68021-8

68021-8

COA NO. 68021-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

VLADIK BYKOV,

Appellant,

v.

DAVID R. ADAMS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable James Doerty, Judge

REPLY BRIEF OF APPELLANT

VLADIK BYKOV
Appellant

14156 91st CT NE
Kirkland, WA 98034
(425) 830-1214

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A. ARGUMENT IN REPLY

1. The trial court erred, as a matter of law, in awarding CR11 sanctions because Brian Fresonke, attorney for Respondent, failed to notify Appellant of a possible CR11 violation, prior to Brian Fresonke filing the motion for CR11 sanctions.

a. The Respondent's "Statement of Issues" is Flawed because Brian Fresonke never notified Appellant of intent to seek CR11 sanctions.

Respondent's 1st statement of issues, "Did the trial court abuse its discretion by granting Respondent Adam's motion to impose CR11 sanctions..." (see Brief of Respondent, Page 1) is flawed because Respondent's attorney failed to provide Appellant with notice of sanctionable conduct prior to filing his motion for CR11 sanctions. Without the pre-requisite notice to opposing side of sanctionable conduct, the court, as a matter of law, could not reach the merits of the motion for CR11 sanctions and, thus, could not exercise its discretion. Thus, it is a question of law, not a question of abuse of discretion.

The law is clear. Attorneys and judges, "...who perceive a possible violation of CR11 *must* bring it to the offending party's attention *as soon as possible*. Without such notice, CR11 sanctions are unwarranted." (italicized for emphasis) *Biggs v. Vail*, 124 Wn.2d at 198, 876 P.2d 448 (Wash., 1994); *Bryant v. Joseph Tree, Inc.,* 119 Wn.2d 210, 829 P.2d 1099 (Wash., 1992) (A party seeking CR 11 sanctions should therefore give notice to the court and the offending party promptly upon

discovering a basis for doing so.) In other words, prompt notice of a possible violation of CR11 to opposing side is a prerequisite, a threshold, to the Court granting sanctions.

In the Federal Courts, a Rule 11 motion for sanctions must be served on opposing counsel twenty-one days before filing the motion with the court, providing the opposing counsel a "safe harbor ... to give the offending party the opportunity...to withdraw the offending pleading and thereby escape sanctions." *Winterrowd v. American General Annuity Ins. Co.*, 556 F.3d 815 (9th Cir., 2009); see *Holgate v. Baldwin*, 425 F.3d 671 (Fed. 9th Cir., 2005) (...the Rule's safe harbor provision requires parties filing such motions to give the opposing party 21 days first to "withdraw or otherwise correct" the offending paper. We enforce this safe harbor provision strictly. We must reverse the award of sanctions when the challenging party failed to comply with the safe harbor provisions, even when the underlying filing is frivolous.); *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994) (citing *Bryant*) (Federal decisions interpreting Rule 11 often provide guidance in interpreting our own rule.)

The purpose of this threshold act is to give the "...offending party an opportunity to mitigate the sanction by *amending* or withdrawing the offending paper." *Biggs.* (italicized for emphasis.) There is no reason why a party should not be given an opportunity to correct an offending brief.

In fact, the party seeking CR11 sanctions has "...a duty to mitigate and may not recover excessive expenditures." *MacDonald v. Korum Ford*, 912 P.2d 1052, 80 Wn.App. at 891 (Wash.App. Div. 2, 1996)

Related to the principle of prior notice, is the fact that if prior notice was properly given and CR11 sanctions are warranted, then, in considering whether a fee is "reasonable," the trial court considers whether those fees and expenses could have been avoided or were self-imposed. *Ibid.* In other words, even if there is cause for CR11 sanctions, a party must mitigate and attempt to limit the attorney fees that may eventually be imposed. Of course, without prior notice, the offending party has no chance to withdraw or amend the offending paper. *Ibid.*, at 891. The threshold for imposition of CR11 sanctions is high. *Skimming v. Boxer*, 82 P.3d 707, 119 Wash.App. 748 (Wash. App., 2004)

