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NO. 69843-5-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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WILLIE RUSSELL and CHRISTINE F.  
HARPER, husband and wife,

Plaintiffs/Petitioners

v.

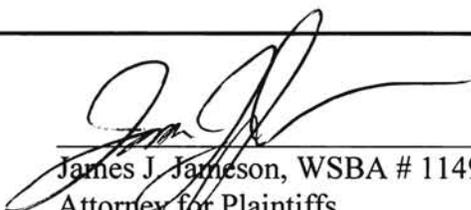
CARLEEN MATSON NICOLE NG-A-QUI,  
JEFFREY ST. GEORGE, LYNN BAMBERGER  
and STEPHAN BAMBERGER and the marital  
community composed thereof; and  
LYNNE WORLEY-BARTOK and JOHN DOE  
WORLEY-BARTOK, and the martial community  
composed thereof,

Defendants/Respondents

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BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	PAGE
I. ASSIGNMENT OF ERROR.....	1
II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR..	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	8
A. <u>Plaintiffs did not violate CR 11 in filing their         Complaint of Amended Complaint.....</u>	8
B. <u>Even if this Court determines that the trial court’s         finding of a CR 11 violation is not error, sanctions         should not have been granted when no notice of a         potential CR 11 violation was given to the Plaintiffs         prior to dismissal of the case.....</u>	11
C. <u>The Plaintiffs’ Complaint was not frivolous and the         Court made no finding that it was and therefore any         award of attorney’s fees pursuant to RCW 4.84.185         should be reversed.....</u>	13
D. <u>If this Court finds that sanctions were warranted under         CR 11 or that attorney’s fees were awardable under         RCW 4.84.185, the fees awarded were excessive and         the Court had no reasonable basis upon which to order         attorney’s fees in the amount of \$74,710.14.....</u>	15
V. CONCLUSION.....	18

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Bryant v. Joseph Tree, Inc.</u> , 119 Wn.2d 210 (1992).	8, 9
<u>Townsend v. Holman Consulting Corp.</u> , 929 F.2d 1358 (9 <sup>th</sup> Cir. 1990).	8
<u>Riss v. Angel</u> 131 Wn.2d 612 (1977).	10
<u>Day v. Santorsola</u> 118 Wn. App. 746 (2003)	10
<u>Interlake Porsche and Audi v. Bucholz</u> 45 Wn. App. 502 (1986).	10, 14
<u>Biggs v. Vail (Biggs II)</u> 124 Wn.2d 193 (1994)	12, 13, 17
<u>Biggs v. Vail (Biggs I)</u> 119 Wn.2d 129 (1992)	13
<u>224 Westlake v. Engstrom Properties</u> 169 Wn. App. 700 (2012).	16
<u>STATUTES</u>	<u>PAGE</u>
RCW 4.84.185	13, 15, 17, 18

RULES

PAGE

CR 11

8, 9, 11-15, 17, 18

FRCP 11

12

ASSIGNMENT OF ERROR

The trial court erred when it granted Defendants/Respondent's Motion for Sanctions and granted judgment against Plaintiffs/Petitioners in the amount of \$76,710.14.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did Plaintiffs violate CR 11 in filing their Complaint against Defendants?
2. Even if it is determined that Plaintiffs violated CR 11, are sanctions appropriate when Defendants received no notice of a potential CR 11 violation?
3. As the Court made no Findings of Fact or Conclusions of Law that Plaintiffs' action was frivolous for the purpose of RCW 4.84.185, did the Court err in Conclusion of Law 2.10 by awarding attorney's fees pursuant to that statute?
4. If sanctions were warranted, is there a proper factual basis to award attorney's fees in the amount of \$74,710.14?

