

COURT OF APPEALS
STATE OF WASHINGTON

2016 JUL -1 PM 4:16

No. 75017-8

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

WASHINGTON CAPITAL MORTGAGE INC.,

Plaintiff/Respondent,

vs.

BRAVERN BUSINESSES LLC,

EVAN BARIAULT,

Aggrieved Non-Party/Attorney/Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(The Honorable Julie Spector)

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

In a December 9, 2015 order denying Bravern Businesses, LLC's motion for reconsideration of an underlying order, the trial court signed an order provided by the plaintiff. The order stated that defense counsel, Evan Bariault, had misrepresented information in violation of CR 11 and the Washington Rules of Professional Conduct. CP 1033-34. The order did not identify the alleged misrepresentation; Mr. Bariault was dumbfounded.

Less than two weeks later, Mr. Bariault learned that his client, Ernie Whitaker, passed away while visiting family over the holidays. Whitaker fell from a deck at a family function, suffering a fatal head injury. On December 22, 2015, Bariault conveyed this information to opposing counsel and informed the trial court the following day.

On December 23, 2015, plaintiff filed a Motion to Establish Amount of CR 11 Sanctions against defense counsel and a now deceased Whitaker. CP 1043-47. The motion was accompanied by Proposed Findings of Fact and Conclusions of Law.¹ The findings were not supported by any citations to the record or citations to previous orders or findings entered by the court.

¹ The proposed findings were provided to the trial court but never filed as part of the court record. They are attached hereto as Exhibit I.

On February 8, 2016, the trial court signed plaintiff's Proposed Findings and Conclusions of Law with limited alteration and sanctioned defense counsel and his client \$3,875.00 each for violating CR 11. CP 1156-62. The evidence before the trial court, however, plainly contradicted the findings proposed by plaintiff and accepted by the trial court. The trial court did not reject the contradictory evidence - it ignored the evidence altogether. It is evident the trial court made no effort to compare the proposed findings and conclusions to the record before it. The order was the culmination of a series of similar efforts by the trial court, each of which simply ignored substantial – and often unrefuted – evidence presented by the defense. The trial court's orders are unfounded, contrary to the evidence and an abuse of discretion. This Court should reverse the sanction orders and the resultant judgment against Mr. Bariault.

II. ASSIGNMENTS OF ERROR

The trial court abused its discretion when it sanctioned defense counsel under CR 11. The sanction was contrary to substantial evidence before the court and ignored long-established Washington precedent.

III. STATEMENT OF THE CASE

Ernie Whitaker, sole member of Bravern Businesses, LLC ("BB"), contacted attorney Evan Bariault on September 4, 2015. CP 1063. Whitaker was concerned about judgments entered against his company in

October and November 2014. *Id.* Whitaker told Mr. Bariault that he had no notice of any lawsuits against his business, had never been served a complaint and that the judgments were entered without his knowledge. *Id.* Through discussion with Mr. Whitaker and by way of independent research, Mr. Bariault discovered a great deal about the underlying issues relevant to BB's adverse judgments.

A. Information obtained through Mr. Bariault's pre-filing investigation.

Through independent analysis and conversations with Mr. Whitaker, Mr. Bariault discovered the following facts. On June 11, 2013, Whitaker formed BB. CP 29; 39. Whitaker and Carlos Gonzalez later discussed the prospect of purchasing houses, improving the properties and reselling them, i.e. "flipping" houses. *Id.* Whitaker had no experience in such ventures. Whitaker said that Gonzalez told him he would "teach him the ropes" and assist him with his first flip. *Id.* Whitaker agreed, and the two sought out a property for BB to purchase. *Id.* Gonzalez then introduced Whitaker to Adam Greenhalgh of Lancaster Holding Group, dba Columbia Property Services. *Id.* Whitaker was told that Greenhalgh was a real estate broker who would assist with the purchase. *Id.*

A property was eventually located at 12607 14th Avenue South, Burien, Washington (hereafter the "Subject Property"), and Greenhalgh,

along with Srdan Nikolic, also of Columbia Property Services, brokered BB's purchase of the property. CP 29; 40. Nikolic informed Whitaker that a new LLC operating agreement was necessary to complete the purchase. CP 29; 40; 45-46. One did not exist at the time, so Greenhalgh provided Whitaker an LLC operating agreement. CP 29; 40; 49. Whitaker signed the agreement on behalf of BB; he was its sole member. CP 29; 40; 69. Whitaker provided a copy to Greenhalgh.

