

No. 66595-2-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NOSWORTHY TELECOMMUNICATION DISTRIBUTOR, INC., a  
Washington corporation, and AMIR BASHIR, a married man,

Appellants,

v.

SAMSUNG TELECOMMUNICATIONS AMERICA, L.L.C., f/k/a  
SAMSUNG TELECOMMUNICATIONS AMERICA, L.P.,

Respondent.

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

Nosworthy Telecommunication Distributor, Inc. (“NTD”) and Amir Bashir (“Bashir”) filed a frivolous lawsuit against Samsung Telecommunications America, LLC (“STA”) and were properly sanctioned for doing so by the trial court pursuant to CR 11. The crux of NTD’s and Bashir’s complaint alleged a wrongful “unilateral” termination of a short-lived distributor agreement between NTD and STA. The reality is the termination was neither wrongful nor unilateral. NTD and Bashir agreed to it. That fact is documented in NTD’s own business records and is even reluctantly admitted by Bashir and NTD.

NTD and Bashir benefitted from STA’s agreement to terminate the distributorship. NTD could not meet its obligations. STA generously allowed NTD to walk away from the distributor agreement without penalty, and without paying STA for a single order. All STA required in exchange, was the return of STA’s products in good condition. NTD and Bashir happily accepted the concessions made by STA. NTD and Bashir then repaid STA the favor by filing a lawsuit against it, alleging breach of contract, bad faith, unfair and deceptive business practices, and fraud, among other claims. NTD’s and Bashir’s claims had no well-grounded basis in fact, and were not warranted under the law. NTD and Bashir filed a baseless lawsuit.

When STA moved for summary judgment and the imposition of CR 11 sanctions, NTD and Bashir offered *no* timely or substantive opposition. NTD and Bashir could not support their allegations in discovery. They failed to present evidence to justify their lawsuit and their claims. The trial court properly found NTD's and Bashir's lawsuit to be "totally frivolous and without merit," and noted that NTD and Bashir made "no response to the summary judgment motion" and there was "no basis shown to the Court for filing this lawsuit."

The trial court's findings were supported, fully justified, adequately documented, and constitute no abuse of discretion. On appeal, NTD and Bashir attempt to deflect blame for the frivolous lawsuit onto their former counsel, and accuse STA and the trial court of not fulfilling their obligations. NTD's and Bashir's allegations of malpractice against their former lawyer are not before the Court, however, and NTD and Bashir are responsible for their frivolous lawsuit. The trial court did not abuse its discretion when it sanctioned them pursuant to CR 11. The Court should affirm the trial court's imposition of CR 11 sanctions against NTD and Bashir.

## **II. STATEMENT OF THE ISSUES**

1. Have NTD and Bashir demonstrated any abuse of discretion by the trial court with respect to its imposition of CR 11

sanctions, where NTD and Bashir failed entirely to (a) present any timely opposition to STA's motion for summary judgment and the imposition of CR 11 sanctions, or (b) present any evidentiary or legitimate legal basis to the trial court justifying their claims?

2. Are NTD's and Bashir's arguments concerning the trial court's December 15, 2010 Order Setting Amount of CR 11 Sanctions within the scope of this Court's review, in light of NTD's and Bashir's failure to designate that order in their Notice of Appeal?

3. Must NTD's and Bashir's complaints and allegations against their former attorney be proven and addressed, if at all, in separate litigation, where the record in this lawsuit shows that NTD and Bashir bear responsibility for filing their frivolous claims against STA?

4. Does the trial court record adequately allow for this Court's review of the imposition of CR 11 sanctions?

### **III. STATEMENT OF THE CASE**

NTD and Bashir appeal only the trial court's imposition of CR 11 sanctions.<sup>1</sup> (Opening Brief of Appellants at 1.) NTD and Bashir do not

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<sup>1</sup> NTD's and Bashir's Notice of Appeal, filed January 24, 2011, designated the following two orders for review: (1) Order Denying Motion for Reconsideration and to Set Aside Summary Judgment Order (December 29, 2010); and (2) Order Granting Defendant's Motion for Summary Judgment (November 24, 2010). (CP 1-6.) The trial court's December 15, 2010 Order Setting Amount of CR 11 Sanctions was not designated in NTD's and Bashir's Notice of Appeal. (*Id.*; *see* CP 421-22.) As a result, the December 15, 2010 Order Setting Amount of CR 11 Sanctions is not within the scope of this Court's review because that order does not "prejudicially affect" either

appeal the trial court's summary judgment dismissal of the claims they asserted against STA in the underlying lawsuit. (*Id.*) NTD and Bashir also do not appeal the trial court's denial of their motion for "reconsideration" and to set aside the summary judgment order under CR 60(b). (*See id.*) The facts and procedure relevant to the trial court's imposition of CR 11 sanctions against NTD and Bashir follow.

**A. The distributor agreement and its terms.**

NTD and STA entered into a distributor agreement in March 2009 ("Agreement"), in which NTD agreed to purchase (and STA agreed to sell) certain telecommunications products. (CP 226-34.) The Agreement provided for an initial one-year term, but provided that "[e]ither party may terminate this Agreement at any time, without cause, upon 30 days' written notice to the other party, but such termination shall not affect orders placed and accepted prior to the effective date of termination." (CP 228 at § 4.1.)

NTD agreed that STA would have no liability for any damages "arising out of the termination of this Agreement for any reason, with or without cause." (CP 228 at § 4.3.) NTD also agreed that "STA shall not

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decision designated in the Notice of Appeal as required by RAP 2.4(b). *See Right Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002) (interpreting the phrase "prejudicially affects" to turn on whether the designated order would have happened absent the non-designated order).

be liable for any indirect, special or consequential damages.” (CP 229 at § 13.)

Under the Agreement, STA’s invoices were ordinarily due and payable “within 30 days of the date of the invoice,” but STA agreed to 60-day terms on NTD’s opening order. (CP 229 at § 6.1; CP 237.) The Agreement allowed NTD to cancel an order at any time, provided that “cancellation of an Order after shipment shall incur a cancellation and restocking charge of 20% of the Order value.” (CP 229 at § 7.3.) With respect to NTD’s opening order, STA agreed that:

At the completion of 60 days you will have the option to return any unopened equipment from your opening order without re-stocking charges. This provision is agreed to with the understanding that NTD will pay all shipping costs for return. At the same time, NTD will place a replacement order for the equal amount that is being returned, thus not creating a reduction in total purchases from Samsung. The new replacement order will be at standard terms and conditions and discount level per the agreed contract.

(CP 237 (emphasis in original omitted).)

By the express terms of the Agreement, NTD “assume[d] full responsibility for the marketing, sale and support” of the relevant products. (CP 227 at § 2.1.) NTD also certified that it was “an experienced user and distributor of telephone systems and equipment,” and that it would “employ sufficient numbers of trained personnel with

the sales and technical experience necessary to demonstrate, sell and support” the products. (*Id.* at §§ 2.1, 2.4.)

The Agreement provided that “[n]o alteration, amendment, waiver, cancellation or any other change in any term or condition of this Agreement shall be valid or binding upon STA unless the same shall have been specifically set forth in writing and signed by a duly authorized officer of STA.” (CP 230 at § 21.5.) The Agreement also contained an integration clause, providing:

This Agreement and documents incorporated by reference constitute the entire agreement between the parties hereto and supersede and cancel any and all prior agreements, including any past present [sic] or future oral statements or agreements, between the parties hereto or their agents, with respect to any of the matters to which this contract applies.