## STATEMENT OF THE CASE

Plaintiffs are residents of a condominium complex known as The Broadway Condominiums. In 2010 Plaintiffs became suspicious that current and prior board members have violated, and were continuing to violate, The Broadway Condominium Conditions, Covenants and Restrictions and the laws of the State of Washington. After unsuccessfully attempting to gain access to records of the association in an effort to confirm these suspicions, Defendant Willie Russell filed a Complaint in Snohomish County District Court, Everett Division, Pro Se, on September 21, 2010. Mr. Russell voluntarily dismissed this action on October 21, 2010 prior to entry of a Notice of Appearance by any Defendant in the action. These facts are set forth in Exhibits D, E and F appended to the Declaration of Laura E. Kruse in Support of Defendants' Motion for Sanctions and Entry of Judgment, (CP 421-432). Plaintiffs then filed their Complaint herein on November 12, 2010 (CP 529-531).

Defendants filed a Motion for a More Definite Statement which was granted (CP 512-513).

Plaintiffs forwarded their Amended Complaint to Defendants' counsel who approved of the filing of the Amended Complaint and

requested a thirty (30) day stay of proceedings until she could investigate potential conflict of interest issues (See letter attached as Exhibit A to Declaration of James J. Jameson in Response to Defendants' Motion to Dismiss, CP 455). Plaintiffs filed their Amended Complaint on April 7, 2011 (CP 490-508). At the time of filing of the Complaint and Amended Complaint, the board of The Broadway Condominiums consisted of three members, two of whom were Lynne Worley-Bartok and Jeffrey St. George.

The Amended Complaint alleged the Defendants while acting in their official capacities violated the association Conditions, Covenants and Restrictions and Washington State law. In addition, the Amended Complaint alleged that Plaintiffs were improperly denied access to association records; that Defendant Ng-A-Qui while President of the association entered into an agreement that was not in the best interest of the association and, therefore, created monetary damages to Plaintiffs as homeowners; that Defendants improperly kept Plaintiff Willie Russell from serving on the board of the association; that Defendant Jeffrey St. George had a conflict of interest; that board members Jeffrey St. George and Lynne Worley-Bartok authorized withdrawals from the reserve

account without proper authority which had a direct financial impact on Plaintiffs; in violation of law, audits were not properly conducted; that board members Jeffrey St. George and Lynne Worley-Bartok failed to register with the FHA causing a diminution in value of the Plaintiffs' condominium unit; that Defendants failed to take appropriate action to preserve a warranty on siding work which would result in monetary damages to Plaintiffs as homeowners in the form of increased dues and/or special assessments; and that Defendant Carleen Matson improperly shredded documents of the association.

Defendants filed an Answer and Affirmative Defenses on or about February 12, 2012 (CP 476-485). This Answer did not allege a violation of CR 11 or RCW 4.84.185.

In March of 2012, Defendants' counsel requested a second stipulation to stay proceedings for sixty (60) days as she informed Plaintiffs' counsel that her firm was withdrawing as counsel for Defendants due to a conflict of interest (CP 473-475). As a good faith gesture, Plaintiffs agreed to the sixty (60) day stay. Upon the termination of the stay, rather than withdraw, Defendants' counsel sandbagged Plaintiffs' counsel and filed a Motion to Dismiss (CP 460-472).

Defendants' Motion to Dismiss was based on two theories: that Plaintiffs' pleadings were insufficient and that Plaintiffs did not have standing to bring the action. In their motion, Defendants requested attorney's fees pursuant to RCW 4.84.185 (CP 470-471).

Plaintiffs filed a response to Defendants' motion (CP 445-450) and a hearing was held on June 28, 2012 before Judge Marybeth Dingley. Judge Dingley, unable to come to a decision, took the matter under advisement (CP 439). Over one month later, on July 30, 2012 Judge Dingley dismissed Plaintiffs' Complaint on the sole ground of lack of standing and did not award Defendants their attorney's fees pursuant to RCW 4.84.185 as requested in their motion (CP 437-438). Plaintiffs, while disappointed in the decision, did not wish to appeal. Part of that decision was based on the fact that there was no attorney fee award.