BB secured financing to purchase the property through Eastside Funding, LLC ("Eastside"). CP 29; 40. On or about March 11, 2014, BB signed two promissory notes with Eastside for a total of \$197,820.00 to purchase the property. CP 29; 81-84. The notes required BB to pay \$1,970.20 on May 1, June 1, and July 1, 2014, with the entire balance of the notes due on August 8, 2014. Additionally, BB signed two separate deeds of trust ("Deeds") on the Property with Eastside as beneficiary to secure the loans. CP 29; 87-101.

In that same timeframe, BB entered into joint venture agreements with Carlos & Leonor Gonzalez ("Gonzalez JV") and DLW General Contractors ("DLW") (the "DLW JV"). CP 30; 40.

The purpose of the Gonzalez JV was (1) to obtain financing for the purchase of an investment property in Washington state, (2) to facilitate the remodel and/or development of the property, and (3) to market and sell

the property for a profit. CP 104. Per the agreement, BB's contributions included the use of BB and the credit of its managing member, Whitaker, for the purpose of purchasing an investment property and securing a mortgage for said property. CP 105. The Gonzalezes' contributions included capital required as down payment for the property as well as payments to cover the mortgage, taxes and insurance. *Id.* In the event funds were not available to pay off the mortgage upon its maturity date, the Gonzalezes were required to secure financing to pay off the existing mortgage. CP 106. The Gonzalez JV held that any disputes between the parties would be submitted to mediation followed by binding arbitration. CP 110.

The purpose of the DLW JV was (1) to repair and remodel the investment property, (2) to subdivide a portion of the property, and (3) to construct new residences on the newly created lots. CP 114. Under the DLW JV, BB was required to contribute the capital necessary to purchase the property as well as capital required to pay the mortgage and insurance on the property until the date of maturity. CP 115. DLW was required to provide all capital and labor required to remodel the existing residential structure and subdivide the lot as well as all capital and labor required to construct single-family residences on the newly-created lots. *Id.* In the event funds were not available to pay off the mortgage upon its maturity

date, DLW was required to secure financing to pay off the mortgage. CP 116. The DLW JV held that any disputes between the parties would be submitted to mediation followed by binding arbitration. CP 120.

Whitaker provided Mr. Bariault with copies of the joint venture agreements; the terms matched what Whitaker had described. CP 1063. Whitaker told Bariault that while he had executed the agreements on BB's behalf, he was never provided copies of the final, signed agreements. *Id.*

After purchasing the property, Whitaker began contacting Greenhalgh and asking him for keys to the property. CP 31; 40. Greenhalgh repeatedly responded with excuses as to why he could not provide defendant with keys. *Id.* Meanwhile, BB was receiving funds from Gonzalez pursuant to the joint venture agreement and utilizing the funds to pay the monthly mortgage. CP 31; 41. Defendant made mortgage payments to Eastside for May, June and July 2014. *Id.*

On July 1, 2014, a "Developer Extension Agreement" was purportedly executed between BB and Valley View Sewer District; Whitaker, however, the sole member of BB, had no notice or knowledge of the extension. CP 31; 41; 124-35. The agreement was for the construction of a sewer line to the Property. The document bears a facsimile of Whitaker's signature, but Whitaker never signed the document. CP 31; 41; 133. The signature was purportedly notarized by

Luciano Greenhalgh Giovanni and dated June 30, 2014. CP 31; 133. Upon investigation it appeared that Greenhalgh Giovanni is the ex-husband/domestic partner of Greenhalgh; he is listed as a member of Columbia Property Services, LLC, alongside Greenhalgh. CP 31; 138. Whitaker, however, had never met Greenhalgh Giovanni. CP 41. By **Whitaker's account**, his signature was forged and Greenhalgh Giovanni falsely notarized the document. *Id.*

On or about July 18, 2014, Eastside assigned the Deeds to **Washington Capital Mortgage (plaintiff) (hereafter "WCM")**. CP 31; 141-42. BB had no knowledge of the assignment at the time and never received any documents or communications directly from WCM. CP 31-32; 41.

