

64837-3

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No. 64837-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re:

GORDON LOTZKAR,

Appellant,

and

KRISTIN KELLEY,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE DOUGLASS NORTH

OPENING BRIEF OF APPELLANT

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ORIGINAL

A handwritten signature in black ink is written over a faint circular stamp. The stamp contains the text "COURT OF APPEALS, DIVISION I" and "STATE OF WASHINGTON".

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering judgment against Gordon Lotzkar, along with his client, for \$500.00 in attorney fees for “improper motion” in the order striking portions of the reply submittal, denying the motion to compel, and awarding fees and sanctions, entered on August 12, 2008, based on the following:

His motion fails to comply with the requirements of KCLR 7 and has no legal authority or basis. In addition, Respondent failed to comply with the discovery rules, specifically CR 26(1), CR 34, and KCLR 37. Respondent’s demand for release of privileged medical records is improper without the entry of an appropriate protective order. CP 81-84.

2. The trial court erred in entering judgment against Gordon Lotzkar, along with his client, for \$500 in attorney fees “related to objection” in the order entered on August 12, 2008, based on the following:

Respondent’s reply submittal contains inadmissible testimony from counsel in violation of RPC 3.7. In addition, it contains information not in strict reply. The following paragraphs of Respondent’s reply submittal are stricken and shall not be considered by the Court: Paragraphs 4, 5, 7, 8, 10, 13, 14 and 16. Due to the unfair litigation tactics by Respondent, an award of \$500 in attorney fees is GRANTED and included in the judgment herein. CP 81-84.

3. The trial court erred in naming Gordon Lotzkar, along with his client, as a judgment debtor for \$1,000 in attorney fees on the

specified terms in the judgment summary on the order entered on August 12, 2008. CP 81.

4. The trial court erred in entering judgment against Gordon Lotzkar for its “award of \$1000.00 in attorney fees and costs to be paid by the Respondent” in its order compelling answers to interrogatories and production of documents and other relief, entered on October 9, 2008. CP 690-691.

5. The trial court erred in granting sanctions of \$1,500 and entering judgment against Gordon Lotzkar in the order entered on October 9, 2008, for the following reasons:

Respondent's responsive submittal contains inadmissible testimony from his counsel in violation of RPC 3.7. In addition, “the evidence of Respondent's intransigence and willful violation of the rules of discovery, including CR 26-37 and KCLR 26-37, is overwhelming. Respondent's counsel certified that the responses to the discovery were in compliance with CR 26(g). By doing so, Respondent's counsel has violated CR 11 and caused Petitioner to incur unnecessary fees and costs. Due to the unfair litigation tactics by Respondent, sanctions of \$1,500 is GRANTED and included in the judgment herein. CP 690-692.

6. The trial court erred in naming Gordon Lotzkar, along with his client, as a judgment debtor for \$1,000 and \$1,500 on the specified terms in the judgment summary on the order entered on October 9, 2008. CP 690.

7. The trial court erred in entering a judgment against Gordon Lotzkar, along with his client, “for immediate payment of the fees as ordered by the arbitrator to allow for release of the full arbitration decision”, subject to the specified consequences in the order re CR 2A Agreement, arbitration decision re: fees, releasing arbitration decision, awarding judgment for fees and costs entered on June 11, 2009. CP 878, 881.

8. The trial court erred in entering judgment against Gordon Lotzkar for \$3,200 “owed by Respondent under the CR 2A Agreement from Respondent, Jeffrey Kelley”, as set out in the order entered on June 11, 2009. CP 878-879, 881.

9. The trial court erred in assessing \$10,199.85” in attorney fees against Gordon Lotzkar in the order entered on June 11, 2009, based on the following:

c. Respondent and his counsel have demonstrated continued intransigence, unreasonable demands, bad faith actions and violations of the CR 2A Agreement, arbitration agreement and Rules Conduct. CP 878, 881-882.

10. The trial court erred in naming Gordon Lotzkar, along with his client, as a judgment debtor for \$3,200 in back child support and \$5,841 in attorney fees on the specified terms in the judgment summary #1 in the order entered on June 22, 2009. CP 878.

11. The trial court erred in naming Gordon Lotzkar, along with his client, as a judgment debtor for \$3,600 in arbitrator fees on the specified terms in the judgment summary #2 in the order entered on June 22, 2009. CP 879.

12. The trial court erred in naming Gordon Lotzkar, along with his client, as a judgment debtor for \$4,358.85 in attorney fees on the specified terms in the judgment summary #3 in the order entered on June 22, 2009. CP 879.

13. The trial court erred in entering the order denying reconsideration of order imposing personal liability on monetary judgments dated June 11, 2009 on June 17, 2009. CP 1045-1046.

14. The trial court erred in entering the order denying Respondent's motion to terminate child support and awarding judgment for fees and sanctions on July 27, 2009. CP 1061-1063.

15. The trial court erred in assessing attorney fees and sanctions against Gordon Lotzkar in the order entered on July 27, 2009, based on the findings:

1. Respondent failed to file any financial disclosure as required by KCLFLR 10. In addition, the relief requested in Respondent's motion is an improper renewal of relief previously denied by this Court and also by the Arbitrator. Such renewed relief is an improper request for reconsideration. In addition, Respondent's request failed to comply with the requirements of the CR 2A Agreement.

2. These improper filings, violations of court rules, and violations of the CR 2A Agreement have caused Petitioner to incur unnecessary fees and costs. Respondent's failure to provide required financial disclosure is a recurring problem which has been noted by this Court and sanctions have been entered against Respondent previously. Additional sanctions are appropriate due to Respondent's ongoing intransigence. CP 1062.

16. The trial court erred in assessing \$2,000 in attorney fees and costs and \$1,000 in sanctions against Gordon Lotzkar "due to the egregious nature of the misconduct by Respondent and his counsel and the financial distress and harm caused to Petitioner by their actions" for the following:

2. Respondent and his counsel have demonstrated continued intransigence, unreasonable demands, bad faith actions and violations of the CR 2A Agreement, arbitration rulings, prior orders of this Court, and CR 11. CP 1063.

17. The trial court erred in naming Gordon Lotzkar, along with his client, as a judgment debtor for \$2,000 in attorney fees and \$1,000 in sanctions on specified terms on the judgment summary on the order entered on June 27, 2009. CP 1061.

18. The trial court erred in ruling that "Attorney fees, other professional fees and costs should be paid, including all judgments entered in this matter which remain unpaid" in the findings of fact and conclusions of law, entered on November 24, 2009. CL 3.7, CP 1108.

19. The trial court erred in ordering, in the decree of dissolution, entered on November 24, 2009, the following:

Attorney fees, other professional fees and costs shall be paid as set for in the Property Settlement Agreement referenced above and in the judgments entered in this matter, which shall remain in full force and effect until fully paid and a Satisfaction of Judgment is entered. Decree 3.13, CP 1101.