(CP 230 at § 21.8.)

**B. STA’s and NTD’s business dealings.**

NTD placed its first and only order with STA on March 30, 2009. (CP 236, 343-49.) NTD never paid the invoice, either in whole or in part. (CP 268-69, 300.) When payment by NTD became due 60 days later, NTD informed STA that it was unable to meet its obligations. (CP 299.) STA representatives spoke on the telephone with Bashir and another NTD officer, Robert Sutter (“Sutter”), on June 9-10, 2009 in

order to address NTD's unpaid invoice and the issues involved. (CP 221-22, 248, 300.)

During the call on June 10, 2009, NTD and STA agreed to terminate the distributor agreement. (*E.g.*, CP 221-22, 248, 300.) STA agreed to forgive NTD of its obligation to pay for NTD's opening order, or its obligation to place a replacement order for an equal amount. (*E.g.*, CP 248, 300.) No restocking, late fees, or penalties were charged or assessed against NTD. (CP 248, 300.) In return, NTD agreed to ship back to STA the inventory from NTD's opening order in "good condition." (CP 248, 300.)

Bart Kohnhorst, who at the time was STA's Senior Vice President Sales and Marketing, sent a letter to NTD and Bashir dated June 15, 2009, providing written confirmation of NTD's and STA's agreement to terminate. (CP 248.) NTD and Bashir did not return a signed copy of Mr. Kohnhorst's letter, but proceeded to have the products repackaged and shipped back to STA consistent with the parties' agreement. (CP 222.) Following the return of STA's products, business dealings between STA and NTD ceased. (CP 300.)

**C. NTD and Bashir make demands and sue STA.**

Several months later, on October 5, 2009, STA received a demand letter from Justin Osemene ("Osemene"), NTD's and Bashir's

attorney.<sup>2</sup> (CP 250-52.) The letter alleged that STA had summarily terminated the Agreement in a “unilateral, arbitrary and capricious manner” and demanded payment of \$100,000.00. (*Id.*) STA responded to the demand letter and reminded NTD and Bashir of the parties’ earlier agreement.

Samsung spent a great deal of time and effort with NTD and Mr. Bashir, its president, in an attempt to make the distributorship relationship with Samsung successful, including extending Samsung’s normal payment terms and providing a 100% return allowance. Despite the efforts of both NTD and Samsung, NTD was not able to generate any business for Samsung products and to meet its obligations under its Distributorship Agreement. Consequently, at the request of Mr. Bashir, Samsung, NTD and Mr. Bashir agreed that all Samsung products should be returned to Samsung and the Distributorship Agreement terminated, without penalty. It is unfortunate that even with Samsung’s support NTD was not able to make a success of this venture, but both parties agreed it was in their best interests to end the relationship in an equitable manner.

Based on the foregoing, there is no basis for NTD to recover its expenses from Samsung, or for Samsung to recover its expenses from NTD. We wish NTD and Mr. Bashir the best in their future endeavors.

(CP 254.)

NTD and Bashir were undeterred and proceeded to sue STA in the Superior Court of Snohomish County, Washington. (CP 389.) In their original Complaint filed on May 3, 2010, NTD and Bashir asserted

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<sup>2</sup> Osemene represented NTD and Bashir throughout the trial court proceedings.

four claims, alleging breach of contract, intentional misrepresentation, unjust enrichment and conversion. (CP 397-400.) On May 11, 2010, NTD and Bashir filed an Amended Complaint adding three additional causes of action, *i.e.*, breach of the implied covenant of good faith and fair dealing, loss of business and economic opportunities, and violation of Washington's Consumer Protection Act ("CPA"), Chapter 19.86 RCW. (CP 379-82.)

The crux of NTD's and Bashir's complaint against STA was that STA "summarily" and wrongfully terminated the Agreement with NTD, and refused to compensate NTD and Bashir for alleged marketing, training, and promotional expenses. (CP 371-84, 389-401.) While NTD and Bashir "assume[d] full responsibility for the marketing, sale and support" of the products in the Agreement, they claimed entitlement to reimbursement under STA's Marketing Development Fund ("MDF") program. (CP 227, 373, 391, 398-99.)

STA explained the MDF program and provided NTD and Bashir with a written copy of the program guidelines prior to NTD and STA ever entering into the Agreement. (CP 299-300, 302-04, 337-41.) NTD never complied with the MDF program guidelines and never became eligible to use or receive MDF funds. (*E.g.*, CP 300.) Among other things, MDF funds only become available to STA distributors upon

payment of their stock order invoices. (CP 337.) NTD never paid any STA invoice. (CP 268-69, 300.) NTD also never submitted any timely claim for MDF expenditures, as required by the guidelines. (CP 300, 337.)

**D. Sutter's memorandum.**

During discovery, NTD and Bashir produced a memorandum dated August 5, 2009, authored by Sutter. (CP 219-22.) Among other things, the memorandum documented the June 10, 2009 telephone call between NTD and STA and confirmed what STA had been saying all along, *i.e.*, there was no basis for NTD and Bashir to allege that STA wrongfully, unilaterally, or summarily terminated the Agreement; STA and NTD agreed to terminate the Agreement. (CP 221-22.) Sutter's memorandum states:

On June 10 there was a conference call in the late afternoon, comprised of the three men [Bashir, Mr. Kohnhorst, and Terence Bloom] and also Mr. Sutter. During the course of this call it became apparent that there were irreconcilable differences existing between the positions occupied by Samsung and by NTD. It was therefore decided by Mr. Kohnhorst that the best resolution for all parties was to end the distributorship, and have NTD return all of the Samsung items it had purchased. He said that Terry Bloom would work with Mr. Sutter in the collection of the data needed to create a Return Authorization. Mr. Kohnhorst would have a Letter of Termination Agreement drawn up and sent to Mr. Bashir for his signature. The conference call ended

with the verbal agreement of all four parties to these terms.

During the next several weeks Mr. Sutter re-packaged all the Samsung materials, verified the serial numbers, and packed all the item boxes into cartons for shipment. Mr. Bloom several times requested emails with information on the serial numbers and number of items to be returned. Mr. Bloom supplied the Return Authorization numbers to Mr. Sutter on July 6. Samsung arranged for return shipping through Challenger Freight Systems of Dallas, whose local representative, Eagle Transport Inc [sic] of SeaTac, WA, arrived on July 10. The truck they sent in the morning was too small to take the entire load, so a second truck was send [sic] in the afternoon to pick up the remainder. All Samsung items were returned on that date.

(CP 221-22.)

