

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.

REPLY BRIEF OF APPELLANTS

TIMOTHY K. FORD, WSBA #5986
ANGELA C. GALLOWAY, WSBA #45330
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604

ATTORNEYS FOR APPELLANTS

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2016 SEP -8 AM 11:38

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents cannot reconcile their erroneous argument that attorneys are categorically shielded from Consumer Protect Act claims with the law, as evidenced by both Appellants' briefing and the trial court's own analysis. Instead, Respondents significantly misstate the factual and procedural background of the case, attempting to impugn Appellants with irrelevant aspersions about their client and mischaracterizations of the procedural and factual background of this case. Respondents do not dispute the fact the trial court made numerous dispositive procedural errors in awarding sanctions against Appellants, and they fail to offer meaningful rebuttal to Appellant's legal analysis.

For the reasons stated below and in their opening brief, Appellants respectfully request that the Court reverse and vacate the superior court's order of sanctions.

II. FACTUAL BACKGROUND

Respondents' Brief takes misleading liberties in describing the background of this dispute, suggesting certain factual allegations were established in the lower court by describing the facts as if a judge or jury had decided them. Resp. Br. at 1-9. But that was not the case. This matter comes before the Court on appeal from an order granting Respondents' motion for sanctions under Civil Rule 11 without benefit of any discovery, and without any factual findings.

Respondents had argued in their motions that dismissal and sanctions were warranted because lawyers are categorically immune from claims under the Washington Consumer Protection Act. See CP 264-69. Seeking to cast Appellants' client in a negative and incredible light, Respondents' brief describes at considerable length its untested account of the factual background of the insurance dispute that ultimately led to this litigation. Resp. Br. 3-9. But the parties did not litigate – or even conduct meaningful discovery into – the propriety or viability of the specific insurance claims that led to this lawsuit.

Importantly, Respondents' brief also includes a revisionist recounting of the procedural background of this matter, misleading this Court as to the reasoning behind the trial court's sanctions decision. Resp. Br. 2. To correct the record: The trial court gave *no* indication it based the dismissal or sanction decisions in any way on allegations that Appellants made factual misrepresentations to the court (despite Respondents' suggestion to the contrary, see *id.* at 2, 10). Instead, as Respondents' brief acknowledges, the court offered only a conclusory statement that the claims asserted by Appellants were not well founded in law or fact. CP 726, 771- 72.¹ Moreover, the court reached that conclusion – one the Appellants challenge as both procedurally and substantively erroneous – after denying Appellants an opportunity for

¹ Respondents argue in their brief that Appellant brought causes of action against Respondents for an improper purpose. Resp. Br. at 10. There was no evidence or any such purpose and the trial court made no finding there was.

discovery and without making any factual findings. Its order was based on a misconception of the law and was an abuse of discretion that should be reversed.

III. ARGUMENT

A. RESPONDENTS' BRIEF IGNORES THE PROCEDURAL IRREGULARITIES THAT LED TO THE SANCTIONS ORDER BELOW.

Respondents' brief does not dispute that the trial court made numerous procedural errors that undermine the validity of its decision to sanction Appellants – errors that Appellants identified in their opening brief and that are dispositive here. See App. Br. 40-46.

First, Respondents do not dispute that the trial court apparently relied in its decision to sanction Appellants on arguments Respondents raised for the first time in their summary judgment reply memorandum. See App. Br. 40-42. Respondents first asserted on reply that Appellants' client could not establish causation and damages, as required for a CPA claim (CP 459-60, 465), and could not establish justifiable reliance, proximate cause, damages, or input on a business transaction to support their negligent misrepresentation claim. CP 464. Appellants had no opportunity to argue the legal conclusions of these arguments, or to challenge the apparent factual presumptions underlying them.