II. STATEMENT OF ISSUES

1. Did trial court err in assessing \$1,000 in attorney fees against Mr. Lotzkar in its order entered on August 12, 2008?
2. Did the trial court err in naming Mr. Lotzkar as a judgment debtor for \$1,000 in attorney fees in the judgment summary on its order to compel on October 9, 2008?
3. Did the trial court err in imposing \$1,500 in sanctions on Mr. Lotzkar in its order to compel on October 9, 2008?
4. Did the trial court err in imposing judgment on Mr. Lotzkar for his client's arbitration fees in its order on June 11, 2009?
5. Did the trial court err in naming Mr. Lotzkar as a judgment debtor for his client's financial obligations of \$3,200 in the judgment summary on its order on June 11, 2009?
6. Did the trial court err in ordering Mr. Lotzkar to pay \$10,998.85 in attorney fees in its order on June 11, 2009?
7. Did the trial court err in refusing to reconsider its order imposing judgments on Mr. Lotzkar for his client's obligations?
8. Did the trial court err in ordering Mr. Lotzkar to pay \$2,000 in attorney fees and \$1,000 in sanctions in its order on July 27, 2009?
9. Did the trial court err in ordering, in the final orders, that all unpaid judgments entered in the matter shall remain in effect?

III. STATEMENT OF THE CASE

Attorney Gordon Lotzkar, while representing a client in a hotly contested dissolution action, woke up to a lawyer's nightmare. The judge began signing orders, proposed by opposing counsel, making him personally liable for his own client's obligations for back child support, arbitration fees, and attorney fee awards. His objections about the lack of personal jurisdiction fell on deaf ears.

The judge also assessed attorney fees against Mr. Lotzkar based on his client's unsuccessful motions and intransigence, as well as sanctions under CR 11, without affording him adequate notice or opportunity to respond—and without ever specifying any sanctionable conduct. As the record reflects, Mr. Lotzkar just advocated for his client—and never acted in any way that would justify the fees and sanctions imposed on him.

A. Kristi's attorney refuses to provide her psychological evaluation.

In December 2007, Kristi Kelley filed a petition to dissolve her 19-year marriage to Jeffrey Kelley and the couple began two years of litigating over their property and two teenage boys. CP 3-8. In January 2008, a court commissioner entered temporary orders, placing the boys primarily with Kristi, obligating Jeffrey to

pay child support, and appointing a guardian ad litem. CP 44-60, 94-102.

As the guardian ad litem's recommended, Kristi and Jeffrey each submitted to a psychological evaluation, and later they each received a copy of their completed report, as did the GAL and the family therapist. CP 11, 19.

Seeking an exchange of the parties' evaluations, Jeffrey's attorney, Gordon Lotzkar, sent a copy of his client's evaluation to Kristi's attorney, Natalie Beckmann. CP 11. Ms. Beckmann, however, refused to do the same in return, writing him, on July 16, that they "were working on a proposed Protective Order". CP 62. Mr. Lotzkar explained that he did not oppose a mutual protective order, as long as it did not limit his ability to have an expert review the evaluation. CP11, 14, 62, 64-66, 78. Ms. Beckman responded that, in that case, he will "need to file a motion to have the evaluation released." CP 16.

Ms. Beckmann did not provide a proposed protective order or a copy of her client's evaluation. CP 11, 78. Seeing no other choice, on July 28, 2008, Mr. Lotzkar filed a brief motion on his client's behalf to compel Kristi to provide her psychological evaluation. CP 10-16, 78.

Ms. Beckman, in a response based partly on her unsworn testimony, attacked the propriety of the motion, along with the motives of both Jeffery and Mr. Lotzkar for bringing it. CP 17-25. She asserted that the motion was not properly formatted; that it was not properly before the court until Mr. Lotzkar requested production of the evaluation under CR 34, and later conferred with her under CR 26(i); and that it lacked any legal authority for access to Kristi's privileged medical records. CP 17-24. Ms. Beckmann demanded an award of attorney fees plus \$1,500 in sanctions against both Jeffrey and Mr. Lotzkar, citing CR 11, RCW 4.84.185, and intransigence. CP 24-25.

Only in the middle of all this smoke did she finally respond to the real issue, saying that Kristi's evaluation should be released with limited access under a protective order. CP 21-22.

On August 6, Mr. Lotzkar filed a reply, explaining that Ms. Beckmann refused to provide Kristi's evaluation unless he filed the motion and her refusal raised concerns about what the evaluation revealed about Kristi's ability to care for their boys, who she had hurt, hosed down with water, and locked out of the house. CP 78-80. He further explained that that Kristi waived any privilege when she gave the evaluation to the guardian ad litem and the family

therapist, so he should receive a copy without a request for its production. CP 78-80/

Ms. Beckmann filed an objection, claiming the statements about Kristi's poor choices and violence toward the boys were not in strict reply and violated RPC 3.7 as testimony by counsel. CP 69-71.

B. The court orders the evaluation released under protective order and assesses fees against Mr. Lotzkar and his client.

On August 14, 2008, the trial court, without oral argument, denied Jeffrey's motion, yet ruled that Kristi's evaluation be released under a protective order. CP 82-84. The court also "awarded judgment against Respondent and his counsel, Gordon Lotzkar" in the amounts of \$500 "for improper motion" plus \$500 related to the objection to the reply, but refused to award another \$1,500 in sanctions for "frivolous and abusive filings", striking this proposed language by hand. CP 81-84.

C. Kristi seeks to compel Jeffery to fully respond to her discovery requests.

In early September 2008, Mr. Lotzkar sent Ms. Beckmann Jeffrey's responses to Kristi's discovery requests. CP 367. On September 4, Kristi filed a motion, along with Ms. Beckmann's supportive declaration, alleging that Jeffrey's responses were

evasive or incomplete and he should be ordered to respond more fully and to pay her attorney fees, under CR 37(a)(4). CP 125-128. She did not mention Mr. Lotzkar. She included a proposed order, “granting an award of \$1,000 in attorney fees and costs to be paid by the Respondent”--not Mr. Lotzkar—and naming only Jeffrey as a judgment debtor on the judgment summary. CP 1257. CP 128-129.

On September 10, Mr. Lotzkar, in a memorandum, explained that when he was retained to replace Jeffery’s prior counsel, the parties had engaged in substantial discovery and Kristi had the materials that she was requesting. CP 365-366. He further explained that when he sent Ms. Beckmann his client’s remaining answers and documents, she had not specified the additional documents she was seeking. CP 366.