**E. The summary judgment proceedings.**

STA prepared and, on October 27, 2010, filed its Motion for Summary Judgment (“Motion”), seeking dismissal of all claims asserted by NTD and Bashir. (CP 350-70.) In the Motion, STA also moved for CR 11 sanctions, arguing that NTD’s and Bashir’s claims were neither well-grounded in fact, nor sustainable under the law. (CP 350, 369-70.) NTD and Bashir did not file any timely response or opposition to STA’s Motion. It was not until after STA filed its reply on November 19, 2010, that NTD and Bashir filed an “Emergency Response” to the Motion. (CP 202-05; *see* CP 206.) The trial court struck the untimely “Emergency Response” and noted that “THERE IS NOTHING IN THE

COURT RECORD FROM THE PLAINTIFF THAT RESPONDS TO THE UNDERLYING MOTION FOR SUMMARY JUDGMENT SHOWING AN ISSUE OF MATERIAL FACT.” (CP 181.) All of NTD’s and Bashir’s claims were dismissed, with prejudice, on November 24, 2010. (CP 179-80.)

In its November 24, 2010 Order Granting Defendant’s Motion, the trial court also awarded STA reasonable attorneys’ fees and expenses incurred “because of the filing of plaintiffs’ claims pursuant to CR 11.” (CP 180.) STA noted in its Motion that NTD’s and Bashir’s allegations were contradicted by the undisputable evidence presented at summary judgment, including Sutter’s memorandum and the admissions therein. (CP 354-55, 369-70; *see also* CP 21-23.) The trial court agreed. (*See* CP 180.) The trial court also directed STA to submit a declaration describing the fees and expenses STA had incurred because of the filing of NTD’s and Bashir’s claims within 10 days. (CP 180.) STA complied on December 3, 2010. (CP 40-56.)

STA’s Motion to Set Amount of CR 11 Sanctions was heard on December 15, 2010. (CP 12-13.) In its December 15, 2010 Minute Order, the trial court found:

DEFENDANT’S MOTION TO SET CR 11  
SANCTIONS PREVIOUSLY AUTHORIZED BY THE  
COURT: GRANTED. THE COURT FINDS THAT

FEES IN THE AMOUNT OF \$51,164.89 INCURRED BY THE DEFENDANT ARE REASONABLE; THAT THERE IS NO OVERLAPPING WORK BY THE ATTORNEYS AND PARALEGALS; AND THAT THE FEES ARE BASED ON THE COURT'S PREVIOUS FINDING THAT THE LAWSUIT WAS FRIVOLOUS AND WITHOUT MERIT.

(CP 13.) The trial court's Oral Ruling from December 15, 2010, further provided:

The matter is on today pursuant to the Court's previous order on summary judgment, which granted CR 11 sanctions. The basis for the sanctions is that the Court found and continues to find today, before reviewing any of the materials on motion to reconsider, that the lawsuit is totally frivolous and without merit.

I have reviewed the fees incurred by the defendants in defending this lawsuit and bringing the matter on for a summary judgment motion. There was no response to the summary judgment motion and no basis shown to the Court for filing this lawsuit.

I find the fees incurred by the defendants to be reasonable. I have looked at what's been done and the amounts incurred. Several different attorneys and legal assistants and paralegals have worked on this. I don't find that is overlapping work. Everybody appears to have done something a little different in that respect.

So I do find that the requested amount of \$51,164.89 has been incurred in defending this lawsuit. The lawsuit is frivolous and without merit [sic], and those are reasonable fees.

(RP 21:16-22:11.) NTD and Bashir appeal the trial court's imposition of CR 11 sanctions.

#### IV. ARGUMENT

##### A. Standards of review.

STA agrees that the abuse of discretion standard applies to a trial court's decision to impose CR 11 sanctions. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). "An abuse of discretion occurs only when no reasonable person would take the view that the trial court adopted." *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 745, 218 P.3d 196 (2009). The abuse of discretion standard "recognizes that deference is owed to the judicial actor who is 'better positioned than another to decide the issue in question.'" *Fisons Corp.*, 122 Wn.2d at 339 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990)). The sanction rules are designed to confer wide latitude for the trial judge to determine the sanctions proper in a given case and to reduce court reluctance to impose sanctions. *Id.*; *Amy v. Kmart of Wash. LLC*, 153 Wn. App. 846, 856, 223 P.3d 1247 (2009).

"The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). The Court also may affirm a trial court decision on a ground not presented to the trial court if the record is sufficiently developed to consider that ground. *Id.*

**B. NTD's and Bashir's claims were frivolous.**

The trial court did not abuse its discretion in finding that NTD's and Bashir's lawsuit was frivolous and without merit. (*See* CP 13, 180; RP 11:4-5, 21:16-22:1.) There was no evidence to support NTD's and Bashir's claims, especially at the hearing on STA's Motion. (*See* CP 181); *see also* RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."). NTD and Bashir even implicitly acknowledge that certain claims were frivolous.<sup>3</sup>

1. NTD's and Bashir's breach of contract claims were frivolous.

NTD and Bashir argue that their "stronger," or "core," cause of action was for breach of contract. (Opening Brief of Appellants at 21-22.) They argue the breach of contract claim was not frivolous because there was "clear evidence" that STA "refused to honor" its agreement to afford NTD the option of returning unopened equipment from its opening order without restocking charges, provided that STA received a replacement order in an equal amount. (*Id.* at 18; *see* CP 237.) The reality is there was no evidence, much less "clear evidence," of such a

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<sup>3</sup> For example, while Bashir and NTD argue "at least some" of the claims were not frivolous, they make no argument whatsoever against the frivolity of the claims for loss of business and economic opportunities and breach of the duties of good faith and fair dealing. (*See* Opening Brief of Appellants at 17-25.)

refusal or breach by STA. The trial court did not abuse its discretion in imposing CR 11 sanctions.

The allegedly “clear evidence” cited by NTD and Bashir consists of portions of affidavits submitted by Bashir and Sutter on December 3, 2010, *after* the trial court had already granted STA’s Motion and awarded CR 11 sanctions.<sup>4</sup> (Opening Brief of Appellants at 18 (citing CP 62-66, 133-34).) The affidavits cannot now be used to argue the trial court abused its discretion when it decided to award the CR 11 sanctions. *See, e.g., Wagner Dev., Inc. v. Fid. & Deposit Co. of Md.*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999) (“Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence.”). The trial court properly held that Bashir’s and Sutter’s

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<sup>4</sup> NTD and Bashir acknowledge “[t]his evidence was not before the trial court” when it granted STA’s Motion. (Opening Brief of Appellants at 18, n.36.) NTD and Bashir argue it was an abuse of discretion, however, for the trial court not to consider the affidavits when it entered its Order Setting Amount of CR 11 Sanctions on December 15, 2010. (*Id.*) As an initial matter, the trial court’s December 15, 2010 order was not designated in NTD’s and Bashir’s Notice of Appeal and is not within the scope of this Court’s review. (*See supra* note 1.) Moreover, those affidavits were filed in support of an entirely separate motion, *i.e.*, NTD’s and Bashir’s Motion for Reconsideration and to Set Aside Summary Judgment Order, which did not address the issue of CR 11 sanctions and which was not taken up by the trial court on December 15, 2010. (CP 12, 161-78.) Indeed, NTD and Bashir had not even filed their reply brief on that motion until 15 minutes before the December 15, 2010 hearing. (*Compare* CP 12, *with* CP 14.)

affidavits did not constitute “newly discovered evidence” as defined by CR 59(a)(4).” (CP 4.)

