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No. 74601-4-I

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

M. CASEY LAW, PLLC, et al.,

Appellants,

v.

COLE WATHEN LEID & HALL, P.C., et al.,

Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants are four lawyers who were sanctioned under CR 11 for making a novel legal argument on behalf of a client who was suing her insurance company for first party bad faith. The argument was that lawyers who investigate first party insurance claims for insurance companies may be separately liable for actionable conduct in that role.

The trial court imposed the sanctions at the same time it dismissed on summary judgment all the claims against the lawyers whom Appellants' client sued. The court made no findings specifying the basis for the sanctions, but said Appellants should have voluntarily dismissed the claims after they were challenged by the lawyer-defendants. But in response to that challenge, Appellants had further researched the law, explained their legal position, and consulted other lawyers and legal experts, who confirmed the legal viability of the challenged claims.

As Appellants' research and inquiries showed, those claims were, at the least, "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishing of new law," which is what CR 11 requires. Several courts, including the Supreme Court of Washington and judges of both federal districts, have made rulings *involving these same defendant lawyers* which rest on much the same legal premise as the Appellants' client's claims: that when

lawyers act as a first party insurance investigators, they have quasi-fiduciary obligations to the insured that conflict with any attorney client relationship they may have with the insurer. It reasonably follows that those same conflicting duties may give rise to claims against them for negligence and violations of the Consumer Protection Act.

The trial court erred by granting Respondents' motion for sanctions without considering the reasonableness of Appellants' arguments for an extension of this body of law, without giving Appellants a fair opportunity to present those arguments, and without entering findings specifying the basis on which the sanctions were imposed.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering the order of sanctions. CP 729.

B. The trial court erred in failing to make findings specifying the basis for its sanctions order. CP 721-730.

C. The trial court erred in failing to consider, and thus denying, Appellants' Motion to Strike arguments raised for the first time in reply. CP 323-24, CP 693-730.

D. The trial court erred in denying Appellants fair notice and a full opportunity to be heard before entering the order on sanctions. *See* CP 730.

E. The trial court erred by granting defendants' Motion to Strike the Declaration of Prof. John Strait and the Third Declaration of Marshall Casey. CP 756.

F. The trial court erred by denying Appellants' Motion for Reconsideration. CP 773-75.

III. ISSUES RELATING TO ASSIGNMENT OF ERROR

A. Is it reasonably arguable that a lawyer who acts as an insurance investigator assumes the legal duties and liabilities of an insurance investigator? Appellants submit it is. (Assignments of Error A and F.)

B. Is it reasonably arguable that a Consumer Protection Act claim does not require proof that the plaintiff had a contractual relationship with the defendant? Appellants submit it is. (Assignments of Error A and F.)

C. Is CR 11's requirement that a lawyer who signs a pleading make "inquiry reasonable under the circumstances" into its legal basis satisfied by familiarity with relevant court decisions and rulings, review and analysis of relevant case law, and consultation with lawyers and a law professor who have relevant experience and expertise? Appellants submit it is. (Assignments of Error A and F.)

D. Are declarations by lawyer-experts regarding their consultations with a lawyer who signed a pleading governed by CR 11, admissible evidence of the “inquiry reasonable under the circumstances” the Rule requires? Appellants submit they are. (Assignments of Error A, E and F.)

E. Are declarations by lawyer-experts setting out opinions regarding the viability of a legal claim admissible to show that the claim was “a good faith argument for the extension, modification, or reversal of existing law or the establishing of new law”? Appellants submit they are. (Assignments of Error A, E and F.)

F. Are lawyers charged with violations of CR 11 entitled to reasonable notice and the opportunity to respond to the allegations against them? Appellants submit they are. (Assignments of Error B-F.)

G. May a trial court properly consider, and impose sanctions, on the basis of arguments and allegations raised for the first time in a reply memorandum, which the opposing party has moved to strike? Appellants submit it may not. (Assignments of Error B and C.)

H. Were the Appellants in this case given reasonable notice and the opportunity to respond to the allegations against them? Appellants submit they were not. (Assignments of Error D.)

I. May a party submit declarations with a reply to a response to a motion, which answer arguments made in the response? Appellants submit that they may. (Assignments of Error D).

J. Can a trial court properly impose CR 11 sanctions without making findings specifying the conduct that it finds to have violated the rule, and the basis for that finding? Appellants submit it cannot. (Assignments of Error B.)

IV. STATEMENT OF THE CASE

This is an appeal from an order imposing CR 11 sanctions. The Appellants were the attorneys for the plaintiff in a first party insurance bad faith action. They were sanctioned for refusing to dismiss their client's CPA and negligence claims against a lawyer and law firm—the Respondents in this appeal—who, as independent contractors, conducted her insurance company's investigation of her loss.

A. Respondent attorneys act and market themselves as insurance investigators of first party insurance claims, and the Washington Supreme Court holds that, in doing so, they have quasi-fiduciary responsibilities to the insured, and are not acting as the insurance company's attorneys

In *Cedell v Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013), the Supreme Court of Washington made an important change in the law regarding the status of lawyers hired by insurance companies to conduct first party claim investigations. Reiterating the

well-established Washington law principle that an insurance company owes “a quasi-fiduciary duty to act in good faith toward its insured,” *id.* at 696, it held that lawyers who perform such investigations are presumed to be engaged in the “quasi-fiduciary tasks of investigating and evaluating or processing the claim,” so their communications with the insurance companies are presumptively unprotected by attorney client privilege.

The lawyer whose investigation for and communications with the insurance company in *Cedell* was one of the partners in Respondents’ law firm, Cole, Wathen, Leid & Hall (“CWLH”). *See id.* at 691. So was the lawyer-investigator in *Johnson v. Allstate Property and Cas. Ins. Co.*, 2014 WL 4293967 (W.D. Wa. No. 14–5064, Aug. 24, 2014), in which the federal Magistrate Judge followed *Cedell* and also denied the insurance company’s claims of work product protection. So were the lawyers in several other cases in which similar issues have arisen since *Cedell*.¹

Appellant lawyers were aware prior to the filing of this lawsuit of the Respondents’ involvement in these kinds of cases, and its practice of marketing itself for and conducting investigations for insurance companies. See CP 50-51, 536-37. They were also aware of a conflicting body of law regarding the viability of lawsuits against lawyers and other independent contractors or agents who conduct first party insurance investigations. See Part V (B)(2), below. This case arose against that legal background.

¹ See, e.g., *Babai v. Allstate*, 2015 WL 1880441 (W.D. Wa. No. No. C12–1518, April 24, 2015); *Langley v. Geico*, ___ WL ___ (E.D. Wa. No. 14-3069, May 4, 2016) .