Second, Respondents' brief does not deny that the trial court erroneously failed to rule upon Appellants' motion to strike those untimely arguments and refused to grant a continuance to address them. App. Br. 40-44. The motion to strike was noted for hearing on February 20, 2015, along with the summary judgment motion. At that hearing, the trial judge allowed each side about 15 minutes to argue its case and to respond to her

questions. CP 694. The judge ignored Appellants' motion to strike Respondents' late-made arguments during that hearing, and allowed Mr. Wathen to argue in court, in support of his motions, that Appellants should be sanctioned for failing to produce evidence supporting each and every element of those claims. See CP 696. Even though Appellants objected, and no discovery on the newly raised issues had been conducted, the trial court allowed Respondents belated arguments (CP 726) and used them to impose CR 11 sanctions against Appellants (CP 729).

Respondents' brief does not address the law holding that a trial court's failure to discount improperly belated arguments is error. "Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. . . . [T]he rule is well settled that the court will not consider issues raised for the first time in a reply brief. . . . 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).

Third, and more broadly, Respondents' brief does not dispute that the trial court failed to honor the due process right of a lawyer to fair notice of the basis for a sanctions motion and the opportunity to defend against it. App. Br. 41.² As Appellants explained in their opening brief, lawyers are entitled to fair notice of what they have done that is allegedly

² Respondent argues that Appellants were given adequate notice "that a motion for sanctions would be filed." Resp. Br. 26. But obviously, notice "that a motion for sanctions would be filed" on one ground does not provide a fair opportunity to contest that motion on grounds different from those set out in the notice.

wrongful, and a fair opportunity to explain their actions. *Bryant v. Joseph Tree, Inc.*, 119 Wn. 2d 210, 224, 829 P.2d 1099 (1992); App. Br. 40-41.

Finally, Respondents' brief does not dispute the fact that the trial court failed to enter findings as to the basis for its sanctions order, as the law requires. App. Br. at 45-46, *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.”) Instead, the court offered only a cursory conclusion that the claims were not well founded in law or fact. CP 726, 771- 72. Nor did the court discuss whether Appellants had reasonably inquired into their client’s claims against Respondents before – or after – filing the lawsuit. CP 693-730, App. Br. 29 – 30. Importantly, Washington law requires movants for CR 11 sanctions prove: (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).

Notwithstanding their misrepresentative suggestions about the procedural background of this appeal, Respondents do not dispute that the trial court failed to spell out the basis for its sanctions order – an omission that significantly complicates review here. That complication is magnified by Respondent’s Brief, which argues variously that the Appellants deserved to be sanctioned because: (1) “the causes of action asserted by the Appellants were not well grounded in existing law or fact and were brought for improper purpose,” Resp. Br. 10; (2) “Appellants had misrepresented the factual record,” *id.* at 29; and (3) “Appellants’ conduct was not well grounded in existing law or fact.” *Id.* at 33.

“Without relevant findings in this regard, there can be no objective evaluation of the reasonableness of the attorney's prefilling conduct.” *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 111-112, 780 P.2d 853 (1989). Indeed, the court’s oral ruling betrayed the judge’s apparent misunderstanding of the claims that Appellants’ brought. Appellants made clear their client’s claims were based on the investigative and entrepreneurial conduct of the Respondents and *not* the Respondents’ legal competence or strategy, let alone the conduct of Allstate itself. Still, the judge at various times suggested the claims were based on entirely different theories, e.g., a perception that “the insurance company has acted in bad faith” or that the company Respondents represent have “in bad faith, denied [Ms. Alvarez’s] claim.” CP 723-24. These discrepancies demonstrate why the law demands explicit findings of fact, and alone provide an adequate reason for vacating the sanctions order here.

B. RESPONDENTS MISREPRESENT THE LAW IN DEFENSE OF THE TRIAL COURT’S APPARENT, AND CLEARLY ERRONEOUS, RULING THAT THE COMPLAINT LACKED LEGAL BASIS UNDER THE CONSUMER PROTECTION ACT.