In *Marriage of Rich,* CR11 sanctions were justified because the offending party was properly notified *numerous* times that CR11 sanctions would be sought. The offending party failed to take action. *Marriage of Rich, In re*, 907 P.2d 1234, 80 Wn.App. 252 (Wash. App. Div. 3, 1996)

Here, the Respondent's attorney, Brian Fresonke, failed to notify the Appellant, Vladik Bykov, of the allegedly sanctionable conduct prior to filing the motion for CR11 sanctions. Brian Fresonke does not deny this. Instead, he claims that the motion for CR11 sanctions *itself*

constituted notice. See Brief of Respondent, Pages 19-20. Yet, Fresonke provides no legal support for this novel contention. Furthermore, assuming, arguendo, that the CR11 motion did *itself* constituted sufficient notice under the law, it was filed impermissibly late.

"A moving party *must* notify the offending party *as soon as it becomes aware* of sanctionable activities." (italicized for emphasis.) *MacDonald v. Korum Ford,* at 891. (Citing *Biggs*) The allegedly offensive brief [1] was submitted to the trial court and mailed out to Brian Fresonke on November 5th, 2010. CP 443-445. Fresonke does not allege that he did not receive it. On the other hand, the motion for CR11 sanctions, embedded in an order to show cause, was served on Appellant on November 3rd, 2011. CP 144-145. Thus, almost a year went by before Fresonke filed a motion for CR11 sanctions. This fact alone vitiates Fresonke's legal argument that it was proper for the trial court to grant sanctions. Waiting a year does not amount to "as soon as...[the party] becomes aware." *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994) (Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. Without such notice, CR 11

[1] The trial court did not determine that the brief itself was harassment, only the failure to redact Fresonke's social security # therefrom. CP 321. The brief accurately presents Fresonke's failure to pay federal income tax. CP 440-450.

sanctions are unwarranted.) (citing *Bryant*.); *Holgate v. Baldwin*, 425 F.3d 671 (Fed. 9th Cir., 2005) (...the [Rule 11] motion should be served [on opposing counsel] promptly after the inappropriate paper is filed, [giving party an opportunity to amend or withdraw] and, if delayed too long, may be viewed as untimely.)

Fresonke could have notified Bykov of the unredacted social security number shortly after the brief was filed. But, he chose not to. It was a calculated decision, as explained *infra.*

Brian Fresonke continues with frivolous arguments, claiming that "Respondent Adams had no duty to notify Bykov of anything prior to serving him with the November 3, 2011 order to show cause." Brief of Respondent, Page 20. This is technically true. [2] But, this is not an appeal in a tort action, and negligence is not an issue. Of course, if it were, the existence of a duty would be a question of law. See *Hertog v. City of Seattle*, 138 Wash.2d at 275, 979 P.2d 400 (1999) However, in this case, according to *Biggs,* the legal consequence of the failure to notify is that, "Without such [prior] notice, CR11 sanctions are unwarranted." *Biggs,* at 198. Once again, Fresonke makes a frivolous argument. Brian Fresonke did not conduct a proper legal research into the issue. Had he read legal

[2] It is also an implicit admission that Fresonke did not notify Bykov prior to filing Respondent's motion for CR11 sanctions.

cases, he would surely have come across *Biggs*. He does not argue that *Biggs* is not good law. He did not include in any of his arguments. See Brief of Respondent.

Yet, Brian Fresonke makes another frivolous argument. He claims that "...CR11 itself afforded Bykov with notice..." Brief of Respondent, p. 20. Once again, Brian Fresonke fails to cite any case law to support this odd contention.