B. Respondent Wathen investigates Appellants' client's first party insurance claims, and her insurance company denies them

In December, 2013, Bonnie Jean Alvarez reported to her insurer, Allstate Insurance Co. ("Allstate"), that someone had stolen her van, which contained much of her personal property. CP 2. Allstate opened claims under Ms. Alvarez's auto and renters' insurance policies and launched an investigation. *Id.*

The investigation dragged on nearly a year. *See* CP 2. One of the Respondents in this case, Attorney Richard Wathen, conducted the investigation for Allstate. CP 35. On May 6, 2014, Mr. Wathen wrote Ms. Alvarez, on his firm's letterhead, saying he "represents Allstate Insurance Company ("Allstate") regarding the above-referenced matter." CP 35. Neither the letterhead, nor the body of the letter, nor the signature line, indicated that Mr. Wathen was a lawyer or that he was acting as such. *See* CP 35, 37. Mr. Wathen's letter said: "Allstate can neither admit nor deny coverage for your claim as the company's investigation is continuing." CP 35. The letter also said Ms. Alvarez would be subjected to an examination under oath, on a specified date, "pursuant to the terms and conditions of the policy and Washington state statute ^[2]". CP 35. It

²The letter did not cite any specific statute, but RCW 48.18.460 provides in part: "If a person makes a claim under a policy of insurance, the insurer may require that the person be examined under an oath administered by a person

also said, “Allstate requires you to produce any and all documents or written materials which in any way support your claim, including but not limited to” (1) the originals of her insurance policies and “any other insurance policy which afforded coverage,” (2) “[a]ny written communication with any agent or representative of the insurance company” pertaining to the or the claims, (3) any estimates, appraisals, canceled checks, or other documents which substantiate” the claims, (4) all photographs or videos ever taken of the subject vehicle, (5) all documents that pertain to the ownership of the vehicle or personal property, (6) her income tax returns from 2011 and documents substantiating her employment and income for the last two years, (7) any reports which she “or anyone else” made to law enforcement relating to the losses, and (8) copies of all her banking account statements for the past twelve months. CP 36. The letter closed with a warning that, “Allstate Insurance Company requires full and complete compliance with all of the terms and conditions of the policy.” CP 36.

Ms. Alvarez was unable to attend the examination under oath on the first two dates Mr. Wathen set, and each time called to reschedule. *See* CP 40. Mr. Wathen wrote Ms. Alvarez again on June 4, 2014, insisting that she appear on June 11, 2014, for an examination—and again warning:

authorized by state or federal law to administer oaths.” The statute does not say that the examination will be conducted by an attorney.

“you have an obligation under Washington law to submit to an examination under oath” and “your failure to submit ... may preclude (sic) coverage under your policy of insurance.” CP 40.

Faced with Mr. Wathen’s demands, Ms. Alvarez consulted Jenna Labourr of Washington Injury Lawyers, one of the Appellants herein. CP 405. On June 9, 2014, Ms. Labourr wrote a letter addressed to Mr. Wathen, Allstate “Special Investigator” Tom Tabor, and Allstate professional Jeremy Olson. CP 42. Ms. Labourr explained that she represented Ms. Alvarez; cited Allstate’s quasi-fiduciary duty to look after Ms. Alvarez’s interests as an insured; and invoked Ms. Alvarez’s right to notice of the subject of the examination under oath, which Labourr noted must be “materially related” to the purpose of the investigation. CP 42-43.

On June 12, 2014, Respondent Wathen wrote Ms. Labourr demanding to know, “why you chose to violate the Rules of Professional Conduct 4.2 by directly communicating with my client?” CP 44. Mr. Wathen’s letter did not indicate to which client he referred.³ In a letter on June 19, 2014, Mr. Wathen responded to Ms. Labourr’s query about the subject of the demanded examination, advising that the purpose was to: “question Ms. Alvarez about the ownership, existence, and facts and circumstances surrounding the loss itself.” CP 45. The letter claimed there

³ Like all of Mr. Wathen’s letters, this letter referred to Allstate as the “insuring entity.” CP 44.

was a delay in reporting the theft which “may have prejudiced Allstate’s investigation” CP 45. Mr. Wathen wrote Ms. Labourr again on June 19, 2014, again insisting on an examination under oath. CP 45-46.

On July 8, 2014, Ms. Labourr wrote back to Mr. Wathen's questioning the relevance of the information Allstate sought but reiterating that Ms. Alvarez, “fully intends to cooperate in any good faith investigation that Allstate is entitled to under the contract.” CP 49-50. Ms. Labourr’s letter expressed puzzlement about Mr. Wathen’s statement that she had communicated directly with “his client.” CP 50. The letter asked whether Mr. Wathen was referring to Ms. Alvarez or to Allstate—and pointed out that, in either case, his dual role as lawyer and investigator could create conflicts of interest. CP 50.

Mr. Wathen responded with letters that threatened to file a Washington State Bar Association complaint against Ms. Labourr. *See* CP 59, 63. In those and other letters, Mr. Wathen alleged Ms. Labourr violated RPC 4.2 when she copied her June 9, 2014, letter to an Allstate adjuster and investigator. CP 53-4, 59, 63. On August 6, 2014, Mr. Wathen made good on his threats and filed a grievance with the Bar. *See* CP 244. After an investigation, the Bar dismissed the grievance without disciplining Ms. Labourr; instead, the Bar advised Ms. Labourr about the

requirements of RPC 4.2 and said it would retain its investigative records on file. CP 244-46.

Meanwhile, Mr. Wathen and Ms. Labourr also exchanged several letters regarding the parties' respective obligations, and the bases for and documentation of Ms. Alvarez's claim. *See, e.g.*, CP 45-52, 55-58, 61-62. On July 30, 2014, Ms. Alvarez sat for an examination under oath, accompanied by Ms. Labourr. CP 89, 211-43. She provided recorded statements, phone logs, and other records. *See, e.g.*, CP 70-71, 247. She repeatedly spoke to Allstate adjusters and investigators. CP 511, CP 247-57. In that examination and through document exchanges, Ms. Alvarez complied with Mr. Wathen's and Allstate's demands for information.

Despite Ms. Alvarez's cooperation, Allstate denied her claims on about October 20, 2014. CP 348-52.

C. Following the denial of coverage, Appellants file a complaint against Allstate and Respondents on their client's behalf

Following Allstate's denial of Ms. Alvarez's claims, Appellant Labourr discussed with various colleagues the factual background and potential legal issues related to Mr. Wathen's conduct. CP 528-29. She reviewed the website of the Respondent's law firm and noted it promoted the firm's services in conducting insurance investigations and examinations under oath for insurers. CP 49.

After the examination under oath, Ms. Labourr consulted and enlisted the assistance of co-appellant Marshall Casey, who had previously

litigated cases involving related matters and areas of law, including insurance disputes, legal malpractice allegations, and claims against both lawyers and investigators that alleged bad faith and violations of the Washington Consumer Protection Act (“CPA”). CP 535-36. Through that work, Mr. Casey was familiar with cases that aim to hold individual professionals responsible for CPA violations. *Id.* Mr. Casey was also aware of what appeared to him to be, “a systematic use of examinations under oath to help insurance companies decline coverage” by Mr. Wathen and his firm. CP 540.⁴ Prior to filing the lawsuit underlying this appeal, Mr. Casey, too, reviewed the website promoting Mr. Wathen and his firm, and advertising to insurance companies the fact that Mr. Wathen had taken thousands of depositions and examinations under oath. CP 536.

Shortly after Allstate denied Ms. Alvarez coverage, the Appellant lawyers filed a lawsuit on her behalf, naming as defendants Allstate, Mr. Wathen and CWLH. CP 1. The complaint alleged that Allstate violated the CPA, violated the Washington Insurance Fair Conduct Act, breached its insurance contract with Ms. Alvarez, acted in bad faith, and negligently

⁴ Mr. Casey testified in a declaration: “I have always had difficulty with the fact that our system sees suing attorneys as different from suing doctors, appraisers, engineers, or any other profession. Not many attorneys will take on cases holding other attorneys accountable, but my belief has always been that if I am willing to take a case against a doctor or appraiser or insurance agent, then I should equally be willing to take a case against an attorney. I have turned down cases against attorneys before when after my investigation it has revealed the case lacks merit, much like I have turned down cases against doctors, or against other professionals. . . . One of the reasons I took this case and believed it was important to pursue Mr. Wathen and his firm in this matter is because I had talked with other attorneys about his firm’s systematic use of examinations under oath to help insurance companies decline coverage.” *Id.*

represented facts to Ms. Alvarez regarding the requirements of her insurance policies, Washington law and the performance of insurance duties. CP 3, 5-7.