As soon as the appeal period expired, Defendants filed a Motion for Sanctions Pursuant to CR 11 and RCW 4.84.185 (CP 379-391). This was the first notice given by Defendants that they would be seeking CR 11 terms. The sole basis for the motion was that Plaintiffs lacked standing which they seemed to argue was a per se CR 11 violation.

The motion was set for hearing on October 18, 2012. Plaintiffs

filed a purely legal response to the motion on October 12, 2012 (CP 371-378). No declarations were filed by the Plaintiffs. At noon on October 17, 2012 Plaintiffs' counsel received voluminous declarations from Defendants, allegedly in reply to Plaintiffs' response (CP 108-370). Over 250 pages of declarations were alleged to be responsive to Plaintiffs' seven page legal memorandum which was in response to the Motion for Sanctions.

Plaintiffs request to strike the alleged reply declarations was denied by Judge Richard T. Okrent and instead he continued the hearing to November 21, 2012 (CP 106-107).

Ultimately Judge Okrent considered all of the filed declarations and concluded Plaintiffs to be in violation of CR 11. Judge Okrent's Conclusions of Law were based on the legal conclusion that Plaintiffs lacked standing to bring the action (CP 3-8). While Conclusion of Law 2.10 states Defendants were awarded attorney's fees pursuant to CR 11 and RCW 4.84.185, the Court may no Finding of Fact or Conclusion of Law that Plaintiffs' claims were frivolous. Without any detailed showing of what work was performed by Defendants' attorneys, Judge Okrent awarded fees to Defendants in the amount of \$76,710.14 (CP 1-2).

## ARGUMENT

A. Plaintiffs did not violate CR 11 in filing their Complaint or Amended Complaint. The seminal case with regard to CR 11 is Bryant v. Joseph Tree, Inc., 119 Wn.2d 210 (1992). After discussing the purpose of deterring baseless filings and curbing abuses of the judicial system, the Bryant Court goes on to say at page 219:

However, the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 199. The Ninth Circuit has observed that:

Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to product large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.

Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1363-64 (9<sup>th</sup> Cir. 1990). Our interpretation of CR 11 thus requires consideration of both CR 11's purpose of deterring baseless claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims.

The Bryant Court goes on to say at page 220 “The fact that a Complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney’s fees to a prevailing party where such fees would otherwise be unavailable.”

While the trial court made no Findings of Fact with regard to the CR 11 claims, Conclusions of Law 2.5 and 2.6 indicate that the CR 11 terms are based on the fact that the suit instituted by the Plaintiffs was, in fact, a derivative action which was not allowed on behalf of nonprofit corporations.

Plaintiffs’ Amended Complaint alleged that Plaintiffs were not allowed access to association records, that the failure of the Defendants to register with FHA caused the diminution in value of the Plaintiffs’ condominium unit and that several of the other actions complained of in the Amended Complaint had the capacity to damage the Plaintiff, monetarily, by way of having to pay increased dues and/or special assessments. These allegations, at least arguably, were individual claims of the Plaintiffs.

Numerous cases have allowed for actions by aggrieved individuals

in a homeowner's association against individuals on boards and committees of the association. See e.g. Riss v. Angel, 131 Wn.2d 612 (1977) and Day v. Santorsola, 118 Wn. App. 746 (2003), review denied 151 Wn.2d 1018 (2004).

Furthermore, even in a derivative setting, a direct recovery to a shareholder is permissible if awarding recovery to the corporation would result in other shareholders receiving a portion of the recovery to which they are not entitled. A Court may then look beyond the corporation and award recovery to the individual shareholders so entitled. Interlake Porsche and Audi v. Bucholz, 45 Wn. App. 502, 519-20 (1986). Here if the award was to the association, the Defendants, who are members of the association, would have benefited from their wrongdoing. As such, even if Plaintiffs' claims could be termed to be derivative, there is precedent to award recovery to an individual under Washington law. It should be noted that Finding of Fact 1.8 that Plaintiffs did not make any effort to persuade the association itself to bring suit against Defendants, is laughable when the board was controlled by two of the Defendants and the association could only act through its board.