Moreover, NTD’s and Bashir’s affidavits, even if they had been timely submitted to the trial court, show no refusal by STA to allow NTD to return the unopened equipment without restocking fees and to place a replacement order. (CP 62-66, 133-34.) STA never refused to honor that commitment. Shortly after NTD informed STA that NTD was unable to meet its obligations and pay its initial invoice, NTD and STA entered into discussions to figure out what to do. (CP 221-22, 248, 299-300.) They decided to terminate the Agreement. (CP 221-22, 248, 299-300.) NTD was not required to place any replacement order, or to pay the invoice, or to pay restocking fees. (CP 221-22, 248, 254, 299-300.) Rather, NTD and STA agreed that NTD would return the products in good condition and that NTD and STA would go their separate ways. (CP 221-22, 248, 254, 299-300.)

Nothing in the affidavits submitted by Bashir and Sutter on December 3, 2010 shows the breach urged by NTD and Bashir. (CP 62-66, 133-34.) There simply was no such refusal by STA.<sup>5</sup> STA and NTD entered into discussions and agreed to terminate the Agreement.

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<sup>5</sup> This is not meant to suggest that STA was not surprised, or did not ask questions when NTD indicated it was planning on returning its entire order, minus only those items NTD removed for its own use, as a stock rotation. (See CP 95.)

Bashir's and Sutter's affidavits, while inherently contradictory, admit that fact.<sup>6</sup> (See CP 63-64, 133-34.) NTD and Bashir agreed to the termination, accepted the concessions made by STA, then proceeded to sue STA with a multi-count complaint falsely claiming that STA had terminated the Agreement in an "arbitrary," "capricious," "summary," and "unilateral" manner. (CP 380, 397.) The trial court did not abuse its discretion in finding the lawsuit to be frivolous and without merit.

NTD and Bashir challenge on appeal the meaning or clarity of the Sutter memorandum.<sup>7</sup> (Opening Brief of Appellants at 18-19.) They argue that Sutter may have understood from the June 10, 2009 conference call that "the Agreement was terminated going forward, but NTD retained the right to make claims for the prior breach." (*Id.* at 19.) This argument, if it is considered for the first time on appeal, is circular. There was no non-frivolous claim to make or retain. Sutter's belief, and

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<sup>6</sup> As NTD and Bashir acknowledge, in order to be actionable a breach of contract claim also requires the claimant to prove the alleged breach proximately caused the claimant damages. *Nw. Indep. Forest Mfrs. v. Dep't of Labor and Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995); (see Opening Brief of Appellants at 18 (citing *Fid. & Deposit Co. of Md. v. Dally*, 148 Wn. App. 739, 745, 201 P.3d 1040 (2009).) Here, not only was there no breach by STA, but NTD and Bashir also incurred no damage as a proximate result of STA's alleged refusal to allow for the return of the products without restocking charges. NTD and Bashir were never charged restocking fees; they made no payments under the Agreement. (CP 268-69.)

<sup>7</sup> NTD and Bashir admit that no evidence or argument was presented to the trial court concerning the interpretation of Sutter's admission that NTD and STA agreed to terminate and rescind the Agreement on June 10, 2009. (Opening Brief of Appellants at 19.) The Court should not indulge the argument for the first time on appeal. See RAP 2.5(a); RAP 9.12.

Bashir's credibility (or lack thereof) about whether he expected to retain "the right to press claims" is not the issue. There was no "prior breach" by STA and no non-frivolous claim for NTD or Bashir to assert. STA never refused to allow the return of products without restocking fees. NTD and Bashir never paid any restocking charges or any other payments under the Agreement. (CP 268-69.)

NTD and Bashir next argue that "NTD's failure to sign the termination letter is ... an independent reason why its contract claim is not frivolous." (Opening Brief of Appellants at 21.) This argument has multiple problems. First, no breach of contract by STA springs from the fact that NTD and Bashir failed to sign STA's letter. Moreover, NTD and Bashir orally agreed to the termination on June 10, 2009, and confirmed the agreement with their conduct when they returned the products and accepted STA's concessions. (*E.g.*, CP 221-22.) Nothing in the Agreement required the letter to be signed by NTD. (CP 230 at § 21.5.) NTD's and Bashir's argument also ignores the fact that the Agreement expressly allowed "[e]ither party [to] terminate this Agreement at any time, without cause, upon 30 days written notice to the other party." (CP 228 at § 4.1.) The argument further ignores the fact that under the express terms of the Agreement, STA had no liability to

NTD for alleged damages “arising out of the termination of this Agreement for any reason, with or without cause.” (CP 228 at § 4.3.)

Finally, NTD and Bashir argue that their breach of contract claim for reimbursement of training and marketing expenses was not frivolous. (Opening Brief of Appellants at 21.) They tacitly admit they had no entitlement to any reimbursement under the MDF program guidelines. (*Id.* (“It is true that the MDF Guidelines contain language tending to deny any liability for such reimbursement in the circumstances of this case.”).) NTD and Bashir argue, however, that because the Agreement does not reference the MDF program guidelines, STA must insist “on the validity of terms established outside of the Agreement itself.” (*Id.*) That assertion is simply not true.

In the Agreement, NTD “assume[d] full responsibility for the marketing, sale and support” of the products. (CP 227 at § 2.1.) NTD certified and agreed that it would “employ sufficient numbers of trained personnel with the sales and technical experience necessary to demonstrate, sell and support” the products.<sup>8</sup> (CP 227 at § 2.4.) The express terms of the Agreement place responsibility for NTD’s

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<sup>8</sup> NTD also agreed that it was “solely responsible for all aspects of the sale of Products, including, but not limited to, ... technical support,” and that it “may be asked to attend meetings, planning sessions, workshops, etc. at STA’s home location” in Richardson, Texas and that such travel would be at NTD’s expense. (CP 228 at § 3.3; CP 231 at § 21.10.)

marketing and training expenses on NTD. (CP 226-34.) STA offers the MDF program to distributors to help offset certain eligible expenses, if the distributor complies with the MDF program guidelines. (CP 299-300, 302-04, 337-41.) Here, however, NTD and Bashir failed to comply with those guidelines. (CP 299-300.) NTD never paid its initial stocking order invoice, never submitted any timely claim for reimbursement, and never became eligible to use or receive funds under the MDF program. (CP 268-69, 299-300, 337-41.) NTD's and Bashir's breach of contract claim was frivolous and the trial court did not abuse its discretion when it imposed CR 11 sanctions.<sup>9</sup>

2. NTD's and Bashir's additional claims were frivolous.

NTD and Bashir argue that the additional six causes of action they alleged against STA "were vulnerable as a matter of law, but that does not mean that they were frivolous." (Opening Brief of Appellants at 22.) STA agrees that a claim is not frivolous and sanctionable under CR 11 simply because the other party presents a meritorious legal

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<sup>9</sup> The same is true of NTD's and Bashir's claims that STA breached the implied duty of good faith and fair dealing. NTD and Bashir identified no contractual terms for which STA allegedly breached its implied duty of good faith and fair dealing. (See CP 379-80.) When STA specifically asked NTD and Bashir to identify those contractual terms during discovery, they failed and refused to do so, making only conclusory and unsupported allegations of wrongful termination and failure to reimburse various expenses. (CP 264, 289-90.) There is no "free-floating" duty of good faith and fair dealing unattached to an existing contract provision; the duty only exists with respect to performance of the specific contract term. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004).

defense. What made NTD's and Bashir's six additional claims frivolous and sanctionable was not simply the application of the "economic loss" or "independent duty" doctrine to certain claims, but rather the reality that NTD's and Bashir's claims were not well-grounded in fact, and were not warranted by existing law, or any good faith argument for a change in the law. *See* CR 11(a).