On September 11, Ms. Beckmann, in a reply declaration, launched into a surprise attack on Mr. Lotzkar, accusing him of a host of improprieties. CP 393-400. She asserted that he violated CR 11 by certifying that his client’s responses were in compliance with CR 26(g); that he violated RPC 3.7 by testifying in the response; and that he was intransigent for fostering his client’s conduct. CP 393-400. With her reply, she included a revised

proposed order, adding Mr. Lotzkar as a judgment debtor, along with his client, in the judgment summary for the proposed award of fees against his client and for the additional sanctions. Compare CP 1257-1258 & 1260-1261.

D. The court assesses attorney fees against Jeffery, plus additional sanctions.

On October 9, the trial court, without oral argument, ordered Jeffrey to respond to the discovery requests within eight days and awarded \$1,000 in attorney fees “to be paid by the Respondent”. CP 691. The court also awarded \$1,500 in sanctions without specifying who was to pay them, due “to the unfair litigation tactics by Respondent,” which consisted of a violation of RPC 3.7, Jeffrey’s “intransigence and willful violation” of every state and King County discovery rule, and Mr. Lotzkar’s violation of CR 11 for certifying the responses under CR 26(g). CP 691-692. The judgment summary on the order remained as drafted by Ms. Beckmann, with Mr. Lotzkar as a judgment debtor for the \$1,000 fee award that was assessed against his client and for the \$1,500 in sanctions. CP 690.

E. The court imposes judgment on Mr. Lotzkar, then corrects the error.

Meanwhile, on August 15, 2008, Jeffrey filed a motion, asking the court to modify the temporary parenting plan to allow the boys to live primarily with him, saying Kristi mistreated them on a number of occasions--some of which she admitted in her response--including spraying the 14 year old with a hose and locking him out of the house; pinching his earlobe and sending him into a rage, resulting in a response by the police; and inappropriately asking the 14 year old if she should kick him in the crotch. CP 85, 87-92, 1266-1276, 1353-1354. The guardian ad litem supported his request. RP 7-8, 10, CP 1355.

Kristi, in a responsive declaration, denied she was abusive and instead claimed that Jeffrey had issues with anger and control and that the guardian ad litem was ignoring that Jeffery was alienating the boys from her. CP 1263-1273. She did not mention Mr. Lotzkar at all.

On October 14, the trial court denied Jeffery's motion and "awarded judgment against Respondent and his counsel, Gordon Lotzkar" for \$4,000 in attorney fees. CP 693, 695.

Two weeks later, on October 31, the trial court realized it erred, as its ruling “did not include sanctions against Respondent’s counsel and he should not have been included as a judgment debtor.” CP 1365. The court issued a corrected order, providing that “Petitioner is awarded judgment against Respondent”—not Mr. Lotzkar—for \$4,000 and naming only Jeffery as the judgment debtor on the judgment summary for this amount. CP 1363-1365.

F. Kristi and Jeffrey enter a settlement agreement with any unresolved issues to be submitted for arbitration.

On January 6, 2009, Kristi and Jeffrey attended a settlement conference, facilitated by Cheryl Russell, and entered a written agreement, pursuant to CR 2A. CP __, Sub. 267 at 11-27, 331-332. They agreed to submit to Ms. Russell any “disputes in the drafting of the final documents or as to other unresolved issues” for binding arbitration pursuant to RCW 7.04A. CP __, Sub. 267 at 13.

Disputes soon arose, and Jeffery and Kristi submitted them to Ms. Russell. CP __, Sub. 267 at 331-332. On February 20, the day of the arbitration, the parties agreed to the arbitration rules, which authorized the arbitrator “to award fees and costs to either party” and to require that all arbitration fees be paid before she released her decision. CP __, Sub. 267 at 338.

G. The arbitrator orders Jeffery to pay her fees.

On April 20, 2009, the arbitrator completed her written decision, in which she ruled, among other things, that Jeffery was obliged to pay about \$2,443 in back child support, a portion of Kristi's attorney fees, and the "remaining arbitration fee of \$3,600". CP __, Sub. 267 at 961, 963-965. The arbitrator notified the parties that she would not release the arbitration decision until Jeffery paid the arbitration fee. CP __, Sub. 267 at 333. When 20 days passed, the arbitrator wrote counsel that she still would not release the decision until Jeffery paid the arbitration fee, again ordering him "to pay the entire remaining fee of \$3,600.00 for the Arbitration proceedings." CP __, Sub. 267 at 332-333.

H. Kristi seeks judgments against Jeffery and Mr. Lotzkar for the arbitration fees, his other obligations, and attorney fees.

On May 15, Kristi filed a motion and declaration, asking the court to confirm the arbitration decision and enter a judgment against Jeffrey, requiring him to pay the arbitration fee. CP 699-702, Sub. 267 at 3. She claimed that arbitrator "ordered Jeffrey or his attorney to pay the \$3,600 in fee due her prior to releasing her decision" and that they both were disobeying the order as a way to hold the arbitration decision hostage. CP __, Sub. 267 at 3. She

sought an award of attorney's fees and sanctions against Jeffrey and Mr. Lotzkar on the grounds that they had engaged in "intransigence, bad faith actions, willful violations of the CR2A and the Arbitration Agreement". CP 700.

Kristi also asked the court to enter a judgment against Jeffery for the amounts due under the CR 2A agreement for maintenance, child support, and other financial obligations. CP 700. Along with the motion, Ms. Beckman submitted a proposed order, naming only Jeffrey as the judgment debtor on the judgment summary for his financial obligations. CP 1251.

On May 21, Jeffrey, in his response, defended himself against the claims and asserted that only he and Kristi "are parties to the CR2A Agreement and it is only the two of us that are responsible for any financial obligations as a result thereof in arbitration", not our counsel. CP 729.

Mr. Lotzkar also filed a responsive declaration, expressing outrage that Ms. Beckmann, by making false accusations against him, was attempting to hold him liable for his client's actions and financial obligations, when he was not a party to the arbitration agreement and only his client was ordered to pay the arbitrator's fee. CP 710-711.

On May 22, Kristi and Ms. Beckmann both filed replies, seeking an award of \$10,199.85 in attorney's fees and costs plus additional sanctions of at least \$10,000 against Jeffery and Mr. Lotzkar. CP 779, 801. Kristi alleged that Mr. Lotzkar "fuels Jeffrey's intransigence and belligerence" and Ms. Beckmann added new grounds of "continued egregious conduct, violations of the court orders and Agreement and willful actions which violated the enumerated RPCs in our motion." CP 779, 801. As she had done before, Ms. Beckmann submitted a revised proposed order, adding Mr. Lotzkar as a judgment debtor for Jeffery's financial obligations for back child support, arbitration fees, and awards of attorney fees on the judgment summary. Compare CP 1251 & 878-879.