On or about August 19, 2014, an "Amendment to Developer Extension Agreement" was recorded in King County for the purposes of constructing another 80 feet of sewer line to the Property. CP 32; 424-27. The agreement contains Whitaker's **signature** with no date. CP 426. However, as with the original agreement, Whitaker claimed he had never signed the document. CP 41, ¶ 16. Given this unusual situation, Mr. Bariault examined the signature and it became evident that the signature is merely a trace of Whitaker's signature on the operating agreement provided by Whitaker to Greenhalgh and Nikolic:

 (Operating Agreement – CP 69)

 (Extension Agreement – CP 426)

On September 9, 2014, Greenhalgh contacted Whitaker and informed him that the sewer district overlooked approximately 160 feet of sewer line it believed was already on the street. CP 32; 41; 73-74. As a result, the city could not approve the short plat until the sewer district engineered, approved and built the 160 feet.² CP 73-74. Greenhalgh further stated that until the short plat was approved, the residence on the property could not receive a separate legal description and therefore could not be sold or financed with traditional financing. *Id.* Ultimately, Greenhalgh proposed Defendant sign title to the property over to the mortgage holder. *Id.* Greenhalgh did not identify the mortgage holder, and Whitaker still believed it was Eastside Funding. CP 32. In response, Whitaker requested Greenhalgh provide information from the city supporting the sewer issues. CP 32; 41, ¶ 18. Greenhalgh never provided the information. *Id.*

² This is undisputed evidence that Whitaker's signature was forged. If Whitaker actually signed the Developer Extension Agreement and the Amendment, he would have already known all the information contained in Greenhalgh's email about the sewer mistake and the necessity for an additional 160 feet. The email shows Whitaker had no knowledge of said information, fully supporting the contention that Whitaker's signature was forged. This is further bolstered by the fact it was notarized by Greenhalgh Giovanni.

Bariault contacted the Valley View Sewer District and the Burien Planning Department related to their involvement in the Subject Property. CP 1063. Bariault learned that an individual named Dean Kalivas (hereafter “Kalivas”) and Greenhalgh had been in communication with both entities without Whitaker’s knowledge.³

A day later, on September 10, 2014, DLW filed a Claim of Lien (“Construction Lien”) against BB, its venture partner, for \$137,816.32. CP 32; 145-46. DLW never contacted BB or Whitaker prior to filing the lien, nor did DLW provide Whitaker a copy of the lien. CP 32; 41, ¶ 19. Further, the lien was contrary to the joint venture agreement. On September 16, 2014, DLW assigned its Construction Lien to WCM, the same entity to which Eastside had assigned the Deeds. CP 32; 149.

B. Evidence of fraud in obtaining the judgment and/or improper service.

On September 19, 2014, WCM sent a summons and complaint (hereafter “The Complaint”) to the Washington Secretary of State for service on BB. CP 11; 33. The Complaint alleged WCM was the assignee and holder of a Claim of Lien filed by DLW. CP 3; 33. The Complaint

³ Further, Bariault made a public disclosure request to the Burien Planning Department. After some months, Bariault received the file related to the Subject Property. The file contains Whitaker’s forged signature and notes establishing a meeting took place between Kalivas, Greenhalgh and the department without Whitaker or his knowledge. Bariault attempted to present this information to the trial court after its receipt, but it was rejected. CP 1122-24.

asserted that DLW, at the request of BB, commenced to provide contractor services on a property commonly known as 12607 14th Avenue South, Burien, Washington. CP 2; 33. It went on to state that DLW was owed \$137,816.32 and made demand of BB to pay the amount owing but BB failed and refused to pay said amount. CP 3; 33. There was never any evidence provided to the trial court suggesting DLW had ever made such demand of BB, let alone that BB had refused or not responded.