To repeat (hopefully without offense to the Court) - the law requires an attorney or judge who perceives a possible violation of CR 11 to bring it to the offending party's attention as soon as possible. Without such notice, CR 11 sanctions are unwarranted. *Biggs.*, at 198 (citing *Bryant*) If the written law itself were sufficient to provide notice, the Washington Supreme Court would have ruled otherwise. Basically, Brian Fresonke is challenging the WA Supreme Court decision, without any citation. The argument he makes is:

> "A litigant appearing pro se is bound by the same rules of procedure and substantive law as his or her attorney would have been had the litigant chosen to be represented by counsel."

Brief of Respondent, p. 20.

Brian Fresonke states a true statement of law. But, if its true, then the principles of *Biggs* and other cases are applicable herein and thus, *in order* for the trial court to have granted CR11 sanctions, Brian Fresonke

was required to have provided Appellant with notice prior to submitting his motion for CR11 sanctions. Since he did not, the trial court had no legal authority to grant the sanctions.

Also, the case that Fresonke cites, *Patterson*, for the last argument, has nothing to do with CR11 sanctions. See *Patterson v. Superintendent of Public Instruction*, 887 P.2d 411, 76 Wn.App. 666 (Wash. App. Div. 3, 1994). *Patterson* deals with the suspension of a teacher's certificate and the fact that the defendant therein, appearing pro se, was required, but failed, to submit facts and legal authorities to support one of his claims during summary judgment proceedings. *Patterson*, at 671. In the case herein, the issue is different.

Another misleading argument that Brian Fresonke makes is that:

"The March 29, 2011 ruling provided Bykov with notice that Fresonke's financial and personal information had no relationship to Bykov's lawsuit against Adams. Bykov did nothing, leaving Adams to reopen the lawsuit in the trial court following the May 13, 2011 mandate to procure the same relief that had been granted by the Court of Appeals with respect to Bykov's filing of the November 5, 2011 pleading there." Brief of Respondent, p.21.

First of all, this argument is misleading because the Court of Appeals did not sanction Appellant. The Court of Appeal's letter said: "The social security number of attorney Brain Fresonke has no relationship to this matter..." CP 178. The letter did not put Appellant on

notice that Brian Fresonke would be filing a motion for CR11 sanctions against Appellant for the November 5th, 2010 brief. Brian Fresonke did not file a motion for CR11 sanctions until more than seven months later, on November 3rd, 2011. Brian Fresonke could have notified Appellant of his intention to seek CR11 sanctions at the time of the ruling, before the ruling, or after the ruling. But, he failed to do so. It was a calculated move to extend litigation.

Having been put on notice by the Court of Appeals, that "Petitioner Vladik Bykov shall not file any additional documents containing the social security number of attorney Brian Fresonke." (see CP 178), the Appellant has strictly complied with this Court's directive.

The essence of *Biggs* and other related cases is that a party must have an opportunity to make corrections so that additional attorney fees can be avoided. Brian Fresonke could have brought up the issue of the other unredacted social security number when he filed his motion to redact in the Court of Appeals. But, he didn't. He saved the issue so that he could litigate it later on – perhaps as an opportunity to obtain additional attorney fees. [3] It was a calculated decision.

If he had apprised the Appellant and Court of Appeals about the other unredacted social security number in his motion, the Court of

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[3] Brian Fresonke owes more than $80,000 to the U.S. government.

Appeals could have directed the Appellant to file a motion in the trial court. The Court of Appeals could also have directed the clerk of the King County Superior Court to redact the social security number. The issue could have been *completely* resolved at that time. Attorney fees would have been avoided. Yet, Brian Fresonke decided to save the issue for another day. He knew the issue would spur further satellite litigation.

Brian Fresonke makes another odd and frivolous argument, contrary to *Biggs*. He states:

"Bykov erroneously claims that Adams was required to provide him with notice that he was seeking CR11 sanctions promptly upon discovering a basis for doing so." Brief of Respondent, p. 22.