For example, NTD and Bashir accused STA of conversion. (CP 400.) Conversion requires evidence of the defendant "willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *Wash. State Bank v. Medalia Healthcare LLC*, 96 Wn. App. 547, 554, 984 P.2d 1041 (1999) (internal quotations omitted). Here, STA did not willfully interfere with anything belonging to NTD or Bashir and they were never deprived of the use of any chattel. (*See* CP 363.) The claims had no legitimate basis in law or in fact.

NTD and Bashir also sued STA for unjust enrichment. (CP 399-400.) As STA presented at summary judgment, however, "[a] party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract." *MacDonald v. Hayner*, 43 Wn. App. 81, 85-86, 715 P.2d 519 (1986).

NTD and Bashir also never had evidence to support their unjust enrichment claims. NTD did not sell any STA products or generate any revenue for STA. (CP 299.) STA received no financial or other benefit from its relationship with NTD; rather, STA lost money. (CP 300.) NTD made no payment toward its only stock order and never paid STA anything under the Agreement. (CP 268-69, 299-300.) STA was not enriched by Bashir or NTD and certainly was not “unjustly” enriched. NTD and Bashir purportedly based their unjust enrichment claims on “marketing” or “promotional” costs, but in the Agreement NTD “assume[d] full responsibility for the marketing, sale and support of the Products.” (CP 227 at § 2.1; *see* CP 399-400.)

The Agreement also provided that “STA shall not be liable for any indirect, special or consequential damages even if advised of the possibility of such damages.” (CP 229 at § 13.) NTD and Bashir nevertheless sued STA claiming loss of business and economic opportunities. (CP 380-81.) To make matters worse, even if the Agreement had not expressly barred such claims, discovery revealed that NTD and Bashir had no evidence to support their claims. (CP 264-65, 290, 364-65.)

NTD and Bashir further accused STA of unfair and deceptive trade practices in violation of the CPA.<sup>10</sup> They alleged:

Defendants' actions, conducts [sic] and behaviors as alleged in this Complaint are unfair, deceptive, unreasonable, unethical, and an offensive [sic] to public policy. Defendants intentionally, negligently, willfully, and recklessly induced Plaintiffs into purchasing NTD with false promises, inducement, half-truth representations, and deliberate withholding of material facts germane to making intelligent and cogent business decisions regarding the distributorship agreement that Plaintiff was enticed to enter into and in which Defendants had all along intentionally and deliberately decided never to consummate or be obligated to act in good faith and fair dealing on with [sic] Plaintiff.. [sic]

(CP 381-82.) STA obviously did not "induce" NTD and Bashir "into purchasing NTD." That allegation appears to have been regurgitated from allegations made in a separate action against William and Elise Nosworthy. (*See* CP 282-83.) Furthermore, the allegation that STA enticed NTD into the Agreement in bad faith is baseless and unsupported by any evidence. NTD and Bashir sought out STA, not the other way around. (CP 300.) When NTD could not fulfill its obligations under the Agreement and pay for the products it ordered, STA acted with the utmost good faith. STA did NTD and Bashir the favor of agreeing to the

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<sup>10</sup> A CPA claim has five essential elements: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) a public interest; (4) injury to the plaintiff in his business or property; and (5) a causal link between the unfair or deceptive act and the plaintiff's injury. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 73, 170 P.3d 10 (2007). NTD and Bashir had no factual or legal basis to support the required elements of a CPA claim. (*See* CP 367-69.)

Agreement's termination and allowing NTD to return the products and walk away without penalty. (CP 221-22, 248, 300.) NTD's and Bashir's claims alleging STA violated the CPA were frivolous and the trial court did not abuse its discretion in so finding.

The only claim, other than breach of contract, which NTD and Bashir substantively attempt to justify on appeal, is their claim for intentional misrepresentation.<sup>11</sup> (See Opening Brief of Appellants at 22-25.) The misrepresentations that NTD and Bashir now allege are (1) STA "said it would waive the restocking charge for NTD's opening order," and (2) STA "agreed it would reimburse marketing and training expenses on conditions different from those in the MDF guidelines."<sup>12</sup> (*Id.* at 24.) As an initial matter, neither of these alleged misrepresentations is of an "existing fact," but instead are promises of future performance which cannot support NTD's and Bashir's claims. "A promise of future performance is not a representation of an existing

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<sup>11</sup> STA agrees that the claim of intentional misrepresentation has nine essential elements, which all must be shown by clear, cogent and convincing evidence: (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity; (5) his intent that it shall be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom the representation is addressed; (7) the latter's reliance on the truth of the representation; (8) his right to rely on it; and (9) his consequent damage. *Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308 (1965).

<sup>12</sup> In spite of targeted discovery requests and the requirements of CR 9(b), these purported "misrepresentations" were never identified with any clarity until NTD's and Bashir's opening brief in this appeal. (See CP 265-66, 291, 398-99.)

fact and will not support a fraud claim.” *W. Coast, Inc. v. Snohomish Cnty.*, 112 Wn. App. 200, 206, 48 P.3d 997 (2002).

In addition, nothing was misrepresented about restocking charges. As discussed above, STA never refused to allow NTD to return its opening order without restocking fees and there is no evidence to the contrary. NTD’s option to return unopened equipment from its opening order without re-stocking charges was expressly conditioned upon NTD placing “a replacement order for the equal amount that is being returned, thus not creating a reduction in total purchases from Samsung.” (CP 237.) No such replacement order was ever made. (*See, e.g.*, CP 221-22, 268, 300.) NTD also never paid any restocking fees.

With respect to the second alleged misrepresentation, NTD and Bashir claim there was “some evidence” of it, citing to Bashir’s December 3, 2010 affidavit. (Opening Brief of Appellants at 24.) Bashir’s contradictory and argumentative affidavit was not before the trial court on November 24, 2010, however, when the trial court decided that CR 11 sanctions were appropriate. (CP 57-71, 179-80). And even if the alleged misrepresentation had been made (and there was some evidence of it) – neither showing was made here – Bashir and NTD had no right to rely upon an alleged oral representation contradicting the terms of the Agreement. (CP 227 at § 2.1; CP 230 at § 21.5.)

Furthermore, NTD and Bashir argue that additional required elements, such as STA's knowledge of the falsity of the alleged representations and intent that the representations be acted upon by NTD or Bashir, "would have been a proper subject of ongoing discovery." (Opening Brief of Appellants at 24.) NTD and Bashir had the opportunity to take discovery, however, and there was no evidence to support their allegations and nothing showing they were well-grounded in fact, or in the law.<sup>13</sup> The trial court did not abuse its discretion when it found NTD's and Bashir's claims to be frivolous and decided to award CR 11 sanctions.