Respondents based their motions for summary judgment and CR 11 sanctions on an argument that Washington law categorically bars Consumer Protection Act claims against attorneys. See CP 264-269. Respondents’ brief recites that same fatally-flawed argument, without addressing either: (1) Appellants’ analysis demonstrating that Respondents misstate the law by suggesting attorneys enjoy a near-limitless shield; or (2) the trial court’s implicit acknowledgement that CPA claims *may* be

stated against lawyers under certain circumstances, such as (analogizing to the law of attorney client privilege) “a really clear case of somebody who is acting outside their role as a lawyer, or who is acting solely on the business side of their practice . . .” CP 723

That, of course, is the law—the very law Appellants relied on in fashioning their client’s claims against Mr. Wathen. Courts apply a function-based test to determine whether a defendant attorney’s conduct may implicate her or him for potential liability under the CPA. The attorney’s relevant conduct, not his or her status as a lawyer, determines whether a claim can lie under the CPA. *Short v. Demopolis*, 103 Wn.2d 52, 61, 65-66, 691 P.2d 163 (1984) (“[L]awyers may be subject to liability under the CPA. We hold entrepreneurial aspects of the practice of law, which are principally counterclaimed by defendant, fall within the sphere of ‘trade or commerce’ under RCW 19.86.010(2) and 19.86.020. As to such claims, we reverse the trial court’s dismissal of defendant’s CPA counterclaims.”); *see also*, *Styrk v. Cornerstone Investments, Inc.*, 61 Wn. App. 463, 471, 810 P.2d 1366 (1991) (“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.”); *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.”)

In the teeth of this established law, Respondents’ brief tells this Court (as they told the court below) that the law is clear and absolute: “claims directed at opposing attorneys are not actionable under the Washington Consumer Protection Act.” Resp. Br. 16.³ Yet it does not and cannot dispute—or even mention—that Washington law *allows* CPA claims against attorneys for conduct *unrelated* to their legal competence or strategy (see App. Br. 33-34), including “the way a law firm obtains, retains, and dismisses clients.” *Short v. Demopolis*, 103 Wash. 2d at 61. Nor does it rebut or mention the fact that the Amended Complaint alleged that Mr. Wathen engaged in deceptive conduct for exactly such entrepreneurial purposes. See CP 12 (“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”).

Instead, Respondents’ brief mischaracterizes the claims at issue here as “complaints regarding the strategy employed by opposing counsel or the competence of opposing counsel in the practice of law.” Resp. Br. 20. This ignores the allegation—and the unrebutted evidence—that Mr. Wathen was *not* acting as “opposing counsel” at the time of the actions he

³ Respondents at one point boldly announces an even broader rule: “The rule of law is clear and unambiguous. An opposing party cannot freely file suit against an opposing party’s attorney based upon allegations arising out of an insurance contract, violations of the CPA claim, or various tort claims.” Resp. Br. 14. If that means to say again that attorneys are immune from all CPA claims (as well, apparently, as all other sorts of contract or tort claims), it is plainly wrong, as the above-cited cases show.

was sued for, or at the time the lawsuit against him was filed. See App. Br. 7, 12, 27, 30-31.

More fundamentally, Respondent's argument is beside the point, because the Amended Complaint did not challenge Mr. Wathen's legal competence or strategy in any way, but instead alleged that he violated the obligation to act nondeceptively and in good faith, which *as an insurance claim investigator* he owed to Ms. Alvarez as his company's insured. CP 11-13; *see* RCW 48.01.030. 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 12. And, as noted above, it claimed Mr. Wathen and his firm obtain clients by advertising their experience in this dual role and implying an ability to assist in denying claims. CP 12-13.

Respondents' willingness to disregard the law, while accusing others of doing so, is further exemplified by their revival of a legal argument they abandoned below, after the trial court correctly pointed out the fallacy of their assessment. The argument was that a CPA claim could not lie without a direct contractual relationship. See CP 267-69.

