgment and the complaint filed in Louis P. Paolino and Marie E. Issa v. Rhode Island Department of Environmental Management, PC 13-246. Plainly, the only presently existing and continuing trespass specified in the jury interrogatories in connection with pond and surface water is the water that is presently being captured by J.F. Realty LLC's storm water remediation system and discharged at the bottom of the stream at the head wall, i.e. one of the trespasses that the Court carefully and specifically addressed and refused to order abated.

On June 25, 2014, the Court ruled on Plaintiffs' Motion for Clarification/Modification of Ruling on Plaintiffs' Motion for Entry of Judgment. The Court granted the Motion to the extent it again clarified the travel and history of this case, the jury's findings, and the Court's previous rulings and orders. It denied the Motion in all other respects.

Show Cause Order

Mr. Wagner filed a written objection and response to this Court's show cause order. In addition, the Court held a hearing on July 23, 2014 during which Mr. Wagner was permitted to present evidence and additional arguments. Although, during the hearing, Mr. Wagner appeared to take the prospect of Rule 11 sanctions seriously, he plainly did not understand the gravamen of what he had done. Although he showed contrition for any possible Rule 11 violation, he stuck by his core argument that he, as a zealous advocate, should be permitted to argue his interpretation of what the jury might have found. He argued that there was no way to divine how the jury weighed and assessed the evidence or determine what it was thinking when it responded to the jury interrogatories and, further, that the jury's ultimate conclusions are "beyond our reach." In essence, he argued that because (1) it never would be known if the jury determined the various Defendants' trespasses to have consisted of water discharge only or if it also found that the discharge contained contaminants that Defendants had failed to remove and (2) his interpretation of the jury's responses was objectively reasonable, he cannot be sanctioned pursuant to Rule 11. In addition, Mr. Wagner asserted an "unclean hands" argument and pointed to the contents of Defendants' papers filed with this Court, which he argued contained misrepresentations. He also complained that Defendants had not met their burden of proof in proving Rule 11 sanctions.

Plainly, Mr. Wagner's various responses to this Court's order to show cause confirm

that his factual representations concerning the jury verdict summary sheet are inaccurate. Not only did he acknowledge in open court that his representations were at odds with the verbiage of the jury interrogatories, in his papers filed in response to this Court's show cause order, Mr. Wagner concedes that the "[t]he coordinating conjunction "or" (as opposed to "and" or the correlating conjunction "either/or") together with the jury's single, affirmative response, "yes," can indicate that the jury found one or both choices to be correct." Plainly and as is evident from the jury verdict summary sheet itself, his affirmative representation that the jury made factual findings that Defendants had contaminated Plaintiffs' property was inaccurate and misleading.

In his written objection papers, Mr. Wagner argues that "[w]hile the interrogatory(ies) written by the Court appear to be clear standing on their own, there can be no argument that the jury's affirmative responses to these interrogatories leave room for interpretation." He argues that his representation concerning the jury's actual findings and his alteration of the jury interrogatory by changing "or" to "and," can be a correct grammatical application of the word "or." Although he concedes that the legal definition of the word "or" is "A disjunctive particle used to express an alternative or to give a choice of one among two or more things," he relies on Black's Law Dictionary, 5th Edition, to argue that "[i]n some useages, the word "or" creates a multiple rather than an alternative obligation." However, Mr. Wagner misquotes Black's by changing a semicolon to a period and failing to complete the sentence: "[i]n some useages, the word "or" creates a multiple rather than an alternative obligation; where necessary in interpreting an instrument, "or" may be construed to mean "and." Black's Law Dictionary 987 (5th ed. 1979). Mr. Wagner further argues that "[s]ince the only answer that we have from the jury to Interrogatories 4, 6, 11, and 13 is "yes," reading that answer to apply to both queries in each question is a more objective and logically sound interpretation than assuming that the jury meant

to answer any part of those questions in the negative." He argues that his interpretation and representation of the jury's finding therefore are objectively reasonable and cannot serve as the basis for a Rule 11 violation. He also argues that Plaintiffs' allegations in their complaint in Louis P. Paolino and Marie E. Issa v. Rhode Island Department of Environmental Management, PC 13-246, are irrelevant to the present matter and that sanctions should not be ordered.