**C. Bashir personally asserted frivolous claims against STA.**

Bashir admits for the very first time in appellants' opening brief that he "is not a proper plaintiff" and "had no claims against [STA] in his individual capacity." (Opening Brief of Appellants at 1, 25.) He now seeks to characterize his inclusion as an individual plaintiff a mere "technical error" in the caption of the complaint and amended complaint. (*Id.* at 25-26.) This sudden about-face that Bashir is attempting on

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<sup>13</sup> NTD and Bashir argue that "Osemene is arguably entitled to a chance on remand to show that these claims were supported by a 'good faith argument for the extension, modification, or reversal of existing law.'" (Opening Brief of Appellants at 25 (quoting CR 11).) NTD, Bashir and Osemene already had ample opportunity, however, to make such an argument and to oppose STA's motion and request for CR 11 sanctions.

appeal cannot be reconciled with his conduct in the trial court proceedings.

Contrary to his argument on appeal, it is not at all “obvious” that Bashir “was making no separate claims in his individual capacity.” (*See id.* at 26.) Bashir is not simply listed in the caption of the complaint and amended complaint, but in the body of the pleadings themselves. (*See, e.g.*, CP 371-72, 389 (identifying Bashir and NTD “collectively” as plaintiff).) STA sent discovery specifically to determine what claims Bashir asserted individually and he did not deny that he was personally making claims against STA at that time. (*See, e.g.*, CP 286.)

**INTERROGATORY NO. 6:** Of the causes of action alleged in your Amended Complaint, identify which causes of action, if any, you personally allege against Defendants.

**ANSWER:** *I object to this interrogatory insofar as it is vague and ambiguous as to meaning “... identify which causes of action, if any, you personally allege against Defendants ...” and for relevancy. This interrogatory is not sufficiently definite or limited in scope as to reasonably infer as to what exact response Samsung seeks. Subject to and without waiving these objections and the General Objections, I have already responded to this as Plaintiffs’ averred causes of action are against all the named Defendants and parties to the NTD-Samsung Distributorship Agreement that was t [sic] I object to this interrogatory insofar as it is vague and ambiguous as to meaning “... all terminated by the Defendants named herein [sic]*

(CP 286.) STA also questioned Bashir’s attorney about Bashir’s personal claims and he refused to dismiss them. (*See* CP 370.)

In addition, Bashir (along with NTD and through counsel): (1) filed a late response contesting STA's summary judgment motion (CP 202-05 (repeatedly using the plural term "plaintiffs")); (2) issued notices of deposition (CP 187-90 (stating examinations would be taken "at the instance and request of the Plaintiff, NTD and AMIR BASHIR")); (3) moved for reconsideration and to set aside the trial court's summary judgment order (CP 161-78 (stating, *inter alia*, that "[t]his Motion is based on the sworn Affidavit of Plaintiff Amir Bashir, NTD's Chief Executive Officer"), CP 14-20 (same)); (4) opposed STA's Motion to Set Amount of CR 11 Sanctions (CP 34-36); and (5) ultimately filed the subject Notice of Appeal (CP 1-2).

This is not a case of a mere technical error in the caption, where the body of the pleadings clarified the matter and demonstrated the identity of the parties and the capacity in which they sued. *Cf. State v. Knutson*, 81 Wn. 47, 49, 142 P. 444 (1914). It is a case in which Bashir asserted personal claims when he thought it benefitted him, only to try and renounce those claims on appeal in light of the trial court's finding that the allegations were frivolous.

**D. The trial court did not abuse its discretion in imposing the CR 11 sanctions upon NTD and Bashir.**

NTD and Bashir argue that Osemene “should bear exclusive liability for any sanctions in this matter.” (Opening Brief of Appellants at 30.) This argument is not well-founded. The law in Washington is that “absent fraud, the actions of an attorney authorized to appear on behalf of a client are binding on the client.” *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 133, 896 P.2d 66 (1995) (rejecting client’s argument that trial court abused discretion by imposing terms on client and not his attorney); accord *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002); *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) (“The rule that a party cannot in equity find relief from the consequence of his own negligence or of a mistake of the law is equally applicable where the mistake or neglect is that of his attorney employed in the management of the case.”) (quoting 3 E. Tuttle, *A Treatise of the Law of Judgments* § 1252 (5th ed. Rev. 1925) at 2608). There is no evidence of fraud here and the trial court was authorized to impose sanctions on NTD and Bashir. See CR 11 (stating “if a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative,

may impose upon the person who signed it, a represented party, or both, an appropriate sanction”).

Contrary to NTD’s and Bashir’s argument that responsibility lies at the feet of Osemene but not themselves,<sup>14</sup> NTD and Bashir were responsible for bringing the frivolous lawsuit. (CP 68-69.) The record shows that NTD and Bashir chose to sue STA and to falsely claim that STA had “unilaterally” and wrongfully terminated the Agreement when NTD and Bashir had, in fact, agreed to the termination and accepted the corresponding benefits and concessions made by STA. (CP 298-300, 371-84, 389-401.) The fact of the agreed-upon termination was even documented in NTD’s own business records. (CP 221-22.)

The lawsuit, from its inception, was neither well-grounded in fact, nor warranted under the law, but NTD and Bashir chose to sue STA anyway and to demand additional benefits they were not entitled to under the Agreement, even if they had not agreed to terminate it.<sup>15</sup> (CP 226-34, 371-84, 389-401.) When STA developed the evidence in discovery and moved for summary judgment and CR 11 sanctions, NTD

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<sup>14</sup> This contention was not raised in the trial court and the Court may refuse to review it pursuant to RAP 2.5(a).

<sup>15</sup> The decision of the U.S. Court of Appeals for the Eighth Circuit cited by NTD and Bashir, *Kirk Capital Corp. v. Bailey*, 16 F.3d 1485 (8th Cir. 1994), is inapposite insofar as there was no allegation or argument in that case that the factual allegations lacked evidentiary support. *Id.* at 1488.

and Bashir offered no timely or substantive opposition, apparently instructing Osemene to “not to expend any further legal capital.”<sup>16</sup> (CP 70, 181.) As stated in the *In re Cooke* decision cited by appellants:

The rule [CR 11] gives the trial court broad discretion in determining who should be sanctioned. *Miller v. Badgley*, 51 Wash.App. 285, 303, 753 P.2d 530, *review denied*, 111 Wash.2d 1007 (1988). It authorizes the court to sanction either the party or the attorney. *Blair v. GIM Corp.*, 88 Wn. App. 475, 481-82, 945 P.2d 1149 (1997). Rule 11 sanctions should be imposed directly on the party if the party is responsible for the frivolous filing.

*In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999). The sanctions imposed against NTD and Bashir were not based upon their hiring of Osemene as they suggest, but based upon the trial court’s supported and justified finding that they filed “a totally frivolous lawsuit.”<sup>17</sup> (RP at 11:4-5.) “Rule 11 directs that the sanction should fall upon the individual responsible for the filing of the offending document. In a given case this could be the attorney, the client, or both.” *Chevron*,

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<sup>16</sup> Making matters worse and needlessly increasing the cost of the litigation, Bashir then submitted an untimely and argumentative affidavit accusing STA’s attorney of attempting to “perpetrate fraud” upon the trial court. (CP 64.)