But, why is this an erroneous claim? It is, contrary to Brian Fresonke's assertion, a true and correct statement of law based on *Biggs* and other related cases.

However, could Fresonke be making the argument that his client, David Adams, was not required to provide Appellant with notice? If so, then that assertion would be correct. David Adams did not have to provide notice. But, Brian Fresonke did. Brian Fresonke was the one seeking sanctions, not David Adams.

However, Brian Fresonke continues to add to his frivolous arguments. He cites to *North Coast Electric Co.v. Selig*, which actually supports *Biggs* principle, that: "[A] party should move for CR11 sanctions

as soon as it becomes aware they are warranted" because "[p]rompt notice of the possibility of sanctions fulfill the primary purpose of the rule, which is to deter litigation abuse." *North Coast Elec. Co. v. Selig*, 151 P.3d 211, 136 Wn. App. 636 (Wash. App., 2007) (quoting *Biggs*) See Brief of Respondent, p.22.

Brian Fresonke claims that *North Coast Electric Co. v. Selig* does not apply to the facts in this case. Next, without logical connection, he says: "The trial court had no jurisdiction due to pendency of Bykov's first appeal in the Court of Appeals." Yet, he fails to cite case law to support this argument. In fact, the law is the opposite. A court "...has the power to award costs even if jurisdiction is found to be wanting." *Scott Fetzer Co., Kirby Co. Div. v. Weeks*, 114 Wn.2d 109, 786 P.2d 265 (Wash., 1990); see also *Kalich v. Clark*, 215 P.3d 1049, 152 Wn. App. 544 (Wash. App., 2009) (A court has jurisdiction to award costs, including attorney fees, even where it determines that it lacks personal jurisdiction over a party or subject matter jurisdiction over the claim.) Thus, if Brian Fresonke had given Appellant proper notice of intent to seek CR11 sanctions *and* Appellant failed to take action, *then* Brian Fresonke could have filed a motion for sanctions and the trial court would have had authority to grant them.

But, even if Brian Fresonke were correct and erroneously thought that the trial court lacked jurisdiction, he still could have given Bykov notice of intent to seek CR11 sanctions. But, since Brian Fresonke failed to provide notice, and waited a year, prior to filing his CR11 motion, the sanctions were – according to *Biggs* – unwarranted.

In furtherance of his frivolous arguments, Brian Fresonke makes an inaccurate statement of fact. He states:

> "The pleadings that Bykov filed on November 10, 2011 included a resubmission of the offensive pleading that was the basis for the CR11 motion (CP 210-270) and additional documents and statements that had no relationship to the litigation." Brief of Respodent, p.22.

This is simply Brian Fresonke's opinion. The trial court did *not* find that the brief itself was offensive - only the failure to redact Fresonke's social security number therefrom. CP 321. In fact, the brief accurately presents Fresonke's failure to pay federal income tax. CP 440-450. And, when Appellant later re-filed that same brief, Brian Fresonke's social security number was redacted, in conformity with the Court of Appeal's order. See CP 256.

The trial court never made a finding that the substance of the brief was harassment because it is a fact that Brian Fresonke has not paid his federal income taxes and owes the U.S. government more than $80,000.00

– to this day. CP 440-450. [4] In fact, because the order entered by the trial judge was composed by Brian Fresonke and adopted by the trial judge, it is implicit evidence that Brian Fresonke did not consider the substance of that brief to be harassment. Otherwise, he would have asked the trial court judge to declare the whole brief harassment. Only now does he claim that the whole brief constitutes harassment.

Brian Fresonke continues his unsupported arguments, by alleging that:

> "Bykov refiled his offensive pleading in this case for the second time 7 days after he received actual notice that Adams was seeking CR11 sanctions against him. Bykov fails to explain how Adam's failure to provide him notice that he was violating CR11 in November 2010 would have made any difference in the amount of the CR11 sanction he was assessed in this case." Brief of Appellant, p. 22-23.