The complaint also alleged that Mr. Wathen and his firm violated the CPA and negligently misrepresented facts to Ms. Alvarez in the letters he sent her before she was represented by counsel. CP 3-7. It alleged that Mr. Wathen and his firm committed these acts while acting “as an investigator and/or provider and/or representative for Allstate in the business of insurance and its investigation.” CP 3. It further alleged that Allstate “engaged Mr. Wathen to conduct the examination under oath as an investigator while simultaneously engaging Mr. Wathen to represent them as an attorney on Ms. Alvarez's claim.” CP 2. It claimed that, as a result of this, “Mr. Wathen owed Allstate a fiduciary duty of loyalty in direct conflict with his duty to Ms. Alvarez,” as the representative of her insurer. CP 4.

The CPA claim against Mr. Wathen and his firm specified several wrongful acts. *First*, it claimed Mr. Wathen conducted an unreasonable investigation, failed to timely process the claim, and violated his obligation under RCW 48.01.030 to act in good faith to insured parties. *See* CP 5. *Second*, it alleged that Mr. Wathen assumed a fiduciary duty of loyalty to Allstate “in direct conflict” with his duties to Ms. Alvarez of good faith, abstention from deception, honesty, and equity. CP 3-4. It said Mr. Wathen “gets much of his business” by “intentionally mixing the fiduciary role of being counsel for an insurance company with the quasi-

fiduciary role” of being an investigator for insurance companies. CP 4. *Third*, it alleged that Mr. Wathen negligently or deceptively misrepresented to Ms. Alvarez key provisions of her insurance policies and his role in the investigation. CP 6.

D. Respondent threatens CR 11 sanctions, and Appellants respond

After a technical amendment, Appellants served an amended complaint on November 24, 2014. CP 9. The next day, Mr. Wathen wrote Ms. Alvarez’s attorneys, threatening to “aggressively” seek sanctions under CR 11, plus separate relief from the Washington State Bar Association, unless Alvarez dismissed her claims against him and his firm. CP 97. Mr. Wathen argued the claims were frivolous under *Manteufel v. Safeco Ins. of Am.*, 117 Wn. App 168, 68 P.3d 1093 (2003). *Id.*

In *Manteufel*, an insured sued Mr. Wathen and another insurance company in Pierce County Superior Court, alleging they had violated the CPA and had acted in bad faith by: (1) the insurer’s directives to Mr. Manteufel to pursue his claim dispute through Mr. Wathen, and (2) Mr. Wathen’s wrongful adjustment of Mr. Manteufel’s claim in place of the insurer. *Manteufel*, 117 Wn. App. at 173. The trial court dismissed Manteufel’s claims on summary judgment, and Division II of the Court of Appeals upheld the dismissal. *Id.* at 174. In so doing, the Division II opinion said in *dictum*—clearly incorrectly, see pages 31-34, below—that

“*Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987) . . . expressly held that Washington law does not allow claims against attorneys under the CPA . . .” *Id.* More accurately, and more to the point of the case before it, the opinion went on to say that *Haberman* “specifically does not allow claims directed at an attorney’s competency or strategy.” *Id.* at 174.

The Court of Appeals in *Manteufel* also upheld the trial court’s award of CR 11 sanctions against the plaintiff’s attorney for frivolously claiming that Mr. Wathen had wrongfully adjusted Manteufel’s claim, because the insurer did not retain Mr. Wathen until *after* it adjusted Manteufel’s claim. *Id.* at 176.

Appellant Marshall Casey promptly wrote back to Mr. Wathen, explaining why they believed their client’s claims against him were not precluded by *Manteufel*:

The focus of our client’s complaint, your duties and breach, arises from your role as an investigator for an insurance company rather than your role as an attorney. . . . [The *Manteufel*] appellate court seems to be relying almost 100% upon *Haberman v. WPPSS* . . . to determine no CPA violation as a matter of law. . . . The complaint in Ms. Alvarez’s case was written with full awareness of that case law. The duty that she claims here is one of good faith and fair dealing under RCW 48.01.030 and not to have unfair or deceiving practices under RCW 19.86.020, which you owed to her as an insurance investigator and part of the business of insurance. . . . It is from your actions in this role, and not the role of an attorney, that the claims

arise. *Manteufel* simply applies to when an attorney is sued for providing legal opinions that could lead to insurance bad faith. ...

The second focus of the unfair practice under the CPA is your taking on a quasi-fiduciary duty to Ms. Alvarez while simultaneously assuming a full fiduciary duty to Allstate as their attorney. While this focus does reflect directly upon your role as an attorney, as noted in *Haberman*, the entrepreneurial aspects of your practice are subject to the CPA and *Haberman* clearly lists fee rates, billing, and client relationships as part of those entrepreneurial aspects. *Haberman*, 109 Wn2d at 169. . . . Specifically, you acquire your clients by promising them a full fiduciary duty as their attorney despite owing their insureds a statutory duty of good faith. [*Shroeder v. Excelsior Mgmt. Group*, 177 Wn.2d 94 n. 3, 297 P.3d 677 (2013)] and *Haberman* support a claim against you for these acts and it is clearly based upon the entrepreneurial aspects of your practice.

As you are aware, only members admitted to the Bar can practice law whereas, by contrast, no special license is required to investigate a claim. It seems that, if we were to interpret *Manteufel* as you do, a Bar license would grant you immunity from CPA claims in investigating insurance claims. This would violate Washington's constitutional prohibitions against special privileges and immunities since your reading of *Manteufel* would imply that a simple Bar membership would grant immunity from responsibility for CPA violations and the duty of good faith imposed upon insurance investigators.

CP 354-56.

Mr. Casey's letter also explained to Mr. Wathen that *Manteufel* did not bar Ms. Alvarez's negligent misrepresentation claim, in part because that litigation did not involve such a claim, and also because more recent case law indicated such a claim was proper. CP 355-56.

E. Appellants consult attorney experts regarding the viability of their client's claims

Nonetheless concerned by Mr. Wathen's demands and threats, Mr. Casey went further and consulted several attorneys with experience and expertise related to the viability of the claims. Those attorneys—Prof. John A. Strait, John Budlong, H. Douglas Spruance III, and J. Gregory Casey, who is Casey's father and former colleague (CP 526)—each told Mr. Casey they believed the claims were viable. Indeed, Mr. Budlong warned Mr. Casey that dropping the claims against Mr. Wathen could prejudice his client. *See* CP 531-34.

