68021-8

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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

BRIEF OF APPELLANT

VLADIK BYKOV
Appellant

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ISSUES:

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B. STATEMENT OF THE CASE

The appeal herein arises out of a lawsuit filed by Appellant against Respondent for nuisance, mainly caused by Respondent's dog. CP 20-26. In response, on June 1st, 2010 the respondent, through his attorney Brian K. Fresonske, filed an answer. CP 1-8. A couple weeks later, having noticed a change in Respondent's behavior, the Appellant filed a motion for dismissal of the entire complaint. CP 27-28. The trial court granted the dismissal. CP 29-30. A couple weeks later, on July 7th, 2010, the Respondent, through his attorney Brian K. Fresonke, filed a motion to compel discovery for further litigation. CP 31-34, 404-406. Mr. Fresonke even made his client pay a $230.00 filing fee. CP 405. In response, the Appellant was forced to file a motion to strike the said motion because the trial court had already dismissed the entire case. CP 38-44. The trial court properly denied Respondent further discovery. CP 56-57. In addition, the Appellant was also forced to file a motion to dismiss Respondent's counterclaim contained in his answer because it was not a legal claim. CP 45-55. In response, the trial court properly dismissed the Respondent's counterclaim. CP 58-59.

On July 29th, 2010 the Respondent, through his attorney Brian K. Fresonke, filed a motion for attorney fees pursuant to RCW 4.84.185, alleging that Appellant's claims were frivolous. CP 60-63. Subsequently,

the trial court granted the motion and entered an order against Appellant, granting Respondent $1600.00 in attorney fees. CP 69-70. Based on the langauge of that order, which was authored by Brian K. Fresonke, the trial court allegedly found that "Plaintiff's claims against defendant are frivolous and advanced without reasonable cause contrary to RCW 4.84.185" CP 69. However, the order did not provide an explanation, nor a factual analysis, to substantiate this allegation. CP 69. Likewise, the order did not provide an explanation of how the judge came to the conclusion that $1600 was an appropriate or reasonable amount. CP 69.

But, shortly thereafter, the Appellant filed a motion for clarification to ascertain whether the trial court judge had found Appellant's complaint frivolous in its *entirety*. CP 91-94. In respone to Appellant's motion for clarification, the trial court judge responded with an order saying that he believed Appellant's 1st count in his complaint and Appellant's request for punitive damages were frivolous. CP 108.

Importantly, the trial court judge did *not* find Appellant's two other claims to be frivolous. CP 108. Attempting to vindicate his rights, the Appellant filed a motion to vacate the $1600 judgment because a trial court cannot grant attorney fees pursuant to RCW 4.84.185 unless the trial court finds the entire complaint frivolous. CP 95-132. But, to no avail. The trial court, summarily and without explanation, denied the motion to vacate the

judgment. CP 133-134. The Appellant filed an appeal in the Court of Appeals, but because he did not have enough money to pay the filing fee, the case was eventually dismissed. See Docket, Case #659201. In the case herein, the Court of Appeals has granted a fee waiver. See Docket for this case.

About a year later, on November 3rd, 2011, the Respondent's attorney, Brian K. Fresonke, filed a motion for an order to show cause, asking the trial court to disburse the $1600 (from the King County Superior Court registry) that Appellant deposited in November of 2010 and to impose a CR 11 sanction against Appellant for Appellant's failure to redact Mr. Brian K. Fresonke's social security number from a brief that had been filed with the trial court back on November 5th, 2010. CP 182-183. But, neither the Respondent, David Adams, nor his attorney, Brian Fresonke, ever gave Appellant prior notice that they would be seeking CR 11 sanctions.

The particular brief referenced by Brian K. Fresonke was a motion that contained three instances of an unredacted social security number and was a request to admit evidence of Brian K. Fresonke's failure to pay U.S. Federal income tax in the least 15 years. See CP 440-450. Brian K. Fresonke never responded to that motion. See Docket, Case # 10-2-15463-9. Thus, Respondent David R. Adams, represented by Brian K. Fresonke, did not incur fees or costs relating to that motion.

Mr. Brian K. Fresonke was concerned with the exhibits attached to the motion, which were exact and unredacted tax liens that were publicly obtained from the King County Recorder's Office. CP 446. The tax liens show that Brian K. Fresonke has failed to pay U.S. federal income tax and owes more than $80,000 to the U.S. Government. CP 440-460. It is obvious why Brian K. Fresonke wanted the documents sealed.