Brian Fresonke is misstating the facts. As already pointed out, the trial court did not determine that the brief was offensive in substance, only the failure to redact the social security number. CP 321. Brian Fresonke's social security number was actually redacted. See CP 256. Thus, the basis for the CR11 sanction was extinguished. Brian Fresonke fails to apprise the court of this fact. Yet, according to the 9th Circuit, "...an

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[4] The tax liens expire in 10 years. Brian Fresonke has nothing to lose by simply waiting for them to expire. It would probably cost *more* than $80,000 for the U.S. government to prosecute him and attempt to collect the monies owed.

attorney has a duty of good faith and candor in dealing with the judiciary." *Pacific Harbor v. Carnival Air Lines*, 210 F.3d 1112 (9th Cir., 1999)

Had Brian Fresonke provided notice, Appellant would have moved the trial court to redact Fresonke's social security number. If not, *then* Fresonke *could have* sought sanctions. Under *Biggs* and related cases, Fresonke had a duty to mitigate attorney fees.

Another unsubstantiated statement that Brian Fresonke makes is:

> "Bykov has filed numerous pleadings [sic] in this case for the improper purpose of maliciously harassing Adam's attorney, and these pleadings (including the pleading for which Bykov was sanctioned on November 15, 2010) caused legal injury to Adams that afforded him standing to seek relief under CR11."

Brief of Respondent, p. 18.

However, Brian Fresonke does not explain the nature of the "legal" injury – either to himself or to his client, David Adams. Brian Fresonke is unhappy because Appellant filed a bar complaint against him, citing his failure to pay U.S. federal income tax. This is why Brian Fresonke has woven a web of lies against Appellant. However, since his failure to pay income tax is a fact and appears in public records, Appellant is not liable for any injury that Brian Fresonke may have suffered because of the disclosure.

Brian Fresonke also makes the argument that "David Adams, a party to this lawsuit, had the right to seek appropriate relief from the court under CR11 and GR15 when Vladik Bykov filed a pleading intended to harass Adam's attorney." However, as already explained, it was error for the trial court to grant CR11 sanctions. And, the sanctions were based on CR11, not GR15.

And, David Adams had no standing to assert any rights of Brian Fresonke because David Adams has no legal right to enforce Brian Fresonke's rights and David Adams did not suffer any injury, legal or otherwise as a result of Brian Fresonke's un-redacted social security number. The issue herein is collateral to the substance of the trial court litigation and does not involve the rights of David Adams. David Adams did not hire Brian Fresonke to redact Brian Fresonke's social security number. He only hired him to defend in the original suite, which has already been dismissed. In any case, the issue is moot because Fresonke failed to provide notice to Bykov prior to filing his motion for CR11 sanctions.

2. The trial court erred in fact and law in determining that Appellant failed to notify defendant of a deposit into the court's registry to satisfy judgment against him.

Brian Fresonke, the attorney for Respondent, alleges that the trial court properly awarded post-judgment interest to Adams on the $1,600.00 judgment. Brief of Respondent, p. 23. However, the argument does not accurately reflect the facts and the law.

On September 16th, 2010, Bykov made an offer to Brian Fresonke to pay the full amount owed to David Adams in an email. See Brief of Respondent, p.24. Even though Appellant offered to pay the debt owed to David Adams and requested that David Adams stop by, he did not argue with Fresonke once Fresonke made it known that asking David Adams to stop by was unreasonable. However, Bykov implicitly agreed to bring the payment to Fresonke, when he asked him whether he would accept cash. But, since Brian Fresonke explicitly refused to accept cash, which is legal tender, Bykov did not pursue any further communication with Fresonke.

Instead, on November 30th, 2010[5], Bykov deposited $1600.00 into the King County Superior Court trust registry, asking the clerk to apply the funds to satisfy the judgment entered in case #10-2-15463-9. The deposit was unconditional. However, the clerk did not inform the Respondent of this deposit. And, the Appellant did not know that he had

[5] Appellant contacted the King County Superior Court clerk to verify the date.

to personally inform the Respondent of the deposit. He assumed that the court clerk would do so.