Prof. Strait—an associate professor at Seattle University School of Law who teaches legal ethics and legal malpractice who has been a licensed lawyer for more than 40 years (CP 611-13)—consulted by phone with Mr. Casey for about an hour in December 2014, discussing Ms. Alvarez's claims against Mr. Wathen and his firm and reviewing the materials and pleadings. CP 614-15. In a declaration filed below,⁵ Prof. Strait testified he, “advised Mr. Casey that the complaint was certainly not frivolous within the meaning of RPC 3.1, not within the meaning of CR 11

⁵ The trial court granted a motion to strike Prof. Strait's declaration, along with Mr. Casey's own Third Declaration submitted in reply to the defendants arguments opposing reconsideration. CP 755-57. The motion to strike cited no rule but argued that the submission of these reply materials “interject new and additional information which was clearly available to him during the first hearing and available to him at the filing of the original Motion for Reconsideration.” CP 689. The trial court's order, which was written by defense counsel, similarly cited no rule but said “The information in both subject declarations pertained to the same issues raised at the time of the original Motion for Summary Judgment and sanctions, and should have been submitted, at latest, with the original moving papers for the Motion for Reconsideration.” CP 756.

under the Washington Rules of Civil Procedure, but as with all relatively novel complaints, it was by no means certain that he would prevail.” CP 615.⁶ Prof. Strait also testified, “It was quite clear in this discussion that Mr. Casey was thoughtful, prepared to abandon his legal theory if it was, in my opinion, not viable, and that he had sought the opinion of others qualified in insurance law, insurance litigation and had done substantial legal research in support of his theories.” CP 616. Prof. Strait concluded that, in his opinion Mr. Casey performed

sufficient inquiry to comply with CR 11. His legal theory and initial, factual investigation subject to discovery (which has still not been allowed to be completed), is the type of extension of current law which is inappropriate to sanction in light of the recognition of Washington Supreme Court in comments 1 and 2 to RPC 3.1 of the potential risk and undesirable chilling which limits full and complete representation of a client.

CP 616.

Mr. Budlong—an award-winning attorney with more than 30 years of experience who had handled many personal injury, product liability, and insurance bad faith trials and appeals in Washington (CP 530)—similarly testified in a declaration:

I advised Mr. Casey on January 8, 2015 that I believed his client had a viable cause of action against both the [examination under oath, “EUO”] attorney, [Mr. Wathen,] and the insurer under *Jones v. Allstate, supra*, and *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013). I also advised Mr. Casey

⁶ Prof. Strait also says he advised Mr. Casey “that it was likely that CWLH would aggressively defend since the viable theories Mr. Casey was asserting would obviously have a substantial impact on the economics and income of some or all of the Allstate business that the firm undertook.” *Id.*

that if he dismissed the claims against the EUO attorney, his client could be prejudiced by an empty chair defense in which the insurer could reduce its own liability share by apportioning fault against the EUO attorney. . . . After discussing the matter with Mr. Casey, I believe he at a minimum had a good faith argument for the extension, modification, or reversal of existing law or establishment of law Indeed, I think he owed a legal duty to his client to do what he could to avoid an ‘empty chair’ defense.

CP 531-33.

Gregory Casey, Appellant Casey’s father, is a past board member of the Washington State Association for Justice who has presented at multiple seminars including presentations about insurance bad faith and insurance laws. CP 525-26. The senior Mr. Casey opined in his declaration that Ms. Alvarez’s attorneys had a factual and legal basis for pursuing the case against Mr. Wathen and his firm. CP 525-27. Based on more than four decades of experience, he testified:

In my years of practice I have participated in writing and teaching on insurance law in seminars, litigating it, and watching it grow. I am familiar with how it has developed over time. . . . I have also observed how our courts have distinguished the actions of attorneys in insurance from their legitimate actions as attorneys. In my opinion, our courts have been moving in direction of not allowing attorneys to hide behind their bar license to protect other activities they do outside the practice of law for insurance companies.

CP 527.

Finally, Mr. Casey consulted H. Douglas Spruance III, an attorney licensed in Washington since 1993. Spruance testified in a declaration: “We had a significant discussion on the matter, and after interviewing Mr. Casey on the matter, I was not concerned with the claim failing for lacking

any legal basis under Washington law. Whether the claim would ultimately prevail is always an issue, but it did not appear to me to be specious or invalid under the law he cited to me.” CP 523-24.

F. Respondent moves for summary judgment of dismissal and CR 11 sanctions on legal grounds, Appellants respond and Respondent raises new arguments in reply

Respondents Wathen and CWLH moved on January 23, 2015, for dismissal of the claims against them on summary judgment and for sanctions under CR 11. CP 258-80. They argued sanctions were because: (1) Washington law generally bars CPA claims against attorneys; and (2) no viable cause of action existed against Respondents’ firm because there was no contractual relationship between Ms. Alvarez and those attorneys. CP 266, 277.

Appellant’s attorneys countered on Ms. Alvarez’s behalf that summary judgment and sanctions were not warranted, and they requested, in the alternative, a continuance to allow for further discovery related to the claims of negligent misrepresentation. CP 301-25. Appellants reiterated the CR 11 standard under Washington law that, “[a]s long as the pleadings are grounded in fact and supported by either existing law or a good faith argument for the change of existing law, the pleadings are not

the proper subject of CR 11 sanctions.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992) (en banc).⁷

In their Reply brief, Respondents Wathen and his firm raised numerous additional issues challenging whether Ms. Alvarez could establish essential elements to her claims. CP 459-60, 464. They asserted that Ms. Alvarez could not establish causation and damages, as required for her CPA claim. CP 459-60, 465. They also asserted that Ms. Alvarez could not establish justifiable reliance, proximate cause, damage, or input on a business transaction to support her negligent misrepresentation claim. CP 464.⁸

Appellants moved to strike from Respondents’ Reply brief the new issues raised therein, including Respondents’ arguments that Appellants could not show causation, damages, or justifiable reliance. Appellants

⁷ Appellants also moved to strike an exhibit to the summary judgment motion: a letter from the WSBA Office of Disciplinary Counsel regarding its dismissal of an investigation into Mr. Wathen’s allegations against Ms. Labourr. See CP 244-46. Appellants argued the letter was improper and inadmissible as an exhibit because: (1) its author renders an opinion on legal duties; (2) it is inadmissible as an unsworn declaration; (3) its author is not competent under ER 702 to testify as an expert, nor competent under ER 602 to testify as a lay witness; and (4) the letter is based upon inadmissible hearsay. CP 323-24.

⁸ Respondents also argued in their Reply that the WSBA letter was a permissible exhibit because: (1) the author’s position as a disciplinary counsel for the WSBA “presumably” qualifies her as a witness; (2) the letter constitutes an administrative decision, and such documents are “routinely cited”; and (3) the letter contains factual evidence regarding the “ulterior motive of Plaintiff’s counsel” CP 460.

argued Respondents had belatedly and improperly raised those issues for the first time in the Reply. CP 482-86. Respondents said: “[T]he law is clear that a party is not allowed to sandbag its initial motion and then raise new issues in the reply.” CP 486. Respondents submitted a short response to Appellants’ motion to strike, denying the briefing was improper. CP 501-02.

Appellants’ motion to strike those portions of Respondents’ Reply brief was noted for hearing on February 20, 2015, along with the summary judgment motion.

G. The trial court ignores Appellants’ procedural objections, dismisses the claims against Respondents on summary judgment and imposes sanctions

At the February 20, 2015, summary judgment hearing the trial judge allowed each side about 15 minutes to argue its case and respond to her questions. CP 694. Without ruling on the motion to strike Respondents’ late-made arguments, the court dismissed the claims against Respondents Wathen and CWLH and imposed CR 11 sanctions against all four attorneys for Ms. Alvarez.⁹ “This case doesn’t have any basis in the law for the claims made here against counsel. But worse, from my point of view, is it has no basis in the facts, either” CP 726.