Before prcoeeding further, and to understand Brian K. Fresonke, its instructive to take a look at his declaration, signed under penalty of perjury, which was attached to the motion for the order to show cause. CP 184-190. Mr. Brian K. Fresonke claims that he was never informed that Appellant had deposited $1600 into the court registry to satisfy the trial court's $1600 judgment against Appellant. See CP 185-186. Specifically, Mr. Fresonke alleged: "Mr. Bykov failed to provid [sic] 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.

Mr. Fresonke also alleged: "Mr. Bykov, the judgment debtor, failed to provide any notice whatsoever that he paid $1,600 into the court registry. He also failed to file any pleading with the Court that would have put my client or me on notice that he was tendering payment toward Mr. Adam's judgment. As a result, Mr. Adams' judgment remains unsatisfied to this day

and prejudgment interest has continued to accrue on the princiapl judgment amount." CP 186.

However, the indisputable evidence shows that Mr. Brain K. Fresonke *was* clealry informed of the deposit into the court's registry in mid-December of 2010 by a motion filed and served on Brian K. Fresonke. CP 239-244. Brian K. Fresonke was clearly apprised that: "The Appellant, in conformity with this Court's prior order, has deposited the sum of $1600.00 in the King County Superior Court trust registry..." CP 239. The document was served on Brian Fresonke on December 17th, 2010. CP 244.

This is why Appellant filed the motion to admit evidence of Brian K. Fresonke's failure to pay U.S. federal income tax. CP 440-450. To show that he is a dishonest person. Mr. Brian Fresonke is currently on a 5 year deferred sentence for DUI in Seattle Municipal Court. (Case# 542173.) CP 260.

In the end, the trial court completely overlooked the evidence, that Appellant had, in fact, informed Respondent of the $1600 deposit in December of 2010. The court issued an order with an interest amount calculated from September, 2010 to November, 2011. CP 320-322. Appellant made Brian Fresonke an offer to settle the judgment on September 16th, 2010. CP 273. Brian Fresonke refused to accept cash. CP 273.

Brian K. Fresonke asked the trial court to impose CR 11 sanctions against Appellant for having filed a document with an unredacted social security number. CP 182-183. But, as mentioned *supra*, he never gave notice to Appellant prior to seeking CR 11 sanctions.

Furthermore, Brian K. Fresonke alleged that it had taken him "2.1 hours reviewing the Clerk's file to locate the places in the record where Mr. Bykov improperly inserted my social security number and in preparing this motion to redact." CP 189-190. However, he already knew where the unredacted social security number appeared, because he was served with the document on November 5th of 2010. See CP 440-450. Perhaps he may have forgotten the precise location because he waited almost a whole year, before making the CR 11 motion on November 3rd, 2011. CP 190.

Brian K. Fresonke asked the court to award $731.50 for the 2.1 hours he allegedly spent looking for his social security number. CP 190. He made the calculation, alleging that he charges $275.00 an hour. CP 190. However, back in 2010 he indicated that he charges $175.00 per hour. CP 36-37, 405. Interestingly, there is no evidence that the Respondent, David R. Adams, actually paid anything to Brian K. Fresonke so that Brian Fresonke could look for his own social security number. Indeed, Brian K. Fresonke admits that there were in fact no attorney fees. See CP 432 . There, Mr. Fresonke says: "Bykov [Appellant] claims that the November 15, 2011 judgment was

for attorney's fees, but it was in fact a CR 11 sanction. Judge Doerty adopted defendant's request to measure the sanction with reference to the value of the attorney time that went into preparing and arguing the motion to redact defense counsel's social security number from Bykov's pleadings." CP 432. Thus, the November 15th, 2011 judgment (CP 318-322) was not a judgment for attorney fees, but simply a "sanction".

In response to Brian K. Fresonke's motion to disburse funds and CR 11 sanction, the Appellant filed opposition briefs. CP 224-317. Appellant clearly pointed out that Brian K. Fresonke was apprised of the $1600 deposit back in December of 2010. CP 224-225. Appellant clearly pointed out that there was no need for Brian K. Fresonke to "look" for his social security number because he already knew where it was. CP 226-227. However, the trial court simply awarded Brian K. Fresonke everything he wanted. CP 318-322. The trial court even listed both, David Adams and Brian Fresonke, as judgment creditors. CP 318.