Appellants' response exposed CP 313-14 and the trial court called the Respondents on the misstatement of law in open court:

THE COURT: You do agree with the defendant, I assume, that under [*Panag v. Farmers Ins. Co. of Washington*, 166 Wn. 2d 27, 204 P.3d 885 (2009)], 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; ...

CP 827. Yet despite that admission, and the authority that compelled it, Respondents repeat the contention in their brief. They say that because “[t]here is no contractual relationship between Allstate’s attorneys and the plaintiff” “[t]here is no cause of action available to Plaintiff against Allstate’s attorneys” (Resp. Br. 19), since the “unambiguous law in the state of Washington” holds that “[t]o be liable under the CPA, there must be a contractual relationship between the parties.” Resp. Br. 15–16 (quoting *International Ultimate Inc. v. Sf. Paul Fire and Marine Ins. Co.*, 122 Wn. App. 736, 87 P.3d 774 (2004)). But in fact, as the trial court reminded Respondents, the unambiguous law of the State of Washington is the opposite: “We hold that a private CPA action *may be brought by one who is not in a consumer or other business relationship* with the actor against whom the suit is brought. We further hold that there is no adversarial exemption from suit under the CPA.” *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 43–44, 204 P.3d 885 (2009) (emphasis added).

C. RESPONDENTS CORRECTLY STATE THE LAW REGARDING NEGLIGENT MISREPRESENTATION BUT IGNORE THE ALLEGATIONS IN THE COMPLAINT SUPPORTING THAT CLAIM.

Respondents are correct that Washington follows the Restatement of Torts (Second) Section 552(1), which defines negligent misrepresentation as follows:

One who, in the course of his business, profession or employment ... supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Resp. Br. 21 (quoting *Westby v. Gorsuch*, 112 Wn. App. 558, 576, 50 P.3d 284 (2002)). Respondent is also correct that claims of negligent misrepresentation may only be brought to recover losses incurred by persons “for whose benefit and guidance he intends to supply the information” and whom “he intends the information to influence” *Id.* But Respondent ignores the fact the Amended Complaint alleged all of these elements, including the fact Mr. Wathen provided Ms. Alvarez information in the course of his business of investigation insurance claims, and that he intended that information to guide and influence Ms. Alvarez’s actions in processing her claim. See CP 14.

Mr. Wathen originally claimed in his letters threatening sanctions that it was this latter element that was lacking—that the letters he wrote to Ms. Alvarez did not contain information or “legal advice which was intended to be utilized by others” See CP 358. But plainly, that was at least arguable. Indeed, it is hard to imagine what reason Mr. Wathen would have had to instruct Ms. Alvarez regarding her alleged duties and obligations to Allstate other than to influence and “guide her” in her business transactions with the company.

Respondents argue here as they did below that this doesn’t matter because Mr. Wathen did “not owe a *public* duty to provide any of the

alleged information” (Resp. Br. 22 [emphasis added]), but this is an obvious misreading of the law. The law provides that the existence of a “public duty” to provide information can alter the scope of liability and limit it “to loss suffered by any of the class of persons for whose benefit the duty is created” Restatement of Torts (Second) §552(2) and (3). But it does not make the existence of such a duty a necessary element, where the claimant is a “person ... for whose benefit and guidance [the defendant] intends to supply the information” *Id.* at §552(2)(a). Mr. Wathen addressed his allegedly misleading letters directly to Ms. Alvarez. She was his company’s insured. There was no requirement of a “public duty” to make his alleged misrepresentations actionable.