In any case, a short time later, on December 17th, 2010, the Appellant herein filed a motion in the Court of Appeals, asking for a stay of judgment and clearly informing the Respondent's attorney of the $1600.00 deposit into the trial court's trust registry. CP 239-254. Instead of admitting that he received notice, Brian Fresonke has alleged he knew nothing of it. See CP 185-189. Brian Fresonke asserted:

> "Mr. Bykov failed to provide notice that he had paid these funds into the court registry. As a result, there was no way for anyone to ascertain that there were funds in the court registry available to pay towards my client's judgment." CP 185.

The declaration, made under penalty of perjury, was signed by Brian Fresonke on November 3rd, 2011. Of course, after explaining to Brian Fresonke that he knew of the deposit (see Brief of Appellant, p. 23-25), Brian Fresonke has not re-alleged that he was not given notice based on the December 17th, 2010 motion.

However, after being given notice of the $1600.00 deposit, Brian Fresonke did nothing. He could have asked the King County Court clerk to disburse the funds. But, he didn't. It was a calculated decision.

Notwithstanding the fact that Respondent, through his attorney Brain Fresonke, knew of the $1600 deposit, the trial court entered an order on November 15th, 2011, stating, in relevant part, that:

"The Court finds that plaintiff Vladik Bykov paid $1,600.00 into the Court registry on November 30, 2010, but he failed to notify defendant of the deposit. As such, the judgment entered against Plaintiff in the principal sum of $1,600.00 on September 10, 2010 was not satisfied and prejudgment [sic] interest accrued thereon at the rate of 12% per annum. A total of $224.00 of prejudgment [sic] interest accrued from September 10, 2010 to November 10, 2011 and an additional $.52 per day of prejudgment [sic] interest accrues from November 10, 2011 until the Clerk disburses funds to defendant David Adams pursuant to this order." CP 321.

The trial court should have found that Respondent, David Adams, knew of the deposit on December 20th, 2010 (date of service, see CP 239-254) and that therefore accrual of interest had stopped on that day. The interest that accrued from September 10th, 2010 to December 20th, 2010 is $53.13. Instead, the trial court calculated $224.00 as post-judgment interest. Thus, based on the facts, trial court committed error in calculating interest.

The law supports Appellant's contention. One of the cases cited by Fresonke, *Lindsay v. Pacific Topsoils, Inc.*, 120 P.3d 102, 129 Wn. App. 672 (WA, 2005), actually supports Appellant's argument. In *Lindsay*, the respondent, Pacific Toposils, Inc., argued, inter alia, that the

appellant therein, Lindsay, should not be entitled to post-judgment interest because Lindsay did not move to withdraw amounts deposited in the court's registry. *Lindsy,* at 106. However, on this argument, the *Lindsay* court ruled against Pacific Topsoil, stating that because Pacific Topsoil had made payment of judgment with the provision that "the money is available immediately to plaintiff James D. Lindsay *in exchange* for entry of a full satisfaction of judgment for this amount per RCW 4.56.100(1)" (italicized for emphasis) it was a conditional payment and consequently, the accrual of interest did not stop when the money was deposited.[6] *Lindsay,* at 105 - 106.

In the case herein, the Appellant did not make a conditional deposit of $1,600.00 on November 30th, 2010. It was an unconditional deposit. Brian Fresonke was notified of the deposit when he was served on December 20th, 2010. Brian Fresonke did not ask the court to disburse the funds - until November 3rd, 2011 – almost a year later. It was a calculated decision. He could have done it earlier. But, he didn't. Thus, Respondent should only be entitled to post-judgment interest from September 10th, 2010 to December 20th, 2010, in the amount of $53.13.