Hoping to convince the judge that the entry of the judgment was wrong, Appellant filed a motion for reconsideration and to vacate the judgment and to schedule an evidentiary hearing to determine whether, in fact, the Respondent, David R. Adams, had incurred any costs or fees as a result of Brian K. Fresonke "looking" for his own social security number. CP 323-378 The Appellant clearly pointed out to the trial court that it was

inappropriate to award CR 11 sanctions because Brian K. Fresonke did not give prior notice of intent to file a motion for CR 11 sanctions. See CP 373. The trial court denied the motion and summarily, without giving an opportunity to defend himself, ordered Appellant to pay $1000 as CR 11 sanction. CP 434. In other words, the trial court judge did not give Appellant prior notice - an opportunity to defend himself - before awarding attroney fees pursuant to CR 11. See CP 434.

C. ARGUMENT

1. **THE TRIAL COURT ERRED IN AWARDING CR 11 SANCTIONS AGAINST APPELLANT ON NOVEMBER 15TH, 2011 BECAUSE:**

First, the standard of review. To determine whether the trial court had the legal right, based on the facts, to grant an award of attorney fees pursuant to a statute or rule is de novo. *Gander v. Yeager*, 274 P.3d 393 (Wash. App., 2012) In other words, the question of whether CR 11 sanctions can be granted, based on the facts, is a question of law. Issues of law are reviewed de novo. See *Rasmussen v. Bendotti*, 29 P.3d at 60, 107 Wash.App. 947 (Wash. App., 2001) On the other hand, a review of the discretionary decision to actually award or deny attorney fees and the reasonableness of any attorney fee award is based on an abuse of

discretion standard. . *Gander v. Yeager,* at 397. In other words, was it reasonable to make the award, based on the facts?

Before proceeding with argument, a review of CR 11. CR 11 permits sanctions, including attorney fees, when a party advances litigation lacking a legal or factual basis. See CR 11. CR 11 was modeled after the Federal Rule of Civil Procedure (Rule 11) and federal decisions interpreting Rule 11 often provide guidance in interpreting the state rule. *Biggs v. Vail*, 124 Wn.2d at 196, 876 P.2d 448 (Wash., 1994)

In deciding upon a sanction, the trial court should impose the least severe sanction necessary to carry out the purpose of the rule. *Ibid.* Should a court decide that the appropriate sanction under CR 11 is an award of attorney fees, it must limit those fees to the amounts *reasonably expended* in responding to the sanctionable filings. *Ibid.,* at 201. (italicised for emphasis) CR 11 sanctions should be limited to the minimum necessary and should not be used as a fee-shifting mechanism. *Ibid.* A purpose of fee shifting statutes is to penalize. *In re Disciplinary Proceeding Against Dynan*, 98 P.3d at 450, 152 Wash.2d 601 (Wash., 2004) In other words, CR 11 sanctions are *not* to be used to penalize the offending party. One judge believes that: "Attorneys overuse Civil Rule 11." See *Gander v. Yeager*, 274 P.3d at 397 (Wash. App., 2012)

However, nothwithstanding an actual violation of CR 11, lawyers and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. *Biggs v. Vail*, 124 Wn.2d at 198, 876 P.2d 448 (Wash., 1994) Without such notice, CR 11 sanctions are unwarranted. *Ibid.* (citing *Bryant v. Joseph Tree, Inc.,* 119 Wash.2d 210, 218-19, 829 P.2d 1099 (1992)) In other words, if the offending party is not notified of a possible CR 11 violation prior to the opposing party filing a CR 11 motion, the Court, as a matter of law, cannot grant the CR 11 motion. It would be an abuse of discretion to do so.

The Appellant believes that the foregoing legal principles, as applied to the facts, show that the court's November 15th, 2011 order (CP 320-322) granting $731.50 in attorney fees to Brian K. Fresonke and to David R. Adams was in error.