I. The court enters judgments against Mr. Lotzkar for his client's financial obligations.

On June 11, the trial court granted Kristi's motion without oral argument, confirmed the arbitration decisions and entered a judgment against both Jeffrey and Mr. Lotzkar for "immediate payment of fees as ordered by the Arbitrator to allow for release of the full arbitration decision" or be found in contempt of court. CP 881.

The court also ordered the obligation of \$3,200 “owed by Respondent under the CR2A Agreement from Respondent Jeffrey Kelley”, without mentioning Mr. Lotzkar. CP 881.

The court further awarded Kristi \$10,998.85 in attorney fees—but not the sanctions--on the following grounds:

Jeffrey and his counsel have demonstrated continued intransigence, unreasonable demands, bad faith actions and violations of CR2A Agreement, arbitration agreement and Rules of Professional Conduct.

CP 881-882.

The court left intact the judgment summaries, prepared by Ms. Beckmann, with Mr. Lotzkar as a judgment debtor for his client’s \$3,200 in back child support and \$5,841 in attorney fees; \$3,600 in arbitration fees; and another \$4,358.85 in attorney fees.

CP 878-879

J. The court refuses to reconsider the judgments.

On June 30, Mr. Lotzkar filed a motion, asking the court to reconsider its prior order as it did not have the authority to impose—and he did not do anything to warrant—judgments on him for his client’s obligations. CP 884-889. The court denied the request, despite its correction of its order of October 14, 2008, on very similar grounds. CP 1045-1046.

K. Jeffery seeks to terminate his support obligation, after the boys begin to reside solely with him.

In January 2009, Jeffrey and Kristi agreed, in the CR 2A agreement, that he would continue to pay \$800 a month in child support, under the temporary order, through June 2009, when their oldest child would turn 18. CP 891, 912-913.

In early February, Kristi was charged with assaulting their younger son and a temporary no contact order was imposed on her. CP 891, 907, 909-910. As a result, the boys began living solely with Jeffrey, without contact or financial support from her, yet he was still obliged for child support. CP 913.

Due to these circumstances, Jeffery requested, at the arbitration on February 20, that he “should have no child support obligation for the children since they have been residing with him since February, 3, 2009.” CP 960. The arbitrator declined to rule on his request, making it clear that it required the authority of the court because until a modified order “is entered DCS will continue to collect child support and maintenance pursuant to the January 2008 Temporary Orders.” CP 961. As the arbitrator determined that Jeffery owed back child support, she stated that if he went to court, a judgment “shall be entered on the Order of Child Support

reflecting the unpaid child support subject to further court order suspending Mr. Kelley's child support obligation because the children are not residing with Ms. Kelly or reimbursing Mr. Kelly for payment made (or due) when the children were not residing with Mr. Kelly." CP 961.

In the order of June 11, a judgment was entered against Jeffery for \$3,200 in back child support. CP 878. By the end of June, it became clear that the boys would continue to live with Jeffery. On June 25, Kristi agreed to entry of an order, continuing the disposition of the assault charge for 18 months, while maintaining the protection order and requiring her to engage in counseling and a parenting program, among other things. CP 1003-1004.

As the arbitrator instructed, on June 30, Jeffrey filed a motion, asking the court to terminate his child support obligation but to reserve any issues regarding reimbursement or reallocation of back child support under the temporary order or the CR 2A agreement. CP 891-892.

On July 9, Kristi and Ms. Beckmann each filed responsive papers, contending that Jeffery was not following the agreed procedure for adjusting child support and also was attempting to

reargue the issue of his back child support, justifying an award of attorney fees against him based on intransigence. CP 916-918, 1019-1025.

Kristi and Ms. Beckmann demanded additional sanctions against both Jeffery and Mr. Lotzkar, alleging that they both violated the court's order of June 11 by failing to pay \$3,200 in back child support. CP 916-918, 1026. Additionally, Kristi alleged that Mr. Lotzkar "continues to fuel this abusive litigation" while Ms. Beckmann alleged, very generally, "willful actions which violate CR 11." CP 918, 1026.

L. The court, denying the motion, assesses attorney fees and sanctions on Mr. Lotzkar and his client.

On July 27, the court denied the motion to terminate child support, without oral argument, based on findings that Jeffery failed to comply with the required process for adjusting support or provide the required financial documents and improperly requested reconsideration, thereby causing Kristi to incur unnecessary fees and warranting additional sanctions due to his "ongoing intransigence." CP 1062-1063. However, the court assessed \$2,000 in attorney fees and another \$1,000 in sanctions on both Mr. Lotzkar and his client. CP 1061-1063.

M. The final orders maintain the judgments against Mr. Lotzkar.

On November 24, the trial court entered the final orders, providing that all unpaid judgments in the case shall remain in effect. CP 1101, 1108. Mr. Lotzkar appeals. CP 1110-1156.

IV. ARGUMENT

A. Introduction

Advocating for his client in a dissolution action, attorney Gordon Lotzkar faced opposing counsel who viewed her successful demands for judgments against him for attorney fees, sanctions, and even his client's obligation for back child support as "simply another weapon in a litigator's arsenal". Biggs v. Vail, 124 Wn.2d 193, 198, 876 P.2d 448 (1994). To achieve her goals, she persuaded the judge to assess fees and sanctions against him by attributing his client's intransigence to him and also by misrepresenting that he violated orders of the arbitrator and the court. Incredibly, she twice even slipped the judge revised proposed orders with her reply papers, naming Mr. Lotzkar as a judgment debtor on the judgment summary for obligations that only his client was actually ordered to pay.

In each instance, the judge exceeded his authority—entering judgments without personal jurisdiction over Mr. Lotzkar, without proper grounds or evidence of sanctionable conduct, and without affording him his due process rights.

This Court should reverse this gross miscarriage of justice and award Mr. Lotzkar attorney fees and costs on appeal.

B. Standard of Review is De Novo

Generally, the trial court's award of attorney fees and sanctions is reviewed for an abuse of discretion. Just Dirt, Inc. v. Knight Excavating, Inc., 138 Wn. App. 409, 415-416, 157 P.3d 431 (2007). But trial courts must exercise their discretion on articulable grounds, making an adequate record so the appellate court can review a fee award. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). The trial court must enter findings of fact and conclusions of law to support an attorney fee award. Id.

If the trial court fails to make factual findings, as in this case, the appellate court may independently review evidence consisting of written documents and make required findings, instead of remanding the matter to the trial court. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 829 P.2d 1099 (1992). Further, because the trial court decided each motion on the basis of affidavits only, this Court

reviews its decisions de novo. Brouillet v. Cowles Publishing Co., 114 Wn.2d 788, 793, 791 P.2d 526 (1990).