In Rhode Island, Rule 11 of the Superior Court Rules of Civil Procedure imbues trial courts with "broad authority . . . to impose sanctions against attorneys for advancing claims without proper foundation." Pleasant Management, LLC v. Carrasco, 918 A.2d 213, 216-17 (R.I. 2007) (quoting Michalopolous v. C&D Resaurant, Inc., 847 A.2d 294, 300 (R.I. 2004)) (internal quotation marks omitted). Rule 11 provides, in pertinent part, that:

> "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that 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. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, any appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

"The language of Rule 11 derives from the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure and is similar, though not identical, to that of its federal counterpart." Pleasant

Management, 918 A.2d at 217 (quoting Lett v. Providence Journal Co., 798 A.2d 355, 365 (R.I. 2002)) (internal quotation marks omitted).[3] However, the Rhode Island Supreme Court has said that "where the federal rule and our state rule of procedure are substantially similar, we will look to the federal courts for guidance [and] interpretation of our own rule." Crowe Countryside Realty Associates, Co., LLC v. Novare Engineers, Inc., 891 A.2d 838, 840 (R.I. 2006) (quoting Smith v. Johns-Manville Corp., 489 A.2d 336, 339 (R.I. 1985)).

First, "when determining whether there [is] a Rule 11 violation, the standard under which an attorney is measured is an objective, not subjective standard of reasonableness under the circumstances." Raylon, LLC v. Complus Data Innovation, Inc., 700 F.3d 1361, 1367 (Fed. Cir. 2012) (quoting Whitehead v. Food Max of Miss., Inc., 332 F.3d 796, 803 (5th Cir. 2003) (internal quotations omitted)). In its objective analysis, the Court cannot "endorse the notion that an attorney can do or say anything and everything imaginable within the course of client representation under the guise of vigorous representation of his client." United States v. Cooper, 872 F.2d 1, 5 (1st Cir. 1989). Further, "[l]egal arguments depend on facts and so lawyers have a responsibility to recite the record fairly and accurately." Frunz v. City of Tacoma, 476 F.3d 661, 665 (9th Cir. 2007). In fulfilling this responsibility, in the course of representing a client, "[a] lawyer is required to 'stop-and-think' before making legal or factual contentions." Jenkins v. Methodist Hospitals of Dallas, Inc., 478 F.3d 255, 265 (5th Cir. 2007) (citing Advisory Committee Note on Fed. R. Civ. P. 11 (1993 Amendments)).

[3] "That federal rule states that upon finding a violation the court 'shall' impose a sanction, while the text of this amendment and the Rhode Island statute provide that the court 'may' impose a sanction." Super. R. Civ. P. 11, 1995 Editor's Committee Note. Additionally, the federal rule differs from that of Rhode Island as it allows for the opposing party to remove the offensive pleading within 21 days of being served with a motion for sanctions. See Fed. R. Civ. P. 11(C)(2).

Moreover, the judge has discretion to fashion what he or she considers to be an appropriate penalty. Pleasant Management LLC, 918 A.2d at 217. However, the court must do so "in accordance with the articulated purpose of the rule: 'to deter repetition of the harm, and to remedy the harm caused.'" Id. (quoting Michalopoulos, 847 A.2d at 300).