⁹ Nor did the court hear the Appellants’ motion to strike the WSBA letter from Respondents’ exhibits to their summary judgment motion. CP 693-730. However, the court apparently rejected that motion because its order cites that exhibit as being among the evidence considered. CP 771

The court did not provide specific findings of fact underlying the decision to impose sanctions. Nor did it discuss whether Appellants had reasonably inquired into Ms. Alvarez’s claims against Mr. Wathen or CWLH before—or after—filing the lawsuit. CP 693-730.

During the argument, the court had confirmed that CPA claims may be brought against attorneys, but said the claims were baseless here. “I agree with you that there are lawyers out there—and they’re reflected in the published cases that we have—who have abandoned their basic duties to be honorable and truthful in their dealings with the public, and that has given rise to CPA claims. But this is not the norm.” CP 723. But the court said it was dismissing on the ground the claims were based on Allstate’s conduct. “If you could bring a cause of action against an attorney who represents an insurance company because you think the insurance company has acted in bad faith toward your client, we would have reams of case law supporting this theory. ... There is nothing in the CPA that gives you the basis to sue opposing counsel because you think that the insurance company they represent has, in bad faith, denied your claim.” CP 723-24.

The trial court simultaneously imposed sanctions against the Appellants “for the reasonable amount of attorney’s fees expended by counsel and his firm defending this suit, from the time that counsel put

you on notice to today.” CP 729. She also directed Respondents to report Appellants to the WSBA alleging violations of the Rules of Professional Conduct. CP 729.

When the court finished, Appellant Casey asked to respond, but the judge denied the request:

MR. CASEY: May I, your Honor?

THE COURT: No. That’s as far as I’m pursuing that issue. . . .We’re in recess, folks.

MR. CASEY: Your Honor –

COURT: We’re done.

CP 769.

The written order dismissing the claims against Respondents stated simply: “Plaintiff’s cause of action against Wathen and Cole Wathen Leid & Hall are (sic) not grounded in existing law or fact. The filing of suit against these two Defendants was frivolous and in violation of CR 11.” CP 771-72. The order did not provide findings of fact explaining the sanctions decision or an analysis of whether Appellants reasonably inquired into the viability of the claims. *Id.*

H. The trial court rejects Appellants’ motion for reconsideration

Appellants timely moved the court to reconsider the decision to impose CR11 sanctions. CP 510-22. The argued the claims had a good

faith basis in law, or a good faith argument for extension of the law, and were supported by a factual basis—plus a belief that discovery would reveal those facts. CP 510-22. They again informed the court that they conducted a reasonable investigation of their theories before and after she filed her complaint. CP 521. They included declarations from three of the attorneys with whom they had consulted about the claims against Respondent: Gregory Casey, John Budlong and H. Douglas Spruance III.

After Respondents submitted an opposition brief arguing Appellants did not qualify for reconsideration under the rules, (CP 591-602), Appellants submitted a Reply accompanied by a declaration from Prof. Strait. The trial court granted a motion by the Respondents to strike Prof. Strait's declaration. CP 755-57. The motion to strike cited no rule but argued that the submission of these Reply materials "interject new and additional information which was clearly available to him during the first hearing and available to him at the filing of the original Motion for Reconsideration." CP 689. The trial court's order, which was written by defense counsel, similarly cited no rule but said, "The information in both subject declarations pertained to the same issues raised at the time of the original Motion for Summary Judgment and sanctions, and should have been submitted, at latest, with the original moving papers for the Motion

for Reconsideration.” CP 756. The court denied Appellants’ Motion for Reconsideration. CP 747.

I. Appellants withdraw as counsel, and their clients’ case is dismissed

Appellants then withdrew as counsel. CP 802-07. Ms. Alvarez’s remaining claims against Allstate were eventually dismissed (CP 865-66), after which the trial court set the amount of CR 11 sanctions at \$14,445. CP 929-31. The amount of the sanction was based on the time Mr. Wathen said he expended on the claim against him and his firm after he wrote the letter demanding those claims be dismissed. See CP 816-21, 878-83, 917-19. Appellants timely filed a notice of appeal from the sanctions order on January 14, 2016. CP 923-24.

V. ARGUMENT

A. Standard of Review

A trial court’s decision whether to impose sanctions under CR 11 is reviewed for an abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994). Abuse of discretion occurs when an order is manifestly unreasonable or based upon untenable grounds. *Watson v. Maier*, 64 Wn. App. 889, 896, 827 P.2d 311 (1992).

B. Appellants' Conduct was not Sanctionable but was a Good Faith Argument for Extension of the Law in A Developing Area

The trial court sanctioned Appellants for suing an opposing lawyer, ignoring the fact that the Supreme Court of our state had held that the function the defendant lawyer was performing is not part of an attorney client relationship. It also ignored the fact that this Court has held lawyers *may* be sued for this very kind of misconduct, and that the lawyers Appellants sued were not opposing counsel when they sued them. CR 11 sanctions cannot properly be imposed against such good faith arguments for extension of the law.

1. Civil Rule 11 allows for sanctions in exceptional cases to deter abuse of the judicial system—not to punish novel or uphill legal theories

Sanctions under CR 11 are not appropriate merely because a claim is proved factually deficient or a party's view of the law is incorrect. *Roerber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 142, 64 P.3d 691 (2003). To avoid being swayed by the benefit of hindsight, a trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004) (even though plaintiff's claim was dismissed, trial court properly denied defendant's request for attorney's fees under CR 11). CR 11 is not intended to chill an attorney's enthusiasm or creativity in pursuing novel legal theories. *Bryant*, 119 Wn.2d at 219.

Moreover, since Washington is a notice pleading state, a court should be reluctant to impose sanctions for factual errors or deficiencies in a

complaint before there is an opportunity for discovery. *Bryant*, 119 Wn.2d at 222.

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 produce 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 (9th Cir.1990).

Instead, a plaintiff's complaint might warrant CR 11 sanctions if several conditions are met: (1) the action is not well grounded in fact; (2) it is not warranted by existing law; and (3) the attorney signing the pleading has failed to conduct reasonable inquiry into the factual or legal basis of the action. *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 341, 798 P.2d 1155 (1990). A filing is "baseless" when it is not well grounded in fact, or not warranted by existing law or 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). The party seeking CR 11 sanctions bears the burden to prove they are appropriate. *Biggs*, 124 Wn.2d at 202.

Even if a complaint lacks a factual or legal basis, "the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim." *Bryant*, 119 Wn.2d at 220 (internal

citation omitted). Whether or not an attorney's investigation is reasonable is evaluated by an objective standard of what a reasonable attorney would do. *Roeber*, 116 Wn. App. at 220. The appropriate level of investigation depends on what was reasonable to believe at the time the pleading, motion, or legal memorandum was submitted. *Biggs*, 124 Wn.2d at 197. The factors governing sanctions decisions include: (a) the time available to the signer; (b) the extent of the attorney's reliance on others, including the client, for factual support; (c) whether the signing attorney accepted the case from a forwarding attorney; (d) the complexity of the factual and legal issues; (e) the need for discovery to develop factual circumstances underlying the claim; and (f) the plausibility of the claim. *Miller v. Badgley*, 51 Wn. App. 285, 301-02, 753 P.2d 530 (1988).

The trial court must also specify in the record the specific filings that violate CR 11. *MacDonald*, 80 Wn. App. at 892.

Here, the trial court far fell short of meeting these standards. Most importantly, the trial court erroneously held that sanctions were warranted even though Appellants were correct on both legal points challenged in the sanctions motion and their client's claims against Respondents had a sound legal basis.