C. Order striking portions of the reply submittal, denying the motion to compel, and awarding fees and sanctions, entered on August 12, 2008

1. The court assessed \$1,000 in attorney fees against Mr. Lotzkar improper grounds. The trial court must base its award of attorney fees on proper grounds. Just Dirt, 138 Wn. App. at 416. Attorney fees may be awarded only if authorized by contract, statute or recognized ground in equity. Bowles v. Department of Retirement Sys., 121 Wn.2d 52, 70, 847 P.2d 440 (1993).

The court, denying the motion to compel, assessed \$500 in attorney fees against both Jeffery and Mr. Lotzkar for an “improper motion,” based on findings pertaining only to Jeffery:

His motion fails to comply with the requirements of KCLR 7 and has no legal authority or basis. In addition, Respondent failed to comply with the discovery rules, specifically CR 26(1), CR 34, and KCLR 37. Respondent’s demand for release of privileged medical records is improper without the entry of an appropriate protective order.

CP 82-84.

Further, the court, ruling that the reply “contains inadmissible testimony from counsel in violation of RPC 3.7” and “information not in strict reply”, struck the parts that Ms. Beckmann objected to and

assessed another \$500 in attorney fees against both of them, for “unfair litigation tactics by Respondent.” CP 82-83.

Ultimately, Mr. Lotzkar was ordered to pay \$1,000 in attorney fees because Jeffery’s motion was unsuccessful on the grounds that it was without legal authority and also was improper without a protective order. But the motion’s failure alone is not a valid ground for an award of fees against Mr. Lotzkar.

The court has the inherent power to assess attorney fees, against an attorney upon an express finding of bad faith litigation conduct. State v. S.H., 102 Wn. App. 468, 474-475, 8 P.3d 1058 (2000). Here, the court did not make any findings as to Mr. Lotzkar, let alone a finding that he acted in bad faith.

The court also has the authority to assess fees against an attorney under certain court rules. When a specific sanction rule applies, the inherent power of the trial court to sanction does not apply. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 340, 858 P.2d 1054 (1993). In this case, the award of fees was based on “improper” filings—the motion and the reply--thereby implicating CR 11, which, by its terms, applies to filings; not conduct. But the court denied Kristi’s request for sanctions under CR 11, striking her proposed finding that his

papers were “frivolous and abusive filings”. CP 84. Thus, the award of fees cannot be justified under CR 11.

While other court rules authorize the court to assess fees against counsel, the rules cited here do not: Local Rule 7(b)(5)(B) pertains to the formatting of motions in King County. Civil Rules 34 and 26(i) state the requirements before the court will entertain a motion to compel discovery. RPCs cannot be proper grounds for the trial court to base a fee award because a breach of an ethics rule provides only a public, e.g., disciplinary, remedy and not a private remedy. Just Dirt, 138 Wn. App. at 417. And, LCR 7(b)(4)(G) provides that any reply material which “is not in strict reply, will not be considered by the court over objection of counsel except upon the imposition of appropriate terms, unless the court orders otherwise.” As the court struck the paragraphs to which Ms. Beckmann objected, her client would not be entitled to additional terms under the rule in any event.

Accordingly, the imposition of \$1,000 in fees against Mr. Lotzkar without proper grounds, supported by findings, was an abuse of discretion.

2. The court, ruling on a motion to compel discovery, is authorized to award fees under CR 37(a)(4). The court should have considered any award of fees under CR 37(a)(4). In denying a motion to compel, as here, the court is authorized to assess attorney fees against the moving party, his counsel, or both unless the court “finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust”:

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

CR 37(a)(4).

As the court failed to consider this rule in making its fee award, this Court, in an independent review of the record, should determine that the motion was “substantially justified” or that “other circumstances make an award of expenses unjust”—and reverse the trial court.

The record shows that Ms. Beckmann laid a trap for Mr. Lotzkar. After he gave her Jeffery’s psychological evaluation and

agreed to a protective order that allowed for an expert to review Kristi's evaluation, Ms. Beckmann refused to supply a proposed protective order, as she promised, and told him that he would have to bring a motion to get a copy of her client's evaluation. CP 11, 14, 16, 63-66.

In response to Mr. Lotzkar's motion, Ms. Beckmann skirted the real issue over the contents of a protective order. Instead, she asserted that the motion was improper in format, procedure, and legal bases and also "abusive" under CR 11. CP 17-25. When Mr. Lotzkar explained that the motion was brought out of concern for the well-being of the children while in Kristi's care, Ms. Beckmann demanded additional fees. CP 79-80.

In the court's order, however, Mr. Lotzkar essentially achieved his goal—except for the fee awards: Kristi was to release her psychological evaluation under a protective order that allowed it to be reviewed by an expert. CP 14, 83-84. Based on these facts, the trial court should have decided—and this Court should conclude—that the motion was "substantially justified" and the "circumstances make the award of expenses unjust." The \$1,000 fee award against Mr. Lotzkar should be reversed.

D. Order compelling answers to interrogatories and production of documents and other relief, entered on October 9, 2008.

1. The court erred in naming Mr. Lotzkar as judgment debtor for \$1,000 in fees in the judgment summary; when it only ordered his client to pay the fee award. The court, in granting Kristi's motion to compel, awarded her \$1,000 in attorney fees "to be paid by the Respondent"--not Mr. Lotzkar—and that his failure to pay the judgment within seven days will entitle her to pursue collection action "without further notice to Respondent." CP 691. But the court signed Ms. Beckmann's revised proposed order that named Mr. Lotzkar as a judgment debtor on the judgment summary for the fees assessed only against his client. CP 690, 1260.

Mr. Lotzkar was not ordered to pay the \$1,000 award of fees. CP 691. The judgment summary is not the same as the judgment, ordered by the court. After the court orders a judgment, the clerk is required to "enter all judgments in the execution docket, subject to the direction of the court and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action." RCW 4.64.030(1). To assist the clerk, the specific terms of the judgment "shall be succinctly summarized" on the first page of each money judgment. RCW 4.64.030(2)(a).

In short, due to Ms. Beckmann's sleight of hand, a judgment for \$1,000 against him was entered in the docket. This error must be reversed.

2. No grounds exist for the sanctions against Mr. Lotzkar. The trial court imposed \$1,500 in sanctions due to "unfair litigation tactics by Respondent" based on the following:

Respondent's responsive submission contains inadmissible testimony from his counsel in violation of RPC 3.7. In addition, the evidence of Respondent's intransigence and willful violation of the rules of discovery, including CR 26-37 and KCLR 26-37, is overwhelming. Respondent's counsel certified that the responses to the discovery were in compliance with CR 26(g). By doing so, Respondent's counsel has violated CR 11 and caused Petitioner to incur unnecessary fees and costs. Due to the unfair litigation tactics by Respondent, sanctions of \$1,500 is GRANTED and included in the judgment herein.

CP 691-692.