Numerous courts have imposed sanctions as a result of a party's misrepresentation to the court. See e.g. Thomas v. Digital Equipment Corp., 880 F.2d 1486 (1st Cir. 1989); Jenkins v. Methodist Hospitals of Dallas, Inc., 478 F.3d 255 (5th Cir. 2007); Frunz, 476 F.3d at 661 (9th Cir. 2007); iParametrics, LLC v. Howe, 522 F. App'x 737, 739 (11th Cir. 2013) cert. denied, 134 S. Ct. 919 (U.S. 2014); Michalopoulos, 847 A.2d at 294. For example, the Ninth Circuit, in Malhiot v. Southern California Retail Clerks Union, affirmed the imposition of sanctions upon a party that intentionally omitted a relevant sentence when it quoted from a marriage statute in its pleading. 735 F.2d 1133 (9th Cir. 1984). If the party had quoted the statute correctly, the court held, his contention that a legal marriage existed would have been clearly wrong because the legal requirements for marriage would not have been met. Id. at 1138. Likewise, the Fifth Circuit upheld the imposition of sanctions upon an attorney in a civil rights case when he had erroneously included the word "boy" in a statement he cited to the court—despite the contention by the offending attorney that it was an error. Jenkins, 478 F.3d at 265. The Jenkins Court reasoned that sanctions were appropriate because if the district court had relied on the erroneous inclusion of a racially discriminatory word, the reliance could have altered the outcome of the case. Id. at 266.

Similarly, here, Mr. Wagner misrepresented the jury interrogatory responses, materially altering the parameters of its responses. Through his own papers and statements on the record, Mr. Wagner admits that he incorrectly cited to the jury verdict summary sheet. See Apr. 29, Tr.

at 41 (Mr. Wagner on the subject of the incorrect citation stated to this Court, "[i]t was intentional your honor," and "[n]o, there's no accident. I mean, I'm zealously representing my client . . . ."). Specifically, he changed the wording of the inquiry in order to obtain findings that the jury may never have made and a judgment materially different from the questions that were submitted to the jury and the answers given by the jury. Although Mr. Wagner attempts to justify this incorrect citation by claiming that his alteration correctly interpreted the language of the jury inquiry, it is of critical importance that Mr. Wagner did not merely suggest a different interpretation to the Court: on the contrary, he attempted to transmogrify his interpretation into law by changing facts. See Lamboy-Ortiz v. Ortiz-Velez, 630 F.3d 228, 246 (1st Cir. 2010) (The court found that an attorney had violated Rule 11, in part, because he blatantly mischaracterized evidence to the jury by stating his interpretation as fact.).

Furthermore, even giving Mr. Wagner credit for not having been present during the trial and for not understanding why the jury interrogatories were written as they were—and, further, assuming he in good faith undertook a definitional and grammar-based analysis of the jury interrogatories before misquoting them to this Court—the content of the jury verdict summary sheet is a subject with which there can be no disagreement. Therefore, the citations to the jury verdict summary sheet in Plaintiffs' Motion for Entry of Final Judgment are objectively unreasonable as they are intentional misrepresentations and material alterations of the record. See Raylon, 700 F.3d at 1367 (holding that Rule 11 violations are analyzed under an objectively reasonable standard). Such misrepresentations made by an attorney, even under the guise of zealous advocacy, should not be overlooked by this Court. See Cooper, 872 F.2d at 5; see also Pleasant Management, 918 A.2d at 219. Importantly, the seemingly slight distinction between the form of the questions given to the jury and the form that Plaintiffs' counsel represented to the

Court is actually material in result. See Jenkins, 478 F.3d at 266. Specifically, questions 4, 6, 11, and 13, did not ask if the jury found choice (a) and choice (b), as was asked in interrogatory 1 of the verdict sheet. Indeed, the jury was permitted to find choice (a) but not necessarily choice (b) and it was not required to specify which. Moreover, even giving credit to Mr. Wagner's grammar based arguments, he concedes that it never will be known what the jury actually found—yet Mr. Wagner represented his version of its findings as fact.