Respondents also argued below (CP 269, 271) and suggest here that Mr. Wathen’s letters to Ms. Alvarez cannot be actionable because they reflect, at most, a “difference[] of opinion of law” Resp. Br. 20. But in *Lawyers Title Ins. Corp. v. Baik*, 147 Wn. 2d 536, 55 P.3d 619 (2002)—another key precedent Respondent completely ignores—the Supreme Court expressly rejected that argument:

The respondents' approach to the “false information” element of a negligent misrepresentation claim would immunize all communications that were explicitly (or even arguably) presented as opinions. Every defendant would claim that he or she had accurately and truthfully stated his or her opinion, and the content of even the most negligently obtained opinion would go unexamined: whether the opinion had been derived by tossing a coin or consulting an astrologer would be of no consequence, so long as the letter accurately stated the opinions that those methods had yielded.⁸ The respondents' self-serving approach is plainly at odds with the Restatement's conception of the “false information” element of a negligent misrepresentation claim. Comment a of

section 552 provides that “liability ... is based upon negligence of the actor in failing to exercise reasonable care or competence in **supplying correct information**” (emphasis added), and as section 552(1) makes clear, supplying information encompasses “obtaining or communicating the information.” (Emphasis added.) Comment b explains that “[t]he rule ... applies not only to information given as to the existence of facts but also to **an opinion** given upon facts equally well known to both the supplier and the recipient.” (Emphasis added.) Thus, under the Restatement, a negligently obtained or communicated opinion will constitute “false information” for purposes of a negligent misrepresentation claim.

Id. at 147 Wn. 2d 547–48 (original emphasis, footnotes omitted).

Respondents admitted below that there is, at least, room for differing opinions regarding whether “Ms. Alvarez was required to submit to an examination under oath” (CP 271), as Mr. Wathen unequivocally told her she was. Whether Mr. Wathen was right or wrong regarding those instructions, and whether any errors he made in doing so were negligent, were issues of fact that could not be conclusively resolved without discovery or other factual development. Presumably, that is why Judge Shaffer said she found the argument that Ms. Alvarez did not have to submit to the examination “odd” (CP 725), but did not make it the basis for her ruling.

Instead, the apparent basis for her ruling was an argument that Respondent did not make below and does not press here: that “even assuming that [Ms. Alvarez relied on Mr. Wathen’s statements] ... how could I find that to be justifiable, if she was represented by you at the time?” CP 724; see CP 726. The problem with that statement, of course, is that Ms. Alvarez was **not** represented—by Appellants or any other legal

counsel—at the time Mr. Wathen wrote his letters of instruction to her. To the contrary, the gravamen of the Amended Complaint was that Ms. Alvarez was “an *unrepresented person* and a person to whom [Mr. Wathen] ... owed a duty of good faith” as a representative of her insurer. CP 12 (emphasis added); see CP 530-31, 704.

As discussed in Part IIIA above, because of the lack of findings and the shifting bases for the Respondents’ sanctions motion, it is impossible to identify with certainty the bases for the trial court’s sanctions decisions. But the basis it gave for imposing sanctions for bringing the negligent investigation claim was a misconception—one that was fostered by the Respondents’ repeated, misleading arguments about suits against “opposing counsel.” The whole point of Ms. Alvarez complaint was that when Mr. Wathen sent her his threatening letters she had no legal counsel to assist or advise her, and she had a right to be treated fairly and with reasonable care by investigators hired by her own insurance company. The trial court was wrong to hold that, as a matter of law, her belief she had that right was completely⁴ unjustified.

D. RESPONDENTS IGNORE THE LAW, WHICH APPELLANTS REASONABLY RELIED UPON, THAT HOLDS LAWYERS ARE NOT IMMUNE FROM SUIT BY VIRTUE OF THEIR STATUS AS SUCH.

Respondents dismiss the fact Appellants submitted declarations of several attorney experts who advised them that their claims against Mr.

⁴ Because negligent misrepresentation claims are subject to Washington’s comparative fault law, *Baik*, 147 Wn. 2d at 552, only a complete lack of any possible justification for a plaintiff’s reliance can defeat such a claim.