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[6] Here, the Appellant asks the Court to find that the accrual of interest stopped when Respondent found out about the deposit.

3. Trial court erred in denying Appellant's motion to vacate the judgment, that awarded CR11 sanctions to David Adam and Brian Fresonke.

Brian Fresonke claims that the trial court properly denied Appellant's motion to vacate the $731.50 judgment entered as CR11 sanctions against Appellant. However, as already explained *supra* and in the Appellant's opening brief, the entry of the $731.50 award as CR11 sanctions by the trial court was in error. Fresonke does not allege that *Biggs* is not good law.

Appellant argued the *Biggs* principles to the trial court. See CP 373. The trial court simply ignored these principles and denied the motion. CP 434. To add insult to injury, the trial court imposed an additional $1000.00 CR11 sanction – without giving prior notice that it was considering CR11 sanctions, as required by *Biggs*. It well may be that the trial court disagrees with *Biggs* and related case law. However, Judge Doerty has not provided any explanation, other than to say that the motion failed "...to conform to the show cause requirements of CR60 and fails to meet the substantive requirements for relief." and that the sanctions were entered because "the motion is not well grounded in fact and is not warranted by existing law." CP 434. But, *Biggs* is good law.

Brian Fresonke argues that "Bykov's affidavit did not provide any explanation as to why Adam's attorney would contact Bykov for any

purpose whatsoever in the midst of Bykov's bizarre and criminal harassment campaign against him." Brief of Respondent, p.27. But, contrary to this misleading statement, the Appellant did write in his affidavit: "Brian Fresonke never contacted me in any way to inform me that he wanted me to redact his social security number from that motion, or that he would be filing a CR11 motion." CP 379-380. If Fresonke wanted the trial court to impose CR11 sanctions on Bykov, Fresonke should have given him prior notice. Fresonke does not argue that *Biggs* is not good law.

Instead, Brian Fresonke has woven a web of lies against Appellant because Appellant filed a bar complaint against him, disclosing Brian Fresonke's willful failure to pay U.S. federal income tax. Appellant did not commit any criminal harassment against Fresonke.

Fresonke also alleges that:

"Bykov has failed to assign error to the trial court's denial of his motion to vacate and he has failed to present argument or legal citation as to the trial court's ruling. This court should not review the trial court's denial of the motion to vacate." Brief of Respondent, p. 28.

While this assertion may be factually correct – that Appellant did not file any motions post entry of the order of denial - nonetheless, the original entry of the order granting CR11 sanctions was in error of law. Subsequently, the trial court erred in failing to vacate that judgment.

Since it is an issue of law, this court reviews the matter *de novo.* See *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.,* 922 P.2d 126, 83 Wn.App. 432 (Wash.App. Div. 2, 1996) (de novo review is appropriate where the issues involve solely questions of law.) (citing *State v. McCormack*, 117 Wash.2d 141, 143, 812 P.2d 483 (1991), cert. denied, 502 U.S. 1111, 112 S.Ct. 1215, 117 L.Ed.2d 453 (1992))

Also, it would have been futile to challenge the denial, because it was obvious that Judge Doerty completely ignored Appellant's *Biggs* arguments and was himself in violation thereof, by his failure to provide to Appellant prior notice before *sua sponte* issuing CR11 sanctions. Brian Fresonke does not dispute Judge Doerty's failure to comport with *Biggs*.

4. The trial court erred, as a matter of law, in awarding CR11 sanctions of $1000.00 against Appellant because the trial court failed to notify Appellant of a possible CR11 violation prior to the trial court awarding those sanctions.