Although Mr. Wagner's subsequent alteration of the jury interrogatories put forward in connection with the Plaintiffs' Motion for Clarification/Modification of Ruling on Plaintiffs' Motion for Entry of Judgment did not form the basis for the Court's show cause order—and therefore cannot be the basis of any Rule 11 sanctions imposed in connection with Mr. Wagner's earlier filing of the Motion for Entry of Final Judgment—those subsequent alterations further illustrate why it is so unacceptable for an attorney to misrepresent the jury's findings and further confirm the need for deterrence in this case. Plainly, Plaintiffs are unhappy with the way the trial unfolded, its outcome, and this Court's orders in connection with injunctive relief. This Court finds that Mr. Wagner attempted to achieve Plaintiffs' ultimate goals by improperly editing the jury interrogatory questions, spinning the jury's answers into something materially different than they were and representing them as fact. Any inclination he or Plaintiffs might have to misrepresent the record in the future—as is suggested by Mr. Wagner's repeated reliance on misleading edits— must be deterred.

After consideration of all of the aforementioned facts, this Court finds that Mr. Wagner's behavior was deliberate, could have had a significant impact on the outcome of this case if not discovered, and was in disregard of his duties under Rule 11.

What is equally troubling is that Mr. Wagner's misrepresentations were not confined to this case, but were also made in a separate case involving the same parties and which from time to time will come before different justices of this Court—justices who will be unfamiliar with the instant case, could therefore be deceived by Mr. Wagner's factual misrepresentations and whose reliance thereon could alter the outcome in that case. See iParametrics, 522 F. App'x at 739 (The iParametrics Court, for the purposes of deciding whether to impose Rule 11 sanctions, took into account misrepresentations made by an attorney to different courts on related matters.). Although Mr. Wagner attached a copy of the jury verdict summary sheet in this case to his original complaint filed in Louis P. Paolino and Marie E. Issa vs. Rhode Island Department of Environmental Management, PC 13-246, the complaint itself contained the affirmative statement that the jury verdict included a

> "finding as fact that the owner(s) and/or operators of the AAR Property trespassed on the Paolino Property by: . . .
>
> "(e) Failing to remediate contamination deposited on the Paolino Property by pond, surface and storm waters diverted from the AAR Property and onto the Paolino Property."

Furthermore, the fact that DEM subsequently answered the case and admitted these inaccurate accounts of the jury's verdict underscores the potential consequences of such misrepresentations. Not only would the Defendants be required to defend against a non-existent finding, any court or administrative body to which the misrepresentations were made would be forced to waste precious resources to decide a debate that ought not to have been opened in the first place and, just as importantly by Mr. Wagner's own admission, can never be resolved. Mr. Wagner's argument—

> "DEM is represented in PC12-2456 by two (2) highly competent attorneys from DEM's Office of Legal Services and the Attorney

> General's environmental unit. After review of the plaintiffs' pleadings and the attached exhibits, DEM's attorneys made their own objective assessment of the jury's responses to Interrogatories 4, 6, 11 & 13, and 'admitted' the allegations in paragraphs 64 of plaintiffs' Complaint"

—does not excuse his misrepresentations. Indeed, DEM's "admission" merely underscores the egregiousness of Mr. Wagner's attempt to turn interpretation into fact. By misrepresenting the jury's responses to the Court, Mr. Wagner transfigured each of the Defendants into "responsible parties," potentially subject to federal and state environmental enforcement actions—which is precisely the kind of relief Plaintiffs are seeking in their separate action against DEM. It strains credulity that Mr. Wagner did not understand the enormity of what he was doing when he sought to have this justice confirm his version of the jury interrogatory responses. Furthermore, DEM's decision to admit its former Deputy Chief Legal Counsel's factual representations concerning the meaning of the jury's findings would not be surprising given the deference that it, presumably, would give to Mr. Wagner's opinions.

In addition, Plaintiffs' efforts to re-write history or skew the outcome of the trial in this case already have usurped more than enough judicial resources. The specter of one or more judicial officers having to devote additional time and resources to this is unacceptable and, for this reason, too, warrants a strong response from the Court. It also cannot be ignored that Plaintiffs seek further action against the Defendants at the state administrative level. Indeed, in his Motion for Entry of Final Judgment, Mr. Wagner urged the Court to consign the Defendants to the administrative process. With the misrepresentations contained in that Motion, he also invited this Court to unwittingly arm Plaintiffs with findings beyond those put forth by the jury. This is especially egregious because of the wide ranging consequences of the Court's mistake in doing so and further weighs in favor of sanctions.