Additionally, the mere fact that Plaintiffs may have lacked standing pursuant to Judge Dingley's decision is not a per se violation of CR 11. It is suggested that this Court hears many arguments in which Defendants have prevailed on the argument of lack of standing and not all of these cases are found to have been violative of CR 11.

It is further evidence that CR 11 sanctions are not warranted in this case in that Judge Dingley, in deciding on the Motion to Dismiss, did not make her ruling at the time of the hearing which, if the case was truly frivolous, she should have been able to do. Instead, she took it under advisement for over a month before ruling on the motion.

Given the facts of this case, the finding of a CR 11 violation by the trial court was clearly error and should be reversed.

B. Even if this Court determines that the trial court's finding of a CR 11 violation is not error, sanctions should not have been granted when no notice of a potential CR 11 violation was given to the Plaintiffs prior to dismissal of the case. CR 11 sanctions are unavailable in the late stages of litigation without prior notice to the opposing party. This is because without prompt notice regarding a potential violation of CR 11 the opposing party is given no opportunity to mitigate the sanction by

amending or withdrawing the offending pleading. Biggs v. Vail, 124 Wn.2d 193, 198 (1994) (Biggs II). The Biggs II Court at page 198 goes on to state:

Prompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses. Deterrence is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions. (Citations omitted) Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. Without such notice, CR 11 sanctions are unwarranted.

The Biggs II court further indicated at footnote 2:

Rule 11 of the Federal Rules of Civil Procedure has recently been rewritten to provide Judges with more flexibility in sanctioning violations, and to encourage early and informal settlement of Rule 11 disputes. ... We share the Federal Court's concerns that sanctions be reserved for egregious conduct and not be viewed as simply another weapon in the litigator's arsenal. We adopt as our own the advice of the advisory committee that, in most cases, "Counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a CR 11 motion."

As the Defendants, at no time prior to filing their motion, which was after the case had concluded by way of the dismissal order entered by Judge Dingley, gave any notice that they would seek sanctions pursuant to CR 11, under Biggs II sanctions are unavailable to the Defendants and the trial court should have denied sanctions on that basis.

C. The Plaintiffs' Complaint was not frivolous and the Court made no finding that it was and therefore any award of attorney's fees pursuant to RCW 4.84.185 should be reversed. Initially, a lawsuit must be determined to be frivolous, in its entirety, and to have been advanced without reasonable cause before an award of attorney's fees may be made pursuant to RCW 4.84.185. Biggs v. Vail, 119 Wn.2d 129, 133 (1992) (Biggs I). The Biggs I Court goes on to state that the frivolous claims statute requires the Judge to consider the entire action as a whole prior to awarding attorney's fees for a frivolous action. Biggs I at 136.

For the reasons, set forth above, as to why this action did not violate CR 11, (Section A, supra) the entire action considered as a whole was not frivolous. Many of the claims set forth in Plaintiffs' Amended Complaint were arguably individual to the Plaintiffs and, even if derivative, could have been awarded to Plaintiffs, individually pursuant to

Interlake Porsche and Audi v. Bucholz, supra. The need for Judge Dingley to take the matter under advisement for over a month before making a decision further indicates that this action was not frivolous.

Finally, Judge Okrent, in his Findings of Fact and Conclusions of Law made no finding that the Complaint was frivolous. Conclusion of Law 2.8 merely restates portions of the statute and Conclusion of Law 2.9 merely finds that the Defendants were the prevailing party. There is no finding that the action was frivolous and therefore attorney's fees should not have been granted pursuant to that statute.

As to both the alleged CR 11 violation and frivolous action claim the Defendants raised several extraneous issues which, the Court apparently considered in its oral decision, although did not make part of its Findings of Fact and Conclusions of Law. These extraneous issues were completely irrelevant and should never have been considered by the Court.