The trial court erred, as a matter of law, in awarding CR11 sanctions against Appellant in the amount of $1000.00 because, as a threshold matter, the trial court judge failed to provide notice to Appellant of sanctionable conduct, prior to issuing the CR11 sanctions, as required by *Biggs*. See *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994) (Both practitioners and judges who perceive a possible violation of CR 11

must bring it to the offending party's attention as soon as possible. Without such notice, CR 11 sanctions are unwarranted.) (citing *Bryant.*); *Holgate v. Baldwin*, 425 F.3d 671 (Fed. 9th Cir., 2005) ("Explicit provision is made for litigants to be provided notice of the alleged [Rule 11] violation and an opportunity to respond before sanctions are imposed.); *Tom Growney Equipment, Inc. v. Shelley Irr. Development, Inc.*, 834 F.2d 833 (C.A.9 (Ariz.), 1987) (In the absence of extraordinary circumstances, procedural due process requires notice and the opportunity to be heard before any governmental deprivation of a property interest. The error in assessing Rule 11 sanctions without prior notice [is] not cured by the subsequent hearing...for the reason that the burden, of proving that sanctions were not justified, were erroneously placed on appellant.) Here, the trial court did not provide Appellant an opportunity to respond to the alleged CR11 violations, prior to imposing the $1000.00 CR11 sanction. Any further hearings would not have cured the failure to provide required prior notice.

Brian Fresonke does not challenge the fact that Judge Doerty failed to provide prior notice, as required by *Biggs* and related cases. Instead, illogically and counter to *Biggs*, he urges this Court to "...determine whether the motion violated CR11." Brief of Respondent, p. 28. However, considering the fact that Judge Doerty failed to provide prior

notice, it is irrelevant, as a matter of law, whether the motion to vacate actually violated CR11, because without the prior notice, sanctions were unwarranted. See *Biggs*.

In hindsight, the Appellant admits that some of the arguments made in the motion to vacate may have been shaky. However, the Appellant's assertion that the trial court ignored *Biggs* principles and erred in awarding the first CR11 sanction is unassailable.

Brian Fresonke does not dispute the validity of *Biggs*. He has chosen to simply ignore it. It is understandable why he has done so. It vitiates his arguments. He does not like it and chose not to mention it in his brief – as if it doesn't exist. See Brief of Respondent.

B. CONCLUSION

1. The trial court erred in awarding $731.50 as CR11 sanction in favor of Mr. Fresonke and Mr. Adams because Brian Fresonke failed to provide notice, as required by Biggs and related cases. The Appellant kindly asks that this Court reverse the award and strike the judgment. (CP 318)

2. The trial court judge erred in awarding $1000.00 in attorney fees as CR11 sanction against Appellant because the trial court judge failed to provide prior notice, as required by *Biggs* and related cases. The

Appellant kindly asks that this Court reverse the award and strike the judgment. (CP 434)

3. The trial Court erred in determining that Appellant did not provide notice to Respondent of a $1600.00 deposit into the King County Superior Court registry. The Appellant kindly asks that this Court find that Respondent was actually notified of the deposit on or about December 20th, 2010 and remand the issue to the trial court for determination of the correct post-judgment interest.

4. If this Court finds in favor of Appellant, the Appellant kindly requests that this Court award costs and statutory attorney fees against Brian Fresonke, not David Adams.

5. If this Court finds Brian Fresonke's arguments frivolous, the Appellant kindly asks this Court to sanction Brian Fresonke in an appropriate amount.

DATED this 14th day of February, 2013

Respectfully Submitted,

Vladic Bykov

Vladik Bykov
14156 91st CT NE
Kirkland, WA 98034

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that I mailed a copy of the foregoing "REPLY BRIEF OF APPELLANT" to Brian K. Fresonke, Respondent's attorney, at 1001 4th Ave., Ste. 3200 in Seattle, WA and to the Court of Appeals at 600 University St, One Union Square in Seattle, WA 98101, postage prepaid on February 14th, 2013 - at a U.S. Post Office.

Dated at Kirkland, Washington this 14th day of February, 2013.

Vladik Bykov

Vladik Bykov, Appellant

14156 91st CT NE
Kirkland, WA 98034