Finally, it is abundantly clear that Mr. Wagner genuinely believes it is acceptable to make to this Court factual representations that he knows quite well may not be true and can never be proved and, further, that he also has the temerity to make those representations in connection with jury findings. This, too, demonstrates the need for sanctions.

Accordingly, this Court finds that this case fits squarely within the type of circumstances under which the application of Rule 11 sanctions are appropriate: when an attorney's conduct amounts to an effort to mislead the Court in hopes that the distortion of facts might be overlooked. See Crumplar v. Superior Court ex rel. New Castle County, 56 A.3d 1000 (Del. 2012); see also Malhiot, 735 F.2d at 1137. Thus, finding that Rule 11 has been violated, this Court will impose sanctions.

In light of the above, this Court finds that an award for reasonable attorney's fees, pursuant to Super. R. Civ. P. 11 will be imposed. See Pleasant Management, 918 A.2d at 217. Defendants have requested attorney's fees, and this Court also finds in its discretion that this form of punishment is appropriate. See Fed. R. Civ. P. 11 Advisory Committee Notes to the 1997 amendments (the court has significant discretion in fashioning sanctions). The imposition of a sanction for the opposing party's attorney's fees serves Rule 11's dual purpose: to deter Plaintiffs' attorney from making misrepresentations in the future, as well as to reimburse Defendants for the money they were forced to expend defending against Plaintiffs' motion. See id. (the sanction imposed by a judge should be consistent with the articulated purpose of Rule 11, to remedy the harm caused and deter future harm by the offending party).

III

Conclusion

After reading Mr. Wagner's submissions, listening to his oral arguments, and considering the evidence of record, this Court finds that Mr. Wagner has not shown cause why sanctions should not be imposed. The intentional misrepresentations Mr. Wagner made were not objectively reasonable and were in violation of Rule 11. This Court therefore assesses sanctions against Mr. Wagner, personally, in the amount of $6647, which represents twenty-five percent of the attorneys' fees set forth in Defendants' counsel's affidavit filed in connection with the Rule 11 motion. The Court declines to award the full amount of the fees because of the fact this sanction will also serve as a future deterrent to most attorneys who might consider engaging in similar conduct. In addition, the Court's findings and decision will serve as a deterrent to Mr. Wagner, who has never been sanctioned in the past. Finally, certain arguments contained in the Motion for Entry of Final Judgment had some support in the law and not all were premised on the wrongfully presented jury findings. Therefore, not all of the fees were incurred as a result of Mr. Wagner's misrepresentations. The Court finds that the sum of $6647 together with these Rule 11 findings is likely to serve as a sufficient deterrent. Mr. Wagner is ordered to pay the aforesaid fees and costs within forty-five days and to provide the Court with an affidavit of compliance upon making such payment.

Finally, in its discretion, this Court strikes paragraphs 64 (e) and 89 (e) of both the original and first amended complaints filed in Louis P. Paolino and Marie E. Issa vs. Rhode Island Department of Environmental Management, PC 13-246. Although, strictly speaking, this sanction will operate to the detriment of Plaintiffs—neither of whom was given notice or

directed to show cause as to why they should not be sanctioned—correcting the record will not cause them to suffer personal harm, and striking paragraphs 64 (e) and 89 (e) is a reasonable sanction to be imposed upon their agent-attorney and author of the offending filings. See Pleasant Management LLC, 918 A.2d at 217.

In deciding this Rule 11 question, the Court did not consider Mr. Wagner's misquoting of a case or cases cited in Plaintiffs' Motion for Entry of Final Judgment. Nor did it consider any statements or arguments he made in connection with Plaintiffs' renewed motion for new trial.

Counsel shall prepare the appropriate orders.

Hurst, J.

August 21, 2014