2. Ms. Alvarez' claims against Respondents had a good faith basis in law and fact

Defendants Wathen and CWLH's bases for summary judgment and CR 11 sanctions were that: (1) the CPA did not apply to them as attorneys (CP 264), and (2) they had no contractual relationship with the

Ms. Alvarez (CP 268). Neither point is sufficiently clear to justify sanctions; in fact, both points are wrong.

a. Attorneys are not categorically immune from CPA claims

Defendants Wathen and CWLH based their assertion that Ms. Alvarez's CPA claim against them was frivolous on a theory that lawyers are immune from such claims. CP 97. Their argument was broadly stated: "a party cannot file suit against the opposing party's attorney for violations of the Consumer Protection Act 'The clear law of this state' prohibits the very cause of action filed by plaintiff in this matter." CP 263. That argument misstated both the case law and Ms. Alvarez's claim.

It misstated the claim because Mr. Wathen was not "the opposing party's attorney" when Ms. Alvarez's lawsuit was filed. Prior to the filing, Mr. Wathen had not appeared in any lawsuit or legal action on Allstate's behalf, because no such lawsuit existed. All Mr. Wathen had done up to that point was investigate Ms. Alvarez's claim and examine her under oath.¹⁰ As noted above, in *Cedell v. Farmers Insurance* the Supreme Court held that lawyers hired to perform such quasi-fiduciary functions on behalf of an insurance company are not acting as attorneys whose work product and communications are covered by the attorney

¹⁰ In contrast, in *Manteufel*, the Division II case Respondents rely on, the plaintiffs "sued SAFECO [and] ... later joined SAFECO's attorney" as a defendant. 117 Wn. App. at 172 (emphasis added).

client privilege. 176 Wn.2d at 700. To the extent the Respondent's argument, and the trial court's concern, arose from the spectre of attorneys suing their opposing counsel to disqualify them or invade their attorney/client relations, *see Jeckle v. Crotty*, 120 Wn. App. 374, 384-85, 85 P.3d 931 (2004), that concern was not relevant here.

More fundamentally, Mr. Wathen's argument misstated the law because it is far from "the clear law of this state" that attorneys who act as insurance investigators cannot be sued for violations of the CPA. Although the Division II *Manteufel* decision at one point said "*Haberman v. Washington Public Power Supply System*, 109 Wash.2d 107, 744 P.2d 1032 (1987) ... expressly held that Washington law does not allow claims against attorneys under the CPA," *Manteufel* 117 Wn. App. at 174, that was plainly *dictum* and was equally plainly incorrect. *Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984) expressly rejected the argument that attorneys are immune from CPA lawsuits and held that the entrepreneurial aspects of an attorney's practice can subject them to liability under the CPA. ("[L]awyers may be subject to liability under the CPA." *Short*, 103 Wn.2d at 65). *Haberman* did not say otherwise, but simply held that the CPA is inapplicable to claims directed at the competence and strategy of attorneys acting within the scope of their legal practice. 109 Wn.2d at 109. The Supreme Court has never overruled

Short, and has continued to follow it in and after *Haberman*. See, e.g., *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 603, 200 P.3d 695 (2009) (“The question is whether the claim involves entrepreneurial aspects of the practice or mere negligence claims, which are exempt from the CPA.”)

It was in deference to *Haberman* that Appellants did not make any claims based on Allstate’s reasons for denying coverage on behalf of their clients. See CP 3-6, 536. Instead, they limited the bases of Ms. Alvarez’s claims against Respondents to: (1) Mr. Wathen’s statements to her prior to her engagement of separate counsel, (2) Mr. Wathen’s investigation of the insurance claims; and (3) Mr. Wathen’s entrepreneurial business practices related to obtaining insurers as clients. See CP 3-6. Doing so, the Complaint focused on Mr. Wathen’s entrepreneurial conduct, as allowed by *Short*, and his insurance claim investigation, which *Cedell*, 176 Wn.2d at 701, defines as the business of insurance rather than law. In contrast, the plaintiff in *Manteufel* made no claim implicating the lawyers’ entrepreneurial actions, and did not limit his complaint to the kinds of investigative activities that are commonly the business of insurance investigation. See *Manteufel*, 117 Wn. App. at 171-73. Instead, Mr.

Manteufel claimed the defendant attorney “had wrongfully adjusted the claim in place of the insurer.” *Id* at 172.¹¹

Division II’s broad *dictum* from *Manteufel* about lawyers’ immunity from CPA claims, which Respondents’ sanction arguments relied on, was plainly inconsistent with the law established and followed by the Supreme and this Court. That law makes the activity in which the attorney engages, rather than his or her status as a lawyer, determine whether a claim can lie under the CPA. *Short*, 103 Wn.2d at 61. As this Court has put it, “The fact [a defendant] ... is a lawyer does not give him an exemption from the Consumer Protection Act when he goes outside the practice of law and engages in a commercial enterprise.” *Styrk v. Cornerstone Investments, Inc.*, 61 Wn. App. 463, 471, 810 P.2d 1366 (1991). That law is consistent with the decisions of other courts which have looked to the actions performed, not an attorney’s status, even with regard to attorneys’ liability for actions taken during in anticipation of litigation. *See, e.g., Kalina v. Fletcher*, 522 U.S. 118, 119, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) (Washington prosecutor subject to liability for

¹¹ The court in *Manteufel* did not say it was forbidden, or frivolous, to sue a lawyer for “wrongfully adjusting” an insurance claim. Instead, the court found that it was frivolous for Mr. Manteufel to argue that the lawyer adjusted the claim improperly when that was factually impossible because the claim had already been adjusted before the lawyer was hired. *Id.* at 176. Mr. Wathen, who was counsel in *Manteufel*, was thus in error when he told the trial court that in that case, “our court stated, in awarding CR 11 sanctions ... the CPA causes of action are simply not available against your opposing party.” CP 826.

civil rights violations caused by her actions as a complaining witness rather than as an advocate).

Applying just such an analysis, this Court has held that lawyers can be liable under the CPA where they “act[] outside the scope of the normal and traditional role of an attorney representing a client,” and “participat[e] in and manag[e] the wrongful and bad faith conduct as agents of” an insurance company. *Gould v. Mut. Life Ins. Co. of New York*, 37 Wn. App. 756, 760, 683 P.2d 207 (1984). The Division II *Manteufel* decision said *Haberman* overruled *Gould*, *Manteufel*, 117 Wn. App. at 174, and this Court in *dictum* has acknowledged that statement, see *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 758, 87 P.3d 774 (2004). But in fact *Haberman* never mentions *Gould*, and the holdings of those cases are fully compatible. *Compare Haberman*, 109 Wn. 2d at 169 (“[c]laims ‘directed to the competence of and strategy employed’ by attorneys ... are not actionable under the CPA.” [quoting *Short*, at 61]), with *Gould*, 37 Wn. App. at 760 (claims an attorney “acted outside the scope of the normal and traditional role of an attorney representing a client” can be brought under the CPA). Moreover, neither case involved conduct which lies categorically outside the attorney client relationship, as the Washington Supreme Court later held in *Cedell* the Respondents’ conduct did.