Wathen were, saying “an attorneys *prefiling* inquiry satisfies CR 11 is measured against the objective standard” and “the opinions of attorneys do not provide the appropriate objective standard required by the court.” Resp. Br. 31 (original emphasis). But as we have noted, the trial court did not impose sanctions for failure to make a “prefiling inquiry”; the sanctions were “awarded for the reasonable amount of attorneys fees expended by counsel and his firm in defending this suit, *from the time that counsel put you on notice* to today.” CP 729. It was undisputed that, as soon as Mr. Wathen put Appellants on notice of his objections, they researched their position, and that research included consultations with the experienced attorneys whose declarations they later submitted. See App. Br. 17-20, 42-3.

What those attorneys told Mr. Wathen was not only “objectively reasonable” but correct. *Cedell v Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013)—another centrally relevant case unmentioned in Respondent’s brief—held that lawyers hired by insurance companies to conduct first party claim investigations are not acting as the insurer’s attorneys for purposes of the attorney-client privilege. From that holding it is but a short and reasonable step to the contention Appellants made: that lawyers performing such work are not “opposing counsel” who have no duty to the insured and whose actions are exempt from the CPA as “legal strategy.” Even if *Manteufel’s* broad *dictum* that “Washington law does not allow claims against attorneys under the CPA”

was right when written—and we submit it clearly was not, see App.Br. 31-34—*Cedell's* holding clearly called it into question. The Appellants were thus presented with a classic situation where they were facing adverse law, but had a claim that was “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.” CR 11.

Kalina v. Fletcher, 522 U.S. 118, 119, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997)—yet another key case Respondent doesn't mention—presented a similar legal question. In that case, the defendant/attorney Kalina was a deputy prosecutor who signed an Information and a motion for an arrest warrant. *Id.* At the same time, she took on the role of a complaining witness, submitting a probable cause declaration in support of her pleadings. *Id.* at 121. She argued that her conduct as a complaining witness was therefore covered by absolute prosecutorial immunity from suit under 42 U.S.C. Section 1983. *Id.* at 123. The Supreme Court of the United States held she was wrong, and she was liable to the same extent as a police officer would have been if an officer had performed the same complaining witness function. *Id.* at 130-31.

Mr. Wathen's situation and argument is directly analogous. He undertook to review and gather evidence by conducting a recorded interview, a statutorily recognized function that need not involve an attorney. *See* RCW 48.18.460. He, apparently, was simultaneously acting as Allstate's defense attorney with regard to any claims made by Ms.

Alvarez. Mr. Wathen argues that, simply because he was an attorney, his performance of both functions is immune from suit. Four experienced lawyers say Mr. Wathen is wrong on this point, just as Ms. Kalina was (*see* App. Br. 17-20)—and their opinions are consistent with the clear weight of governing Washington authority (*see* App. Br. 33-35) and with recent rulings by several federal District Court judges on analogous issues impacted by *Cedell*⁵ (more rulings Respondents make no mention of, even the ones that involve their own law firm). So, Appellants submit, says The trial court was simply wrong to hold that assertion of virtually the same legal theory accepted by all nine Justices of the Supreme Court of the United States in *Kalina*, and supported by all those other authorities in this context, is frivolous and sanctionable.

E. RESPONDENTS' PUBLIC POLICY ARGUMENT LACKS BOTH AUTHORITY AND MERIT.

Respondents argue, for the first time on appeal, that public policy favors sanctions against Appellants. Resp. Br. 32-33. Respondents support their argument with dire warnings (*e.g.*, or a threat of a “Pandora’s box” that could “effectively limit many defendants ability to retain any attorney at all,” Resp. Brief at 32); but Respondents offer no authority or compelling rationale for their argument.

⁵ See App. Br. 6 (*citing Johnson v. Allstate Property and Cas. Ins. Co.*, 2014 WL 4293967 (W.D. Wa. No. 14-5064, Aug. 24, 2014), *Babai v. Allstate*, 2015 WL 1880441 (W.D. Wa. No. C12-1518, April 24, 2015), and *Langley v. GEICO*, 2015 WL 10937557 (E.D. Wash. No. 14-3069, Feb. 18, 2015). (Appellants’ opening brief erroneously cited to a different order in the *Langley* case; counsel regret the error).