In order to secure service of process through the Secretary of State, WCM filed an “Affidavit of Attempted Service” signed by Kalivas with the State. CP 287. The affidavit stated that the complex where Whitaker resided, the Bravern Residences, was a public-access building and that Kalivas had attempted unsuccessfully to serve Whitaker at his residence. CP 291-92, ¶ 2. **Following up on Whitaker’s claim that he had never been served with the action**, Mr. Bariault contacted the manager at Bravern Residences, Kathleen Beeby. CP 1064, ¶¶ 2-3. Ms. Beeby informed Mr. Bariault that contrary to the Kalivas declaration, the Bravern Residences was not a public-access building and Mr. Kalivas would not have been able to gain access. *Id.* Mr. Bariault secured a declaration from Ms. Beeby confirming that the information in Kalivas’ declaration was false. CP 1078-79, ¶ 7 (dated October 12, 2015).

Through independent research, Mr. Bariault also learned the following about Kalivas: 1) he was disbarred in the State of Virginia; (2) he had engaged in the unauthorized practice of law in Washington on multiple occasions and held in contempt on one occasion; (3) he was suspended from practice before the Internal Revenue Service; (4) he lied to a Pierce County Sheriff about being an attorney; (5) he had previously forged signatures and engaged in racketeering activity; and (6) he engaged in mail and wire fraud. Mr. Bariault also discovered that he was the secretary of DLW, BB's joint venture partner. CP 1064, ¶ 4.

Based on this information, Mr. Bariault concluded that Kalivas had submitted a false affidavit to the Secretary of State in order to bypass the statutory requirement that a party must first undertake reasonable diligence in attempting personal service before resorting to service by the Secretary of State. CP 1065; RCW 25.15.025.⁴

⁴ The statute was repealed by 2015 c 188 § 108, effective January 1, 2016. It read:

25.15.025. Service of process on domestic limited liability companies.

(1) A limited liability company's registered agent is its agent for service of process, notice, or demand required or permitted by law to be served on the limited liability company.

(2) The secretary of state shall be an agent of a limited liability company upon whom any such process, notice, or demand may be served if:

(a) The limited liability company fails to appoint or maintain a registered agent in this state; or

(b) The registered agent cannot with reasonable diligence be found at the registered office.

(3) Service on the secretary of state of any such process, notice, or demand shall be made by delivering to and leaving with the secretary of state, or with any duly authorized

On October 14, 2014, unaware that an action had been initiated against him, Whitaker went out to the Subject Property based on concerns that he was being scammed by his venture partners. CP 33; 41. Upon arrival he noticed that someone was residing in the property. *Id.* Whitaker contacted the police and a King County Sheriff arrived. *Id.* King County Deputy Sheriff Edward Draper contacted the occupant of the house, William Rogers.⁵ CP 33-34; 198-204. Rogers was the president of WCM⁶ and contacted his alleged attorney who spoke with Draper. *Id.* His alleged attorney identified himself as Dean Kalivas and informed the sheriff that Rogers was in the property legally. *Id.* At that point Sheriff Draper informed Whitaker it was a civil matter and would have to be resolved through the parties' attorneys. *Id.* Mr. Bariault contacted Draper directly who confirmed Kalivas, disbarred and previously sanctioned for the

clerk of the secretary of state's office, the process, notice, or demand. In the event any such process, notice, or demand is served on the secretary of state, the secretary of state shall immediately cause a copy thereof to be forwarded by certified mail, addressed to the limited liability company at its principal place of business as it appears on the records of the secretary of state. Any service so had on the secretary of state shall be returnable in not less than thirty days.

(4) The secretary of state shall keep a record of all processes, notices, and demands served upon the secretary of state under this section, and shall record therein the time of such service and the secretary of state's action with reference thereto.

(5) This section does not limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a limited liability company in any other manner now or hereafter permitted by law.

2014 Rev. Code. Wash. (ARCW) § 25.15.025.

⁵ Rogers is listed as the sole officer for Washington Capital on the Washington Secretary of State webpage. CP 207.

⁶ This information was learned after Bariault conducted a background search on the company.

unlicensed practice of law, held himself out as an attorney. Bariault had this information memorialized in a declaration signed by Draper. CP 203-4.