The facts and legal argument. In the case herein, the Respondent's attorney, Brian K. Fresonke, on November 3rd, 2011, filed a motion for attorney fees pursuant to CR 11, alleging that "...there was no legitimate reason for Mr. Bykov to include my social security number in his November 5, 2010 pleading. He did this solely as an act of malice and harassment against me. I am therefore asking the court to award CR 11 sanctions against Bykov for including my social security number in his pleading because he did so to harass me and because his doing so had

needlessly increased the cost of the litigation." CP 189. Furthermore, Brian K. Fresonke goes on to say "I [Brian K. Fresonke] have spent 2.1 hours reviewing the Clerk's file to locate the places in the record where Mr. Bykov improperly inserted my social security number and in preparing this motion to redact. (This does not include the time spent on the other aspects of this motion.) I anticipate that I will be spending an additional 2.0 hours obtaining an *ex parte* order to show cause and appearing for the hearing on show cause to be scheduled before Judge Inveen. I believe that 1/3 of this additional 2.0 hours of attorney time, or .66 of an hour, is attributable to the motion to redact my social security number form {sic} Mr. Bykov's pleading." CP 189-190.

From the above, it is clear that the Respondent, David R. Adams, did not request that his own social security number be redacted from a pleading. Instead, it is the Respondent's attorney, Brian K. Fresonke, who wanted his own social security number be redacted from a pleading. CP 185. In other words, Brian K. Fresonke was not representing David R. Adams in the motion regarding the appearance of Brian K. Fresonke's social security number. And, Brian K. Fresonke is not a party to this lawsuit. Yet, CR 11 only authorizes the court to issue "...an order to pay to other *party or parties* the amount of the reasonable expenses *incurred* because of the filing of the pleading, motion, or legal memorandum,

including attorney fees." See CR 11. (italicised for emphasis) Thus, it was error of law to grant attorney fees.

Also, David R. Adams did not have standing to ask the Court to redact Brian K. Fresonke's social security number because David Adams can not claim harm from the appearance of his attorney's unredacted social security number. The standing doctrine prohibits a litigant from raising another's legal rights. *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (Wash., 1994)

It is safe to say that Brian K. Fresonke was unhappy that Appellant had failed to redact his social security number from a pleading. The undersigned apologizes to Brian K. Fresonke for not redacting his social security number. However, why did Brian K. Fresonke wait a year to bring up the issue? Why didn't he ever inform the Appellant of the failure to redact social security number and that he would be seeking sanctions prior to filing of the CR 11 motion? But, a party seeking CR 11 sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. *Bryant v. Joseph Tree, Inc.,* 119 Wn.2d at 224, 829 P.2d 1099 (Wash., 1992)

Therefore, the trial court could not award CR 11 sanctions. In other words, without prompt and prior notice regarding the potential violation of the rule, the Appellant was not given an opportunity to mitigate the

sanction by amending or withdrawing the offending paper or asking the Court to seal it. But, opposing party was required to do so. *Biggs v. Vail*, 124 Wn.2d at 198, 876 P.2d 448 (Wash., 1994) And, without prior notice of intent to seek CR 11 sanction, award of sanctions were unwarranted. *Ibid.*

The brief containing Brian K. Fresonke's social security number was mailed to Brian K. Fresonke on November 5th, 2010. CP 440-450. The Respondent, through Brian K. Fresonke, did not oppose the motion. Likewise, Brian K. Fresonke himself did not oppose the motion. Thus, the Respondent, David R. Adams, did not incur any fees or costs. And, since Brian K. Fresonke does not allege that he did not receive a copy of the motion, he knew back in November of 2010 that his social security number was unredacted. Yet, Brian K. Fresonke claims that he "...spent 2.1 hours reviewing the Clerk's file to locate the places in the record where Mr. Bykov improperly inserted my social security number..." CP 189-190. If he knew about the unredacted social secuity number in November of 2010, why did he have to go back and look for it? He could have brought up the issue at the time he received a copy of that motion. But, he didn't. He cannot now claim expenses for time spent "looking" for documents with unredacted social security numbers. But, of course, he did not incur any expenses.