In fact, public policy militates against sanctions in this case. Washington law is clear: CR 11 is not to be used to stifle legal creativity or punish novel thinking. Sanctions under CR 11 are not appropriate merely because a claim is proved factually deficient or a party's view of the law proves 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 had 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). That is why CR 11 prohibits only arguments 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 trial court's oral ruling never addressed whether Appellants were arguing in good faith. Plainly, they were. They had good reason to believe that an insurance company was taking unfair advantage of unrepresented customers like Ms. Alvarez by using attorneys to investigate first party claims, and then exploiting their dual role. They knew a recent Supreme Court decision had rejected an argument (by the very attorney Ms. Alvarez insurer was using) that communications and work product made in that dual role are protected by attorney client privilege—and, to the contrary, had established a presumption that there is

no such protection during “the claims adjusting process,” *Cedell*, 176 Wn. 2d at 699. It makes obvious sense that, similarly, the non-legal conduct of such a “dual role” attorney/investigator during “the claims adjusting process” is not protected by the same immunities that protect an opposing counsel’s conduct in litigation. Appellants knew that there was *dictum* in a Court of Appeals case indicating that attorneys could never be sued under the CPA, but they also knew there was Supreme Court authority that directly contradicted it.

In sum, the Appellants’ lawyers faced exactly the sort of situation envisioned by the language in CR 11 that permits good faith arguments “for the alteration of existing law.” Public policy would not be served by revoking that permission.

F. RESPONDENTS CITE NO BASIS FOR AWARDING ATTORNEYS FEES ON APPEAL, AND THERE IS NONE.

Respondents’ brief ends with a request for “further attorneys fees and expenses,” to which they say they are entitled because they “believe this appeal is frivolous and is in furtherance of the wrongful conduct of Appellants in this matter.” Resp. Br. 34. That is their entire argument.

Id. Obviously, it fails.

The rule requires more than a bald request for attorney fees on appeal. *Thweatt v. Hommel*, 67 Wash.App. 135, 148, 834 P.2d 1058, *review denied*, 120 Wash.2d 1016, 844 P.2d 436 (1992). Argument and citation to authority are required under the rule to advise us of the appropriate grounds for an award of attorney fees as costs.

Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn. 2d 692, 710, 952 P.2d 590 (1998).

The party requesting fees on appeal is required by RAP 18.1(b) to argue the issue and provide citation to authority in order to advise the court as to the appropriate grounds for an award of attorneys' fees and costs. *Wilson Court Ltd.*, 134 Wash.2d at 710 fn. 4, 952 P.2d 590.

Blueberry Place Homeowners Ass'n v. Northward Homes, Inc., 126 Wn. App. 352, 363, 110 P.3d 1145 (2005).

Merely calling an argument "frivolous" doesn't satisfy the rule; neither does it make it so. All this final request does is provide some additional insight into the care with which Respondents have made such accusations, and sought sanctions against opposing counsel, in this Court and in the court below.

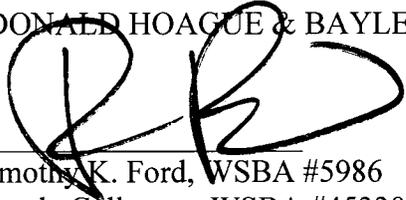
IV. CONCLUSION

For the reasons set forth above and in Appellants' opening brief, this Court should vacate and reverse the trial court's sanction order.

DATED this 6th day of September, 2016.

Respectfully submitted,

MacDONALD HOAGUE & BAYLESS

By 
Timothy K. Ford, WSBA #5986
Angela Galloway, WSBA #45330
Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 6th day of September, 2016, I served a copy of the foregoing via e-mail and U.S. Mail upon:

Counsel for Defendants:

Rick Wathen
Cole Wathen Leid Hall, P.C.
303 Battery Street
Seattle, WA 98121-1419
rwathen@cwllaw.com
kforrette@cwllaw.com



Laura Faulstich, Legal Assistant

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