As set forth in the Statement of the Case, above, Mr. Russell filed a Pro Se Complaint in District Court which he dismissed one month prior to the entry of a Notice of Appearance. Why this was even raised, other than to divert the Court's attention from the true merits of the motion, is unknown.

In the Declaration of Laura E. Kruse in Support of Defendants' Motion for Sanctions and Entry of Judgment (CP 392-436) she also alleged that Plaintiff Russell had filed small claims actions against two of the Defendants in this action with regard to matters which had no relation to The Broadway Condominiums. No allegation was made that these small claims suits had anything to do with the facts of the case at hand or that the small claims actions were ever found to be frivolous or in violation of any court rule.

It appears from the Court's statements in its oral decision that these extraneous issues in some way swayed the Court in its ruling.

Again, these issues had nothing to do with the merits of the motion and should never have been considered by the Court.

D. If this Court finds that sanctions were warranted under CR 11 or that attorney's fees were awardable under RCW 4.84.185, the fees awarded were excessive and the Court had no reasonable basis upon which to order attorney's fees in the amount of \$74,710.14. The sole basis for calculating the amount of attorney's fees that the trial court awarded to Defendants is the Supplemental Declaration of Laura E. Kruse in Support of Defendants' Motion for Sanctions and Entry of Judgment and to

Determine Plaintiff Willie Russell a Vexatious Litigant (CP 64-83). This declaration sets forth no detailed itemization of hours spent or which tasks were performed by each timekeeper. There is indication in the declaration that some of the fees for which the Defendants are seeking compensation were expended in other matters having nothing to do with this litigation.

In the recent case of 224 Westlake v. Engstrom Properties, 169 Wn. App. 700 (2012) the Court of Appeals was faced with a similar situation as we have in the present case.

In that case the Plaintiff, who was entitled to an award of attorney's fees, merely presented a list of the total hours expended by each timekeeper. The 224 Westlake Court reversed the award of attorney's fees to the Plaintiff finding that this list "does not come up to the standard set in Bowers because it does not distinguish among the tasks accomplished during the hours claimed. Without access to such basic information, Engstrom had no hope of critiquing the request in a meaningful way."

224 Westlake at 740.

Here, the Defendants did not even offer a list of total hours expended by each timekeeper, but merely set forth the total number of

hours allegedly spent. As such the attorney fee award cannot be upheld by this Court.

Furthermore, the Defendants should not be rewarded for waiting through the entire litigation process and then filing its Motion to Dismiss for Lack of Standing when nothing occurred in that process which changed the standing issue.

The Court in Biggs II at footnote 3 indicated that any award of attorney's fees in that case "should be further limited by the apparent absence of any attempts at mitigation on the part of Vail."

In the instant case the Defendants ran up an exorbitant amount of attorney's fees, waited until the very end of the litigation process and now seek to use CR 11 and RCW 4.84.185 as fee shifting mechanisms in violation of the purpose for which they were enacted.

Therefore, should this Court, for some reason, find that the Defendants are entitled to an award of attorney's fees, those fees should be limited given the Defendants' apparent absence of any attempts at mitigation.

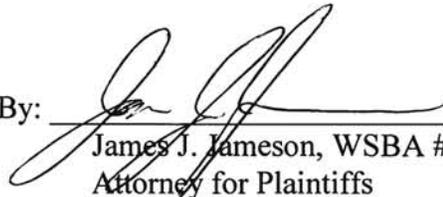
CONCLUSION

In conclusion, the trial court erred in awarding attorney's fees to Defendants pursuant to CR 11 and RCW 4.84.185. The Court of Appeals should reverse the Order and Judgment on sanctions entered by the trial court on January 7, 2013 and remand with instructions to deny the motion.

DATED: April 22, 2013

RESPECTFULLY SUBMITTED:

By: \_\_\_\_\_



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Attorney for Plaintiffs