If Mr. Wathen was not an attorney, but instead an investigator who contracted with insurance companies, there would be no question that he was individually subject to a CPA claim by a person injured by misconduct in that role. Ms. Alvarez’s counsel reasonably believe that Mr. Wathen’s status as a lawyer does not change the CPA analysis. The trial court erred in accepting Respondent’s argument to the contrary. There was clearly a legitimate, good faith basis that these claims were “warranted by existing law or good faith argument for the extensions, modification, or reversal of existing law or establishment of new law.” CR 11(a)(2).

b. Ms. Alvarez made a viable CPA claim against the Respondent Attorneys.

Respondents’ second summary judgment argument was that Ms. Alvarez’s claims were frivolous because Ms. Alvarez had no contractual relationship with Respondents. CP 266, 268. However, as both Mr. Wathen and the trial court recognized during the summary judgment hearing, contractual privity is not element of a CPA claim. *See Panag v. Farmers Ins.*, 166 Wn.2d 27, 38, 204 P.3d 885 (2009).¹² But while acknowledging his original argument failed, Mr. Wathen asserted a new, eleventh hour basis for sanctions.

¹² *Panag* overruled this aspect of *Int’l Ultimate, Inc.*, which was premised on the idea that a contractual relationship is an essential element of a CPA claim. See 122 Wn. App. at, 758,

THE COURT: You do agree with the defendant, I assume, that under *Panag*, you don't have to have a direct contractual relationship for a CPA claim?

MR . WATHEN: I would agree that, in general terms, that is the case, your Honor; however, it still requires proximate cause and evidence of damage to business or property, under *Hangman Ridge*.

CP 696.

The trial court's acknowledgement, and Mr. Wathen's concession, that the second stated basis for his sanctions motion failed under *Panag* should have been the end of the matter. It meant both the arguments on which the summary judgment and sanctions motions were brought were wrong. But the trial court allowed Mr. Wathen to change the subject and make new and additional arguments in support of his motions, arguments raised for the first time in reply—improperly, we respectfully submit. See pages 41-42, below. But even if those arguments had been properly before the trial court, they should have been rejected.

To prevail in a CPA claim, “the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.” *Panag*, 166 Wn.2d at 38 (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784 P.2d 531 (1986)).

Ms. Alvarez’s Complaint against Respondents alleged that, acting as an insurance claim investigator, Mr. Wathen violated his obligation to act in good faith to insured parties. CP 3-4; *see* RCW 48.01.030. It specifically claimed that he failed to contact witnesses who could verify Ms. Alvarez’s claims, misrepresented her obligations under her policies, and failed to effectively communicate what records he needed to process the claim. *Id.* It also alleged that Mr. Wathen improperly and “intentionally mix[ed] the fiduciary role of being counsel for an insurance company with the quasi-fiduciary role of being an investigator and/or provider and/or representative for insurance companies when investigating claims.” CP 4-5. It claimed Mr. Wathen and his firm obtain clients by advertising their experience in this dual role and by implying an ability to assist in denying claims. It also alleged Mr. Wathen misrepresented and deceived Ms. Alvarez regarding his status and her obligations as an insured, which it claimed was actionable as both a CPA violation and negligent misrepresentation, based on Mr. Wathen’s quasi-fiduciary duties to her. CP 4-5. It further alleged knowledge of the misrepresentation, reasonable reliance and harm. CP 6.

Accordingly, Ms. Alvarez plainly met the pleading requirements to establish that the actions at issue here were conducted in the context of trade or commerce; insurance is in the public interest, and the claims at

issue effect the public interest; and Ms. Alvarez's economic, property, and business interests were harmed by the unfair practices. Moreover, Ms. Alvarez's counsel reasonably have believed discovery would lead to more evidence on this point and sent Allstate requests for production to obtain that information.

The same is true for Ms. Alvarez's negligent misrepresentation claim. To prove negligent misrepresentation, "a plaintiff must show that the defendant negligently supplied false information the defendant knew, or should have known, would guide the plaintiff in making a business decision, and that the plaintiff justifiably relied on the false information. In addition, the plaintiff must show that the false information was the proximate cause of the claimed damages." *Van Dinter v. Orr*, 157 Wn.2d 329, 333, 138 P.3d 608 (2006). Washington courts have held attorneys liable for communications to third parties under the doctrine of negligent misrepresentation. *Lawyers Title In s. Corp. v. Baik*, 147 Wn.2d 536, 549, 55 P.3d 619 (2002); *Haberman*, 109 Wn.2d at 163-164.

The trial court at one point indicated that it was dismissing the claims and imposing sanctions because Mr. Wathen and his firm cannot be held liable for *Allstate's* conduct:

If you could bring a cause of action against an attorney who represents an insurance company *because you think the insurance company has acted in bad faith* toward your client, we would have

reams of case law supporting this theory. . . . There is nothing in the CPA that gives you the basis to sue opposing counsel *because you think that the insurance company they represent has, in bad faith, denied your claim.*

CP 723-24 (emphases added). However, Ms. Alvarez's allegations were quite clearly made against Mr. Wathen and his law firm based on *his* conduct, *not* that of Allstate:

Mr. Wathen's actions as an investigator and/or provider and/or representative for Allstate . . . combined with his actions as counsel for Allstate constituted an unfair or deceptive practice. . . . Mr. Wathen gets much of his business by intentionally mixing the fiduciary role of being counsel for an insurance company with the quasi-fiduciary role of being an investigator and/or provider and/or representative for insurance companies when investigating claims. . . . [And] Mr. Wathen conducted an unreasonable investigation for Allstate, misrepresented key policy provisions to Ms. Alvarez, refused to cooperate in the duty of good faith to timely process the claim, and misrepresented his role to Ms. Alvarez; all of these being unfair and deceptive acts under the laws of Washington.

CP 11-13.

In sum, neither on the basis of the arguments Respondent originally made, nor on the basis of those they were permitted to belatedly come up with, nor on the basis on which the trial court apparently ruled, could the claims Appellants made on Ms. Alvarez's behalf properly be held frivolous or violative of CR 11. They were the very kind of novel legal contentions, based on shifting and emerging developments in the law, which the rules are supposed to encourage. They should not have been sanctioned.

C. The procedure by which the trial court entered its sanctions order was erroneous and unfair

The trial court's erroneous conclusion that Appellants' client's claims were sanctionable was also a result of procedural error.

1. Appellants were not given fair notice of the alleged violations

Before being sanctioned by a court, lawyers like anyone else are entitled to fair notice of what they have done that is allegedly wrongful, and a fair opportunity to explain their actions. *Bryant*, 119 Wn. 2d at 224. Appellants were not provided this. Instead, the trial court based its sanctions order in large part on arguments that the Respondent attorneys raised only in a reply memorandum, which Appellants had no fair opportunity to answer. It ignored Appellants' motion to strike those newly raised arguments, cut off oral argument when Appellants' counsel tried to respond, and refused to give any weight to (and wrongly struck) expert declarations showing that Appellant's legal position was viable and had been thoroughly investigated before they proceeded with it.

As noted above, Respondent's summary judgment and sanctions motions were expressly based on two arguments, which it specified: that the CPA did not apply to them as attorneys, and that they had no contractual relationship with the Ms. Alvarez. CP 264, CP 268. When Appellants filed a response that showed Respondents were wrong on both points, Respondents added a slew of new arguments, claiming victory because they said Appellants had not produce evidence to support each and every element of their client's claims. CP 458-66.

Appellants moved to strike these newly added arguments, but the trial court ignored their motion. That was error.