Furthermore, it was Brian K. Fresonke who moved the Court to order redaction. However, the facts show that he did not incur any costs or fees. Allegedly, it was David R. Adams who incurred the costs and fees. CP 432. But, if that assumption is true, why is Brian K. Fresonke a creditor? See CP 318-319. However, contrary to the assumption, Brian K. Fresonke admits that there were no attorney fees. See CP 432. He says: "Bykov [Appellant] claims that the November 15, 2011 judgment was for attorney's fees, but it was in fact a CR 11 sanction. Judge Doerty adopted defendant's request to measure the sanction with reference to the value of the attorney time that went into preparing and arguing the motion to redact defense counsel's social security number from Bykov's pleadings." CP 432. Yet, Brian K. Fresonke goes on to say: "Bykov's claim that there was no evidence to support the reasonableness of defense counsel's attorney's fees is false. The evidence supporting the reasonableness of the fees was set forth in defense counsel's declaration submitted with the original moving papers." CP 432. And, unabashedly, Brian K. Fresonke goes on to say: "Bykov claims that David Adams should not be a judgment creditor. This is not true because Mr. Adams pays my attorney's fees for the work I do in this case." CP 432. But, didn't Brian K. Fresonke say that the November 15th, 2011 judgment was not for attorney fees? In other words, the November 15th, 2011 judgment was not a judgment for

actual attorney fees that Respondent had to pay to his attorney, Brian Fresonke, but, according to Brian K. Fresonke himself, simply a "measure…with reference to the value of the attorney time that went into preparing and arguing the motion…" CP 432. Yet, Brian Fresonke maintains that "Mr. Adams pays my attorney's fees for the work I do in this case." What kind of manipulative game is Brian Fresonke playing?

Objectively, according to Brian Fresonke, there were no attorney fees or court costs expended. Yet, in error, the Court awarded $731.50 to Brian K. Fresonke. CP 318-319. Likewise, it was error for the Court to award $731.50 to David Adams. See CP 189-190.

But, even if David Adams had standing to ask the Court to have his attorney's social security number redacted and even if David Adams had in fact accrued attorney fees and even if Brian Fresonke or David Adams had informed Appellant of their intent to seek sanctions prior to filing the motion for sanctions, it was abuse of discretion for court to award $731.50 because Brian K. Fresonke did not spend 2.1 hours "reviewing the Clerk's file to locate the places in the record where Mr. Bykov improperly inserted my social securityy number." See CP 189-190. He already knew where it was back in November of 2010. See CP 323-366. Likewise, Brian Fresonke did not charge David Adams $275 per hour. He charged David Adams $175 per hour. See CP 36-37, 405. But, of course, according to

Brian Fresonke, David Adams was not actually charged anything for redaction of his attorney's social security number.

Of course, it is unknown whether or not, *in fact,* David Adams actually paid Brian Fresonke to have Brian Fresonke's social security number redacted. Brian K. Fresonke does say that "...Mr Adams pays [Brian Fresonke's] fees for the work I do in this case." CP 432 But, there are no affidavits from David Adams. Did David Adams pay Brian Fresonke to have Brain Fresonke's social security number redacted? According to Brian Fresonke, the answer is: No. See CP 432. Yet, Brian Fresonke makes it seem like David Adams did pay attorney fees. Ultimately, we may never know.

In conclusion, the King County Superior Court erred in awarding a judgment of $731.50 against Appellant on November 15th, 2011 because:

A. The Respondent, David Adams, and his attorney, Brian K. Fresonke, failed to meet the Biggs requirement of giving Appellant prior notice of CR 11 violation prior to the filing of the motion seeking CR 11 sanctions.

B. Appellant was not given the opportunity to mitigate the sanctions as required by Biggs.

C. David Adams incurred no attorney fees, nor costs, related to Brian Fresonke's motion to redact social security number.

D. Brian K. Fresonke incurred no attorney fees, nor costs, in filing the motion to redact social security number.

E. Brian K. Fresonke knew where his unredacted social security number appeared and did not spend 2.1 hours "looking" for it. In other words, the $731.50 award was unreasonable and an abuse of discretion by the trial court.

F. The award of $731.50 is a penalty. But, CR 11 does not allow the court to penalize a party. It only allows compensation for reasonable costs and fees *actually* expended. Here, there were none.

G. Brian K. Fresonke is not a party to the lawsuit and cannot be compensated because CR 11 can only compensate a party or parties to the lawsuit.

H. David Adams did not have standing to assert the legal rights of Brian Fresonke to have his attorney's social security number redacted.