This was an abuse of discretion. These purported findings are actually erroneous conclusions which are not grounds for sanctions against Mr. Lotzkar and are not supported by the record.

a. RPC is not grounds for fees. RPCs are not proper grounds for a fee award. Just Dirt, 138 Wn. App. at 417.

b. A client's intransigence is not grounds for fees. In a dissolution action, the court has the equitable authority to assess attorney fees against a spouse based on the extent to which that

spouse's intransigence causes the spouse seeking the award to require additional legal services. In re Marriage of Morrow, 53 Wn. App. 579, 591, 770 P.2d 197 (1989). But a lawyer cannot be sanctioned for his client's intransigence, only for his own, on a finding of bad faith litigation conduct. Wilson v. Henkle, 45 Wn. App. 162, 165, 174, 724 P.2d 1069 (1986).

c. Mr. Lotzkar did not act in bad faith. The record does not reflect intransigent or bad faith conduct by Mr. Lotzkar; only Ms. Beckmann's assertion, in her reply, that Mr. Lotzkar was intransigent for fostering his client's intransigence. CP 399. However, intransigence is not supported by simply making bald assertions of intransigent behavior, even when the case was highly contested. In re Marriage of Wright, 78 Wn. App. 230, 239, 896 P.2d 735 (1995).

d. No violation of discovery rules. Fees cannot be assessed against Mr. Lotzkar based on the unsupported finding of "overwhelming" evidence that his client violated every state and local discovery rule. Kristi alleged—and the court agreed—that Jeffery violated only one discovery rule, CR 37(a)(2). CP 694. There is no support in the record for the preposterous conclusion

that he also violated every other remaining state and county discovery rule.

e. CR 11 does not apply. Mr. Lotzkar, in certifying Jeffery's discovery responses, did not violate CR 11. CR 11 only applies to pleadings, motions and legal memoranda. CR 26(g), the discovery counterpart to CR 11, governs the sanctions related to the certification of discovery responses. Fisons, 122 Wn.2d at 299. CR 11 sanctions are not appropriate where, as here, another court rule, CR 26(g), more properly applies. Id. at 339-340. The court applied the wrong legal standard, requiring reversal.

f. The sanctions violated Mr. Lotzkar's due process rights. To comport with the fundamental due process requirements of notice and opportunity to be heard, the potential target of the sanction must have notice that sanctions are contemplated and of what his or her alleged deficiency is, and have a reasonable opportunity to contest and explain. Watson v. Maier, 64 Wn. App. 889, 900, 827 P.2d 311 (1992).

Ms. Beckman, on her client's motion, set for hearing without oral argument, asserted, for the first time in her reply, that Mr. Lotzkar violated CR 11 by certifying his client's responses under CR 26(g). CP 393. Our supreme court affirmed the court of

appeals sanctioning a respondent under CR 11, where the appellant requested the sanctions for the first time in the reply brief, concluding that the respondent had the opportunity to respond at oral argument. Bryant, 119 Wn.2d at 225.

Mr. Lotzkar's circumstances were significantly different—and as a result, his due process rights were entirely eclipsed. He had no notice that Ms. Beckmann contemplated sanctions against him. He had no notice of what sanctionable conduct she was alleging, other than the mere violation of a rule. And, he no longer had an opportunity to respond, as she raised the sanctions in a reply and the court ruled without oral argument. The court, sanctioning Mr. Lotzkar in deprivation of his due process rights, manifestly abused its discretion.

g. Mr. Lotzkar did not violate CR 26(g). The trial court did not find that Mr. Lotzkar violated CR 26(g) or that sanctions were imposed under this rule. The record does not support such findings. Rule 26(g) requires, in part, that:

Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name....The signature of the attorney or party constitutes certification that he has read the request, response, or

objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is:

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

A review of the record shows that Mr. Lotzkar did not violate

the rule: He made a reasonable inquiry into his client's discovery responses. Whether an attorney has made a reasonable inquiry is judged by an objective standard. Fisons, 122 Wn.2d at 343. In determining whether an attorney has complied with the rule, the court should consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request. Id. Fair and reasoned resistance to discovery is not sanctionable. Id. at 346.

Mr. Lotzkar was Jeffery's second attorney. CP 365. He learned that discovery took place and also that Kristi already had the materials she was requesting, as shown on prior court orders

directing “the business computer and peripherals in possession of wife’s counsel shall be immediately couriered to husband’s counsel” and that the husband “shall receive all orig. leases and copies of the personal and business records”. CP 365-373. In light of this, Mr. Lotzkar gave Ms. Beckmann the remainder of what his client said he still had, and, thereafter, Ms. Beckmann did not specify what else she was seeking. CP 367-368.

Considering these “surrounding circumstances”, Mr. Lotzkar’s inquiry into his client’s responses was objectively reasonable and the court’s imposition of sanctions on him under CR 26(g) was manifestly unreasonable.

h. The sanctions improperly shifted fees. The court must limit the fees to the amounts reasonably expended in responding to sanctionable filings. Biggs, 124 Wn.2d 193, 201, 876 P.2d 448 (1994). CR 37(a)(4), CR 11, and CR 26(g) direct the court to award the “reasonable expenses incurred” as a result of the motion or the violation. The fact that Kristi was awarded \$1,000, presumably as “reasonable expenses,” for prevailing on her motion to compel, plus an additional, arbitrary \$1,500 in sanctions, under CR 11 or possibly CR 26(g), indicate that the sanctions were an improper fee shifting mechanism.

The sanctions rules are not fee shifting rules and requests for sanctions should not turn into satellite litigation or become a cottage industry for lawyers. Fisons, 122 Wn.2d, at 356. Yet this is precisely what happened here. Ms. Beckmann litigated for awards of fees and sanctions as a way to shift her client's obligation for her own fees onto Jeffery and Mr. Lotzkar. Each success fueled her drive for judgments for greater sums of money.

E. Order re: CR 2A agreement, arbitration decision re: fees, releasing arbitration decision, awarding judgment for fees and costs entered on June 11, 2009.

Upon its execution in January 2008, the arbitration agreement limited the trial court's jurisdiction to just two actions: enforcing the arbitration agreement and entering judgment on the arbitration award. RCW 7.04A.260. On a Kristi's motion to confirm the arbitrator's decision, the court was required to issue an order confirming the decision and "to enter a judgment in conformity with the order." RCW 7.04A.220, .250. The court lacked the authority to alter the decision, unless it was modified, corrected, or vacated by the arbitrator. RCW 7.04A.220.

But, exceeding its authority, this is precisely what the court did. It entered judgment against Mr. Lotzkar for \$3,600 in arbitrator's fees that the arbitrator ordered Jeffery to pay; it named

Mr. Lotzkar as the judgment debtor for \$3,200 in back child support on the judgment summary that it ordered his client to pay; and it assessed Mr. Lotzkar with \$10,998.85 in attorney fees that were related to enforcing his client's obligations. CP 878-882.