<sup>17</sup> NTD and Bashir seek to shift responsibility by effectively accusing Osemene of legal malpractice. (Opening Brief of Appellants at 1, 8-9, 34-36.) NTD’s and Bashir’s allegations of malpractice, however, are not before this Court. *See, e.g., Philips Elecs. N. Am. Corp. v. BC Technical, Inc.*, No. 2:08-CV-639 CW-SA, 2011 WL 677462, at \*2 n.7 (D. Utah Feb. 16, 2011) (recognizing client’s allegations of malpractice were not before the court in the context of order imposing sanctions for spoliation and contempt of court).

*U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir.1985).<sup>18</sup> Here, the evidentiary record supports the trial court's imposition of sanctions on NTD and Bashir.

**E. The record is adequate for this Court's review.**

NTD and Bashir argue that the trial court record is "inadequate to support meaningful appellate review" and ask that the matter be remanded to the trial court to further develop the record on sanctions. (Opening Brief of Appellants at 14-17.) The record here is sufficient to support this Court's review and an additional outlay of attorneys' fees and expenses should not be required to unnecessarily supplement the record on remand.

NTD and Bashir rely principally upon *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), to argue that findings of fact and conclusions of law were required in the orders granting CR 11 sanctions. (Opening Brief of Appellants at 14.) *Mahler* does not involve CR 11, or the imposition of sanctions, but rather an attorneys' fee award pursuant to *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn. 2d 37, 811 P.2d 673 (1991) and MAR 7.3. *Mahler*, 135 Wn.2d at 430. Accordingly, it is not clear that *Mahler* applies to the circumstances of this case. *See Woodhead*, 78 Wn. App. at 134 (holding cases concerned with the

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<sup>18</sup> *See Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 44 n.7, 14 P.3d 879 (2001) (stating "[t]his court looks to federal courts for guidance in construing CR 11.").

method for determining whether an award of attorneys' fees is reasonable do not apply to the question of the imposition of terms). Even if *Mahler* were to apply, however, the record here and the trial court's findings are sufficient to support this Court's review.<sup>19</sup>

First, the trial court did specify the sanctionable conduct in its orders. (See CP 180 (stating it is "ORDERED, ADJUDGED AND DECREED that [STA] is awarded its reasonable attorneys' fees and expenses because of the filing of plaintiffs' claims pursuant to CR 11"); CP 13 (finding "THE FEES ARE BASED ON THE COURT'S PREVIOUS FINDING THAT THE LAWSUIT WAS FRIVOLOUS AND WITHOUT MERIT"); (RP 21:16-22:1) (stating "[t]he basis for the sanctions is that the Court found and continues to find today ... that the lawsuit is totally frivolous and without merit.... There was no response to the summary judgment motion and no basis shown to the Court for filing this lawsuit").) It is evident from trial court's orders that it found NTD's and Bashir's lawsuit, as set forth in their complaint and amended complaint, violated CR 11. The trial court complied with *Biggs v. Vail*,

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<sup>19</sup> NTD and Bashir suggest that detailed *written* findings of fact and conclusions of law are always mandatory, unless the trial court specifically incorporates oral findings in the final written judgment and order. (See Opening Brief of Appellants at 16 n.29 (citing *Johnson v. Jones*, 91 Wn. App. 127, 136, 955 P.2d 826 (1998).) While it is true that in *Johnson*, the Court noted that the trial judge "specifically incorporated" her oral findings into the final judgment and order, it did not hold that step was necessary, or that the trial court could not otherwise intend for its oral decision to set out the findings and conclusions. See *Johnson*, 91 Wn. App. at 136.

124 Wn.2d 193, 876 P.2d 448 (1994), and its instruction that “it is incumbent upon the court to specify the sanctionable conduct in its order.” *See id.* at 201.

The record also shows that the trial court found NTD’s and Bashir’s claims to be baseless. “A filing is ‘baseless’ when it is ‘(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.’” *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883-84, 912 P.2d 1052 (1996) (quoting *Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994)). While the trial court’s orders did not mimic the exact language of CR 11, such precise formality should not be necessary, particularly where the trial court found there was “no basis shown to the Court for filing this lawsuit.” (RP 21:24-22:1.)

NTD and Bashir argue the trial court failed to specify whether it found their claims not to be well-grounded in fact, or unwarranted by law, or both. (Opening Brief of Appellants at 17.) They acknowledge the trial court’s finding that the claims were “[t]otally frivolous’ *could* mean both ungrounded in fact and unwarranted by law,” but they argue “it need not mean this.” (*Id.* at 17 n.31.) A filing is “baseless” for purposes of CR 11 in either event. *See MacDonald*, 80 Wn. App. at 883-84 (stating a filing is baseless if it is not well-grounded in fact, *or*

unwarranted by law). Moreover, the evidentiary record before the trial court amply supports the conclusion that NTD's and Bashir's claims were neither well-grounded in fact, nor warranted by law.<sup>20</sup> NTD and Bashir failed to timely offer *any* substantive opposition or evidence in response to STA's Motion and request for CR 11 sanctions.<sup>21</sup> (*See* CP 181.)

NTD and Bashir further argue that the trial court was "completely silent" on the subject of whether they (or Osemene) made a "reasonable inquiry" into the factual or legal basis of their claim.<sup>22</sup> (Opening Brief of Appellants at 15); *see also Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992) (holding in a case involving the imposition of sanctions against attorneys that "[i]f a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that

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<sup>20</sup> In oral argument on December 15, 2010, NTD's and Bashir's attorney even conceded the lawsuit was frivolous at the time the Court granted STA's Motion and imposed CR 11 Sanctions. (RP 16:16 (admitting "[t]his was a frivolous lawsuit, granted, at that time").)

<sup>21</sup> Notably, STA's Motion, which NTD and Bashir failed to oppose, argued that NTD's and Bashir's "allegations are not (and were not) well-grounded in fact, or in the law, and are flatly contradicted by the undisputable evidence." (CP 370.) NTD and Bashir further fault the trial court for not specifying whether it found their claims were also submitted for an "improper purpose." (Opening Brief of Appellants at 15 n.26.) STA did not make such an argument, however. The trial court should not be required to disclaim findings or conclusions that were never argued, or that the trial court did not consider.

<sup>22</sup> Notably, an attorney's "failure to obtain knowledge" is attributable to the client. *Dixie Ins. Co. v. Mello*, 75 Wn. App. 328, 339, 877 P.2d 740 (1994).

the attorney who signed and filed the complaint failed to conduct a *reasonable inquiry* into the factual and legal basis of the claim”). Here, as the trial court found in its oral ruling on December 15, 2010, “[t]here was no response to the summary judgment motion and no basis shown to the Court for filing this lawsuit.” (RP 21:24-22:1.) In addition, Osemene argued against the frivolity of the claims and asserted he did conduct the necessary “due diligence,” but the trial court appropriately retorted: “What have you submitted counsel to show that? Nothing.” (RP 11:4-15.) NTD’s and Bashir’s failure to conduct a reasonable inquiry into the law and facts is thus evident from the record and the trial court’s findings.

Finally, NTD and Bashir criticize the trial court for not explaining the “decision to impose sanctions on Mr. Bashir and NTD as opposed to on Mr. Osemene.” (Opening Brief of Appellants at 17.) The trial court ordered NTD and Bashir to pay the sanctions in its December 15, 2010 Order Setting Amount of CR 11 Sanctions. (CP 421-22.) NTD and Bashir failed to appeal that order. (*See supra* note 1.) In addition, none of the authorities cited by NTD and Bashir require the explanation that NTD and Bashir claim the trial court failed to make. STA is not aware of any such requirement in Washington. Rather, an

attorney's actions are ordinarily binding on the client. *See Woodhead*, 78 Wn. App. at 133.