2. **THE TRIAL COURT ERRED IN AWARDING CR 11 SANCTIONS AGAINST APPELLANT ON DECEMBER 8th, 2011 BECAUSE:**

First the relevant facts. After the Court had granted Brian Fresonke and David Adams an award of $731.50 in attorney fees (CP 318-322) the Appellant filed motions to vacate the judgment. CP 323-378. In response, Brian K. Fresonke, representing David Adams, filed a

memorandum in opposition to Plaintiff's Motion to Vacate Judgment. CP 432. Neither Brian K. Fresonke nor David Adams sought CR 11 sanctions against Appellant. However, on December 8th, 2011 the trial court denied Appellant's motion to vacate the judgment and *sua sponte* granted attorney fees in the amount of $1,000 as CR 11 sanctions. See CP 434. It is unknown to whom these attorney fees were granted, to Brian Fresonke or David Adams. Indeed, there are no allegations and no proof that any, or any specific amount of attorney fees or costs were incurred.

Legal argument. As already discussed *supra,* prior to seeking CR 11 sanctions, the opposing party needs to provide notice to the offending party. See *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994) Notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses. *Ibid.,* at 198. In this case the Respondent and his attorney did not provide any prior notice that they would be seeking CR 11 sanctions. Indeed, they, in fact, did not seek sanctions. In this case, the court, *sua sponte,* issued the CR 11 sanctions, alleging that Appellant's "...motion is not well grounded in fact and is not warranted by existing law." CP 434.

The court did not explain why the motion was not well grounded in fact, or why it was not warranted by existing law. See CP 434. The allegation that Bykov's motion failed to conform to the show cause

requirements of CR 60 and failed to meet the substantive requirements for relief is simply an allegation. Vladik Bykov was not given an opportunity to defend himself against these alleged violations.

However, both attorneys and *judges* who perceive a possible violation of CR 11 *must* bring it to the offending party's attention as soon as possible. (italicised for emphasis) *Biggs v. Vail*, 124 Wn.2d at 198, 876 P.2d 448 (Wash., 1994) Without such notice, CR 11 sanctions are *unwarranted.* (italicised for emphasis) *Ibid.,* at 198.

In this case, the trial court judge (James Doerty) did not provide Vladik Bykov with any notice of a potential CR 11 violation prior to entering the award against Vladik Bykov. Therefore, it was error of law to order sanctions against Vladik Bykov. It was an abuse of discretion likewise. This fact requires vacation of the December 8th, 2011 order granting CR 11 sanctions. CP 434.

Likewise, the failure of the trial court to provide notice of potential CR 11 sanctions is a violation of Appellant's due process rights. Due process requires notice and an opportunity to be heard before a governmental deprivation of a property interest. *Bryant v. Joseph Tree, Inc.,* 119 Wn.2d at 224, 829 P.2d 1099 (Wash., 1992) Appellant was not given an opportunity to brief the issue and defend himself against the alleged CR 11 violations, prior to the entry of the CR 11 sanctions. Thus,

the trial court judge violated Appellant's due process rights. This fact is also a basis on which to vacate the December 8th, 2011 order granting CR 11 sanctions. CP 434.

Furthermore, the amount of sanctions entered was error because there was no basis for this amount. See CP 434. There is no evidence that $1000 in attorney fees was incurred. In fact, there is no evidence that *any* attorney fees or costs were incurred. It seems likely that the trial court simply came up with that number out of the blue. It was meant to punish Vladik Bykov. However, CR 11 sanctions are not meant to punish, as explained *supra.* And, should a court decide that the appropriate sanction under CR 11 is an award of attorney fees, it must limit those fees to the amounts *reasonably expended* in responding to the sanctionable filings. (italicised for emphasis) *Biggs v. Vail*, 124 Wn.2d at 201, 876 P.2d 448 (Wash., 1994)

Even if attorney fees or costs were, in fact, incurred, there is no documentary evidence for the actual amount that was incurred. In other words, the $10000 CR 11 sanctions against Appellant was an abuse of discretion because "...in fashioning an appropriate sanction, the least severe sanctions adequate to serve the purpose should be imposed." *Bryant v. Joseph Tree, Inc.*, at 225. There is no evidence to suggest that the memorandum filed by Brian K. Fresonke incurred a $1000 fee.

But, because the trial court judge did not provide a basis for the $1000.00 sanction, this court has no way to determine whether the trial court complied with law. But, in any case, as already explained, it was error of court to enter the judgment in the first place, without having given Appellant prior notice of a potential CR 11 violation. The award must be vacated.