1. The trial court erred in imposing judgment on Mr. Lotzkar for his client's arbitration fees. On June 11, 2009, Judge North granted Kristi's motion, without oral argument, purporting "to approve and enter" the arbitrator's decisions of April 20 and May 10, 2009, and to enter judgment against Mr. Lotzkar and his client for "immediate payment of fees as ordered by the Arbitrator to allow for release of the full arbitration decision" and specified a harsh—and likely unconstitutional—punishment of contempt of court, including jail time if either of them failed to pay the full amount within five days. CP 881. This was an error.

This was not the arbitrator's decision about who was to pay her fees; it was Kristi and Ms. Beckmann's misrepresentation of her decision. The arbitrator specifically ordered, in the arbitration decision, that Jeffery "shall pay the remaining arbitration fee of \$3,600" and, 20 days later, she again ordered Jeffery "to pay the entire remaining fee of \$3,600.00 for the Arbitration proceedings." CP 964-965, Sub. At 332-333.

Without the authority to alter the arbitrator's decision by entering judgment against Mr. Lotzkar for her fees, the court's order and judgment for the fees is void and must be reversed.

2. The trial court erred in naming Mr. Lotzkar as a judgment debtor for his client's obligation of \$3,200 in back child support. The court granted Kristi's request for a judgment against "Respondent, Jeffrey Kelley"—not Mr. Lotzkar—for \$3,200 "owed by Respondent under the CR2A Agreement from Respondent Jeffrey Kelley" for the following:

maintenance; child support; uninsured medical medicals bills and portion of children's health insurance; payment of credit card obligations; and taxes and other obligations owing on property awarded to Petitioner.

CP 881.

But the court erred as it did in its order of October 9, 2008; it signed the revised proposed order, drafted by Ms. Beckmann to ensure payment of the judgment by adding Mr. Lotzkar as a judgment debtor on the judgment summary for sums he was not ordered to pay. Compare CP 1251 & 878-879. As a result, the clerk entered a judgment against Mr. Lotzkar for \$3,200 that the court ordered only Jeffery to pay. This error must be reversed.

3. The trial court erred ordering Mr. Lotzkar to pay \$10,998.85 in attorney fees. The court further erred in assessing \$10,998.85 in attorney fees against Mr. Lotzkar and his client, without findings as to specific conduct by either of them:

Respondent and his counsel have demonstrated continued intransigence, unreasonable demands, bad faith actions and violations of CR 2A Agreement, arbitration agreement and Rules of Professional Conduct.

CP 881-882.

The court failed to make an express finding of bad faith conduct by Mr. Lotzkar, as required to exercise its inherent authority to sanction him. State v. S.H., 102 Wn. App. at 479. Nothing in the record supports a finding of bad faith. By comparison, a trial court properly sanctioned an attorney who fraudulently procured a judgment, finding his conduct was “inappropriate and improper,” which was tantamount to a finding of bad faith and also supported by the record. Wilson v. Henkle, 45 Wn. App. at 162. Here, the sanctions were based on the false allegation that Mr. Lotzkar held the arbitrator’s decision hostage by refusing to comply with the arbitrator’s order that he pay her fees. CP ___, Sub. 267 at 3. They also were based on the vague assertion that Mr. Lotzkar was “fuels” his client’s intransigence. CP 801.

These allegations, which are either false or vague, do not support a finding of bad faith conduct by Mr. Lotzkar. The court abused its discretion in sanctioning him on this ground.

F. Order denying reconsideration of order imposing personal liability on monetary judgments dated June 11, 2009.

The trial court erred in refusing to reconsider its order imposing judgments on Mr. Lotzkar for his client's financial obligations and fee awards. CP 1045-1046. Mr. Lotzkar was Jeffrey Kelley's attorney; he was not a party to the Kelley's dissolution case. Accordingly, as Mr. Lotzkar asserted, trial court lacked the personal jurisdiction required for imposing the judgments on him. CP 884-889.

First and basic to any litigation is jurisdiction. Painter v. Olney, 37 Wn. App. 424, 427, 680 P.2d 1066 (1984). Id. First and basic to jurisdiction is service of process. Proper service of a summons and complaint is essential to invoke personal jurisdiction over a party. Allstate Ins. Co. v. Khani, 75 Wn. App. 317, 324, 877 P.2d 724 (1994). Notice without proper service is not enough to confer jurisdiction. In re Marriage of Logg, 74 Wn. App. 781, 784, 875 P.2d 647 (1994).

Mr. Lotzkar was never served with notice that the dissolution proceedings could result in judgment against him personally for his client's financial obligations. Nor did he agree to jurisdiction. He was not a party to the CR 2A agreement, the arbitration agreement, or the arbitrator's rules. The court lacked the authority to sanction him on the grounds of violating these agreements.

Whenever a trial court lacks personal jurisdiction over a party, any judgment entered by the court against that party is void. Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 541, 886 P.2d 189 (1994). That being so, the judgments against Mr. Lotzkar for his client's financial obligations and fee awards must be reversed.

G. Order denying Respondent's motion to terminate child support and awarding judgment for fees and sanctions entered on July 27, 2009.

The court, denying the motion to terminate child support, assessed \$2,000 in attorney fees, plus another \$1,000 in sanctions, against Mr. Lotzkar and his client, without identifying any specific sanctionable conduct by Mr. Lotzkar.

2. Respondent and his counsel have demonstrated continued intransigence, unreasonable demands, bad faith actions and violations of the CR 2A Agreement, arbitration rulings, prior orders of this Court, and CR 11. Petitioner shall receive an award of attorney fees and cost in the amount of \$2,000. In addition, due to the egregious nature of the misconduct by Respondent and his counsel and the

financial distress and harm caused to Petitioner by their actions, an award of \$1,000 in sanctions is also granted to Petitioner. Judgments for these sanctions and fees/costs are entered hereto.

CP 1061-1063.

The court only made specific findings as to Jeffery's conduct in order to support the award of fees as "appropriate due to Respondent's intransigence":

1. Respondent failed to file any financial disclosure as required by KCLFLR 10. In addition, the relief requested in Respondent's motion is an improper renewal of relief previously denied by this Court and also by the Arbitrator. Such renewed relief is an improper request for reconsideration. In addition, Respondent's request failed to comply with the requirements of the CR 2A Agreement.

2. These improper filings, violations of the court rules, and violation of the CR 2A Agreement have caused Petitioner to incur unnecessary fees and costs. Respondent's failure to provide required financial disclosure is a recurring problem which has been noted by this Court and sanctions have been entered against Respondent previously. Additional sanctions are appropriate due to Respondent's ongoing intransigence.