It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. It is for this reason that, in the analogous area of appellate review, the rule is well settled that the court will not consider issues raised for the first time in a reply brief. E.g., *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); *Stevens v. Security Pac. Mortgage Corp.*, 53 Wn. App. 507, 519, 768 P.2d 1007, review denied, 112 Wash.2d 1023 (1989); *State v. Manthie*, 39 Wn.App. 815, 826 n. 1, 696 P.2d 33, review denied, 103 Wn.2d 1042 (1985); RAP 10.3(c).

Moreover, nothing in CR 56(c), which governs proceedings on a motion for summary judgment, permits the party seeking summary judgment to raise issues at any time other than in its motion and opening memorandum.

White v. Kent Medical Center, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991).

CR 11 procedures “obviously must comport with due process requirements.” Fed.R.Civ.P. 11 advisory committee note, 97 F.D.R. at 201. Due process requires notice and an opportunity to be heard before a governmental deprivation of a property interest. *Tom Growney Equip., Inc. v. Shelley Irrig. Dev., Inc.*, 834 F.2d 833, 835 (9th Cir.1987) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971)). A party seeking CR 11 sanctions should therefore give notice to the court and the offending party promptly upon discovering a basis for doing so.

Bryant, 119 Wn. 2d at 224.

Appellants were given notice by Mr. Wathen that he would argue their claims against him and his firm were indisputably barred by *Manteufel*. CP 97-98. They considered his submission and researched the law and concluded—correctly, we submit—that, he was wrong. See CP

354-56; pages 15-16, above. Mr. Wathen then moved for summary judgment and sanctions based on two legal propositions that he argued were dispositive of Ms. Alvarez's claims. CP 258-80. Appellants briefed the issue and showed he was wrong on those points as well. See pages 30-39, above. But when Mr. Wathen conceded that in open court, he was nonetheless allowed to argue generally, in support of his motions, that Ms. Alvarez's claims had no basis in law or fact and should be dismissed and her lawyers should be sanctioned for failing to produce evidence supporting each and every element of those claims. See CP 696. Even though Appellants objected, and virtually no discovery had been conducted, the trial court apparently accepted this. CP 726, 29. That was unfair. The sanctions motion should have been decided on the basis on which it was made.

2. The trial court improperly refused to consider the evidence showing that Appellants made a reasonable inquiry into the validity of their client's claims against Respondents

So too was it error for the trial court to disregard Appellants' representations that they had adequately researched the law before proceeding. See CP 535-41. Having allowed Respondents to change and expand the scope of their motion, and having cut off Appellants' requests to answer it (CP 769), it was a further abuse of discretion for the trial court to refuse to reconsider its ruling when Appellants produced declarations from attorney-experts confirming the adequacy of their investigation and the viability of their arguments. See *Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554 (1990) (abuse of discretion to refuse to consider

evidence on reconsideration that party was reasonably unable to produce in opposition to summary judgment).

The declarations Appellants submitted showed that they had made the inquiry CR 11 requires, and that their positions had a reasonable basis in developing law, according to lawyers with unchallenged expertise in the field. See pages 17-20, above. Respondent argued the Court should disregard the declarations because such expert opinion was inadmissible under *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 17 858 P.2d 1054 (1993), and because they showed only that Appellants' made inquiry after their claims were filed and challenged by the Respondents. CP 592. But *Fisons* held only that "[l]egal opinions on the ultimate legal issue before the court are not properly considered under the guise of expert testimony," 122 Wn. 2d at 344. The issue on a CR 11 sanction is not whether a claim is not just whether a claim is "warranted by existing law" but also whether it is based on "a good faith argument for the extension, modification, or reversal of existing law or the establishing of new law." CR 11. "[G]ood faith is typically understood as a question of fact." *Riley-Hordky v. Bethel Sch. Dist.*, 187 Wn. App. 748, 759, 350 P.3d 681 (2015) (citing *Marthaller v. King County Hosp. Dist. No. 2*, 94 Wn. App. 911, 916, 973 P.2d 1098 (1999)).

Respondents' other argument—that the expert declarations were irrelevant because they involved inquiries by Appellants after Ms. Alvarez's lawsuit was filed—forgot the basis of its sanction motion. The

motion sought, and the trial court imposed, sanctions in the form of fees incurred after the Appellants refused to dismiss the claims in response to Mr. Wathen's challenge. See CP 729. The declarations showed that Appellants took that challenge seriously, and consulted experts to make sure their legal analysis was valid, before Respondents incurred the fees and costs for which they sought reimbursement. The declarations were not the only evidence of such an inquiry—Appellants separately demonstrated they had done their research before filing the lawsuits in declarations of their own (and in the letter they wrote to Mr. Wathen explaining their position, just a day after he challenged it. CP 354-56, 535-36.

The trial court should have considered those declarations—including the declaration of Prof. Strait, which Appellants explained responded to arguments raised for the first time in Respondents' opposition to reconsideration. CP 737. The trial court order striking Prof. Strait's declaration said the opposite—that Prof. Strait's declaration “pertained to the same issues raised at the time of the original Motion for Summary Judgment and sanctions, and should have been submitted, at latest, with the original moving papers for the Motion for Reconsideration.” CP 756. But if that was correct, it was not a valid reason to categorically reject the evidence. As noted above, it is submissions raising *new* issues in reply, not additional support for previously raised arguments that the rules, and fairness, generally forbid. See page 41-42, above.

3. The trial court failed to enter findings identifying the actions or arguments it found to be violations of CR 11.

An order imposing CR 11 sanctions must specify the offending conduct, explain the basis for the sanction imposed, and quantify any amounts awarded. “The trial court must also specify in the record the specific filings that violate CR 11.” *MacDonald*, 80 Wn. App. at 892. The “court must make a sufficient record to enable the appellate court to conduct a proper review.” *Rinehart*, 59 Wn. App. at 342.

Here, the trial court offered only conclusory statements: “Plaintiff’s cause of action against Wathen and Cole Wathen Leid & Hall are (sic) not grounded in existing law or fact. The filing of suit against these two Defendants was frivolous and in violation of CR 11.” CP 771-72. Such a cursory ruling falls does not provide a sufficient record for review.

One thing that is plain, however, is that the trial court did not discuss or make findings regarding whether Appellants reasonably inquired into the validity of the challenged claims. Such an analysis is required before imposing CR 11 sanctions. *Bryant*, 119 Wn.2d at 220.

[I]t is essential that the court inform itself and make findings as to the inquiry undertaken by the nonmoving party. The court’s focus should begin with the language of the rule itself and center on the attorney’s: ‘knowledge, information, and belief, formed after reasonable inquiry ...’ CR 11.

Doe v. Spokane & Inland Empire Blood Bank, 55 Wn. App. 106, 111, 780 P.2d 853 (1989). As in *Doe*, “the record in the instant case is silent as to what pre-filing inquiry was undertaken by respondent’s attorney. Without relevant findings in this regard, there can be no objective evaluation of the

reasonableness of the attorney's pre-filing conduct." *Id.* at 111-12. The trial court judge never discussed—in either her oral or written orders—the pre-filing inquiry conducted by Ms. Alvarez's team of lawyers. On that ground, too, it the sanctions cannot stand.

CONCLUSION

The order of sanctions should be reversed.

DATED this 31st day of May, 2016.

Respectfully submitted,

MacDONALD HOAGUE & BAYLESS

By 

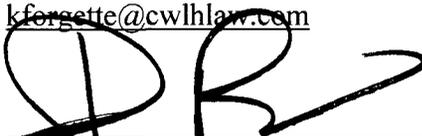
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 31st day of May, 2016, I served a copy of the foregoing via first class mail upon:

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