3. **THE TRIAL COURT ERRED IN RULING THAT APPELLANT HAD FAILED TO NOTIFY DEFENDANT OF A DEPOSIT OF $1600 INTO COURT REGISTRY.**

On August 19th, 2010 the trial court entered an order awarding $1600 against Appellant for allegedly having filed a frivolous complaint in its entirety. See CP 69-70. However, after further clarification the Court ruled that it believed only Appellant's 1st claim and request for punitive damages were frivolous. See CP 108. Nortwithstanding the court's error in entering a judgment against Appellant, on November 30th, 2010, the Appellant submitted $1600.00 into the court's registry and on December 17th, 2010 mailed a motion to Brian K. Fresonke, in which Appellant clearly notified Brian K. Fresonke and Respondent of the deposit. See CP 239-244. Indeed, on September 16th, 2010 the Appellant made an offer to Brian K. Fresonke to satisfy the judgment. See CP 273. Brian Fresonke refused to accept the offer of cash. CP 273.

In any case, about a year later, on November 3rd, 2011 Brian Fresonke filed a motion for an order to show cause, in which he alleged, under penalty of perjury, that he was never informed that Appellant had deposited $1600 into the court registry to satisfy the trial court's $1600 judgment against Appellant. CP 185-189. Specifically, Mr. Fresonke alleged: "Mr. Bykov failed to provid [sic] 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. Furthermore, Mr. Fresonke alleged: "Mr. Bykov, the judgment debtor, failed to provide any notice whatsoever that he paid $1,600 into the court registry. He also failed to file any pleading with the Court that would have put my client or me on notice that he was tendering payment toward Mr. Adam's judgment. As a result, Mr. Adams' judgment remains unsatisfied to this day and prejudgment interest has continued to accrue on the princiapl judgment amount." CP 186.

However, as already mentioned *supra,* the indisputable evidence shows that Mr. Brain K. Fresonke *was* clealry informed of the deposit into the court's registry in mid-December of 2010 by a motion filed and served on Brian K. Fresonke. CP 239-244. Brian K. Fresonke was clearly apprised that: "The Appellant, in conformity with this Court's prior order, has deposited the sum of $1600.00 in the King County Superior Court trust

registry…" CP 239. The document was served on Brian Fresonke on December 17th, 2010. CP 244.

However, contrary to the clear fact that Appellant had indeed provided notice of the deposit, the trial court erroneously held: "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 interest accrued thereon at the rate of 12% per annum. A total of $224.00 of prejudgment interest accrued from September 10, 2010 to November 10, 2011 and an additional $.52 per day of prejudgment interest accrues from November 10, 2011 until the Clerk disburses funds to defendant David Adams pursuant to this order." CP 321.

Instead, the trial court should have found that Appellant had indeed provided notice of the deposit.

D. CONCLUSION

Vladik Bykov asks that this Court to vacate the trial court's entry of the following two judgments against him:

1. In the amount of $731.50, entered on Nov. 15th, 2011. (CP 318-322)

2. In the amounf of $1000.00, entered on Dec. 8th, 2011. (CP 434)

Appellant asks that this court declare that Appellant did not fail to inform Brian Fresonke of the $1600 deposit into the court's registry.

REQUEST FOR ATTORNEY FEES AND COSTS

Appellant asks this court to award him statutory attorney fees and costs, against Respondent, associated with this appeal, pursuant to RAP 14. The Respondent erred in seeking CR 11 sanctions without having given prior notice, in violation of Biggs v. Vail. The trial court committed the same error. If Appellant substantially prevails, he is entitled to costs.

DATED this 15th day of November, 2012

Respectfully Submitted,

Vladik Bykov

Vladik Bykov
14156 91st CT NE
Kirkland, WA 98034

CERTIFICATE OF SERVICE

I cerify, under penalty of perjury under the laws of the State of Washington, that I mailed a copy of the foregoing "BRIEF OF APPELLANT" to Brian K. Fresonke, Respondent's attorney, at 1001 4th Ave., Ste. 3200 in Seatttle, WA, postage prepaid on November 15th, 2012.

Dated at Kirkland, Washington this 15th day of November, 2012.

Vladic Bykov

Vladik Bykov, Appellant

14156 91st CT NE
Kirkland, WA 98034