CP 1062.

1. No sanctions for client's conduct. As stated above, the court abused its discretion in sanctioning Mr. Lotzkar for his client's intransigence without finding that he too acted in bad faith. For the same reasons, the court erred in sanctioning him here.

2. Mr. Lotzkar did not violate a court order. Kristi and Ms. Beckmann alleged that Mr. Lotzkar violated an order that he pay his client's back child support obligation; but, as Ms. Beckmann knew, as the drafter of the proposed order, Mr. Lotzkar was only listed as a judgment debtor on the judgment summary of that order. CP 916, 1026.

3. Bad faith actions. Other than the bogus claim that Mr. Lotzkar violated an order requiring him to pay his client's back child support, the record contains only one more, equally weak allegation against him. Kristi claimed that he "continues to fuel this abusive litigation." CP 918. This bald allegation alone does not support a finding of bad faith. Marriage of Wright, 78 Wn. App. at 239.

4. Mr. Lotzkar did not violate the CR 2A agreement and arbitration agreement. As stated above, as Mr. Lotzkar was not a party to this action or to any agreements between the parties, he could not have violated these agreements.

5. Sanctions for egregious nature of misconduct. The court was required to limit the fee award to the amount reasonably expended in responding to any sanctionable conduct. Just Dirt, 138 Wn. App. at 418. Instead, the court awarded \$2,000 in fees, in part, for "bad faith actions," then an additional, arbitrary \$1,000

sanction for the synonymous reason of “egregious misconduct.”
CP 1063. The sanction served only as an improper fee shifting
mechanism and must be reversed. Id.

6. Mr. Lotzkar did not violate CR 11.

CR 11 provides, in part:

Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name.... The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney'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.

When a trial court imposes CR 11 sanctions, it must specify the sanctionable conduct in its order. Here, the court failed to specify any sanctionable conduct by Mr. Lotzkar. Biggs, 124 Wn.2d at 201. The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose. Biggs, 124 Wn.2d at 201. The court failed to make this finding as well.

The record reflects that Kristi too failed to specify any sanctionable conduct by Mr. Lotzkar. Ms. Beckmann merely claimed that he did “willful actions that violate CR 11.” CP 1026. CR 11 applies only to filings; it does not apply to the “actions” sanctioned here, including failing to provide financial documents or follow agreed procedures; engaging in intransigent or bad faith actions; and violating the CR 2A agreement, the arbitrator’s rules, or court orders. CP 1062-1063. The only possible basis for CR 11 sanctions would be that the motion was an improper request for relief previously denied by the court and the arbitrator. CP 1062.

The record shows that Mr. Lotzkar in fact filed the motion after a reasonable inquiry into the facts and the law. An attorney's conduct in certifying the pleading is evaluated under an objective reasonableness standard by asking whether a reasonable attorney in similar circumstances would believe that her actions were factually and legally justified. Bryant, 119 Wn.2d at 220.

The motion was grounded in the fact that Jeffery was obligated to pay child support, even though the boys had been living with him 100% of the time for the prior five months, without financial support or contact from the wife. It was warranted by law because the arbitrator correctly stated that the court would need to

issue an adjusted support order, otherwise, DCS would continue to collect support under the existing temporary order. CP 891-892, 912-913.

Further, Mr. Lotzkar did not file the motion for an improper purpose. The husband was not seeking to shirk his obligation for \$3,200 in back support; this amount already had been reduced to judgment in the order entered on June 11, 2009. CP 878.

Even if the Court concludes that Mr. Lotzkar violated CR 11, it should reverse due the violation of his due process rights. CR 11 procedures obviously must comport with due process requirements. Bryant, 119 Wn.2d at 224. Ms. Beckmann, alleging just “willful actions that violate CR 11”, did not notify Mr. Lotzkar of any sanctionable conduct and he was unable to respond to her allegation. CP 1026. Without such notice, CR 11 sanctions are unwarranted. Biggs, 124 Wn.2d at 198.

H. Findings of fact and conclusions of law and decree of dissolution, entered on November 24, 2009.

The final orders in the Kelley’s dissolution case provide that all unpaid judgments in the case shall remain in effect. CP 1101, 1108. This too was an error, as it perpetuated the judgments improperly entered against Mr. Lotzkar. The final orders should be

reversed and the trial court should be directed to specify in amended final orders that the prior judgments against Mr. Lotzkar are void.

V. MOTION FOR ATTORNEY FEES

Mr. Lotzkar requests an award of attorney fees and costs incurred on appeal against Kristi Kelley based on her intransigence and also on the arguable merit of the issues on appeal and the financial resources of the respective parties, under RCW 26.09.140. RAP 18.1, 18.9, Johnson v. Johnson, 107 Wn. App. 500, 505, 27 P.3d 654 (2001).

This appeal is the result of Kristi's incessant litigation to obtain judgments against Mr. Lotzkar personally in the midst of her dissolution action. This was clearly a strategy to ensure that Mr. Lotzkar would have to pay his client's obligations in the event that his client failed to do so.

As shown by the appellate record, Kristi vehemently opposed Mr. Lotzkar's attempt to seek appellate review before the final orders were entered in her dissolution case. In the meantime, Kristi's attorney prepared the final orders, providing the judgments against Mr. Lotzkar would remain in effect, and obtained entry of the orders. She knew that the judgments against Mr. Lotzkar were

improper. And she knew that she could have corrected the errors in the final orders. Yet, she seized the opportunity to ensure that the judgments would remain in effect until paid by either Mr. Lotzkar or his client.

To be free of the money judgments and to clear his good name of the sanctions, Mr. Lotzkar was forced to renew his request for appellate review. As a result, he has needlessly incurred attorney fees and costs.

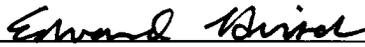
This Court should not condone Kristi's strategy of litigating against her husband's counsel to score awards of fees and to ensure payment of financial obligations. Her misconduct constitutes intransigence and justifies paying Mr. Lotzkar's attorney fees and costs.

VI. CONCLUSION

This Court should reverse the improper judgments imposed on Mr. Lotzkar. The trial court should be directed to vacate the specified orders and judgments and to enter amended final orders, stating that these judgments are void and no longer in effect. In

addition, Mr. Lotzkar should be awarded his attorney fees and costs incurred in bringing this appeal.

RESPECTFULLY SUBMITTED this 16th day of August,
2010.



Edward J. Hirsch, WSBA #35807
Attorney for Appellant

DECLARATION OF MAILING

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 16th 2010, I arranged for service of the foregoing Opening Brief of Appellant to the Court and the parties to this action as follows:

Office of Clerk Court of Appeals – Division I 600 University St Seattle, WA 98101-1176	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivered
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DATED at Seattle, Washington this 16th day of August, 2010.

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