**F. STA provided NTD and Bashir with adequate notice and the CR 11 sanctions appropriately correspond to the cost of responding to NTD's and Bashir's sanctionable filings.**

NTD and Bashir next argue that the trial court failed to consider lesser sanctions and that they had no opportunity to mitigate the harm caused. (*See* Opening Brief of Appellants at 27-29.) Once again, however, NTD and Bashir failed to designate the trial court's Order Setting Amount of CR 11 Sanctions in their Notice of Appeal and, accordingly, the amount of sanctions awarded by the trial court is outside the scope of this Court's review. (*See supra* note 1.)

Even if the issue of the amount of sanctions is within the scope of this Court's review, the trial court appropriately considered NTD's and Bashir's arguments for lesser sanctions. (CP 34-36, 421-22; RP 16:21-19:13.) The trial court considered the evidence and the briefing submitted, as well as the argument of counsel, and ruled as follows:

I find the fees incurred by the defendants to be reasonable. I have looked at what's been done and the amounts incurred. Several different attorneys and legal assistants and paralegals have worked on this. I don't find that is overlapping work. Everybody appears to have done something a little different in that respect.

So I do find that the requested amount of \$51,164.89 has been incurred in defending this lawsuit. The lawsuit is

frivolous and without permit [sic], and those are reasonable fees.

(RP 22:1-11; *see also* CP 421-22.)

The trial court properly limited the sanctions to those amounts it found were “reasonably expended in responding to the sanctionable filings.”<sup>23</sup> *See Biggs*, 124 Wn.2d at 201. NTD’s and Bashir’s assertion that having their claims dismissed was “already a substantial penalty” and “a significant incentive to be more careful in seeking legal advice in the future” misses the mark.<sup>24</sup> (*See* Opening Brief of Appellants at 29.) The dismissal of frivolous claims is no penalty at all; such claims should not be brought in the first instance. In addition, the issue of whether Osemene committed legal malpractice is not at issue and is not before the Court.

NTD’s and Bashir’s accusation that STA did not provide adequate notice of its intent to seek CR 11 sanctions is similarly unfounded. STA pointed out that their allegations had “no basis” even prior to the filing of the lawsuit. (CP 254.) When discovery revealed that

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<sup>23</sup> Contrary to NTD’s and Bashir’s contention, the sanctions imposed do not represent all of STA’s attorneys’ fees and costs, excepting only the \$4,500 previously awarded as a discovery sanction. (*See, e.g.*, RP at 8:11-21. *Cf.* Opening Brief of Appellants at 2, 29.)

<sup>24</sup> Whether NTD and Bashir were satisfied with Osemene’s representation, or would choose alternative counsel in the future is not the issue, “[t]he purpose behind CR 11 ‘is to deter baseless filings.’” *MacDonald*, 80 Wn. App. at 884 (quoting *Bryant*, 119 Wn.2d at 220).

NTD's own business records acknowledged the agreed-upon termination, but that NTD and Bashir proceeded to file their lawsuit anyway alleging "an arbitrary, capricious and summary termination" of the Agreement, STA promptly prepared its Motion for summary judgment and CR 11 sanctions.<sup>25</sup> (See CP 221-22, 350-70, 397.) NTD and Bashir had the opportunity to withdraw their claims, or to contest STA's Motion, oppose the imposition of sanctions and demonstrate that their claims were not frivolous. NTD and Bashir did neither. Rather, NTD and Bashir offered no evidence and made no showing against the imposition of sanctions and when the trial court found the claims to be completely frivolous and without merit, NTD and Bashir nevertheless continued to press their claims and increase the expense of the litigation by moving for "reconsideration" and relief under CR 60(b). (CP 161-78.) Given this background, it is wholly-incongruous for NTD and Bashir to now complain they had no opportunity to mitigate the sanctions.

**G. Osemene's alleged failures do not belong to the trial court or STA.**

Without citing authority that substantively supports the position, NTD and Bashir finally argue that it was an abuse of discretion for the trial court not to consider the affidavits submitted by Sutter and Bashir in

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<sup>25</sup> By comparison, in *Biggs*, while not the "usual" case, the trial court imposed CR 11 sanctions following a bench trial. *Biggs*, 124 Wn.2d at 195-96.

support of the Motion for Reconsideration and to Set Aside Summary Judgment Order, before the trial court entered its Order Setting Amount of CR 11 Sanctions on December 15, 2010.<sup>26</sup> (Opening Brief of Appellants at 35-37.) NTD and Bashir are incorrect. Those affidavits were filed in support of an entirely separate motion which did not address the issue of CR 11 sanctions.

The reconsideration motion was not taken up by the trial court on December 15, 2010. NTD and Bashir literally filed their reply brief on that motion a mere 15 minutes prior to the December 15, 2010 hearing. (CP 12, 14, 161-78.) It was no abuse of discretion for the trial court not to consider the matter on December 15, 2010. Nothing required the trial court to consider NTD's and Bashir's reconsideration motion, or the materials submitted in support of it, before entering its Order Setting Amount of CR 11 Sanctions. *See* CR 59, 60(b); (*see also* CP 24-25 (refuting NTD's and Bashir's claim that the matter was "premature" and noting that nothing in CR 59 or CR 60 called for any continuance, stay, or delay).)

Finally, to the extent Osemene failed to notify his clients of a conflict of interest, NTD and Bashir need to take that matter up with

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<sup>26</sup> Once again, STA does not believe the trial court's December 15, 2010 order is within the scope of this Court's review. (*See supra* note 1.)

Osemene. It was not STA's or the trial court's duty to determine Osemene's "continued capacity to represent his clients" on December 15, 2010, as NTD and Bashir suggest. NTD and Bashir cite no authority to the contrary. "[O]nce a party has designated an attorney to represent him in regard to a particular matter, the court and the other parties to an action are entitled to rely upon that authority until the client's decision to terminate it has been brought to their attention...." *Haller*, 89 Wn.2d at 547.

#### V. CONCLUSION

The trial court appropriately sanctioned NTD and Bashir pursuant to CR 11. There was no abuse of discretion. NTD and Bashir filed a frivolous lawsuit against STA and were responsible for the unfounded and unsupportable allegations that they levied. CR 11 is intended to be used to deter precisely these types of filings and the sanctions were properly applied here. The Court should affirm the trial court's imposition of sanctions under CR 11.

DATED this 18th day of May, 2011.

RYAN SWANSON & CLEVELAND, PLLC

By



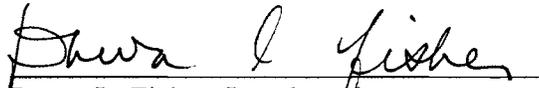
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Bryan C. Graff, WSBA 38553  
Attorneys for Respondent

**DECLARATION OF SERVICE**

I declare that on the 18th day of May, 2011, I caused to be served the foregoing document on counsel for Appellant, as noted, at the following addresses:

***Via Email:***

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Dawn L. Fisher, Legal Assistant

Dated: May 18, 2011

Place: Seattle, WA

2011 MAY 18 PM 2:30