Mr. Bariault was able to confirm not only that Kalivas was the Secretary/Director for DLW and a disbarred attorney, but also that Kalivas has a lengthy disciplinary history for illegally holding himself out as an attorney in Washington and was the subject of a \$4 million judgment in federal court for falsely identifying himself as an attorney in Washington and Oregon, among other things. CP 34; 209-25. This information bolstered Mr. Bariault's belief that Kalivas had submitted a false declaration to the State.

Whitaker served Rogers with documents attempting to evict him from the Property. CP 34; 41. Rogers prepared an answer *pro se* dated December 9, 2014, alleging BB was not the owner of the Property. CP 34; 228-29. Included with Roger's answer was a letter from WCM – his own company – dated October 27, 2014, stating that all rents were to be paid to WCM. CP 34; 231. The letter is signed by Srdan Nikolic, the same individual that was working for the broker, Columbia Property Services, when BB purchased the property. *Id.*

On October 30, 2014, WCM filed The Complaint against BB under King County Superior Court Cause No. 14-2-29631-2 SEA. CP 1-5. That

same day WCM filed a Motion for Default Judgment claiming BB had failed to timely respond to the complaint. CP 12-14. The motion alleged BB “was served with copies of the summons and complaint by the Washington Secretary of State in this action on September 19, 2014, via mail and certified mail[.]” This statement was false; the complaint and summons were only received by the State on that date. There is no evidence the State served BB with copies via mail or certified mail on that date. In fact, the correspondence from the State clearly sets forth the documents were not mailed until September 23, 2014. CP 11.

The trial court entered an Order of Default and Default Judgment, establishing a total judgment amount of \$141,638.48. CP 19-21.

On December 3, 2014, the trial court issued an Order of Sale on the Subject Property. CP 234-35. WCM subsequently purchased the Subject Property at a sheriff’s sale on February 27, 2015. CP 238-41. Under the sale, BB was given a one-year redemption period. CP 240.

On March 26, 2015, an individual named Jon Krieg added himself as a member to BB’s LLC via the Secretary of the State, without Whitaker’s consent or knowledge. CP 35; 41; 244. Krieg listed his address as 101 S.W. 119th St. #103, Burien, WA. CP 244. Upon investigation Mr. Bariault discovered that Krieg’s address was also the address for Beverly Park Owner’s Association (“BPOA”). CP 35; 246-47.

The president of BPOA is Srdan Nikolic, the same individual that worked for the broker, Columbia Property Services and wrote the letter on behalf of WCM. Jon Krieg is the maintenance director for BPOA. CP 35; 249-50. **Additionally, one of BPOA's managing members is Debra Wilson.** CP 35; 252-53. Mr. Bariault discovered that Ms. Wilson was also the registered agent and treasurer for DLW. CP 35; 154-55.

On March 31, 2015, Jon Krieg, on behalf of BB, deeded the Subject Property to WCM in lieu of foreclosure **without Whitaker's** knowledge. CP 35; 255-57. **Krieg's signature is notarized by none other than Greenhalgh Giovanni.** CP 257. The Real Estate Excise Tax Affidavit is signed by Krieg and William Rogers of WCM. CP 35; 259-60. In a separate King County complaint against BB on November 25, 2015, No. 14-2-31833-2 SEA, however, Rogers and WCM acknowledged that Whitaker was **the sole member of BB, stating “(“Bravern”) is believed to be a Washington limited liability company under the sole ownership of one Ernie W. Whitaker II[.]”** Rogers, consequently, was aware that Krieg was not a member of BB, yet accepted the deed notwithstanding.

Based on the available facts, evidence and supporting case law, Mr. Bariault determined BB had a viable claim to overturn the judgment on the basis that service was improper and/or judgment was obtained through fraud. Specifically, Whitaker contended he was never served; his contention was

bolstered by the false affidavit used to seek service through the State signed by an individual (Kalivas) who Mr. Bariault had ample reason to believe was not credible. The plaintiff never provided the trial court with any evidence **that Whitaker, BB's registered agent, was ever served in-person or via certified mail via the Secretary of State.**

Not only did defense counsel elect to move forward to vacate the judgment based on available information, but on September 22, 2015, he and Whitaker also met with King County Prosecutor Hugo Torres and Mortgage Fraud Investigator, Linda Williamson. Information compiled by defense counsel and Whitaker was provided to the prosecutor. CP 1064. Torres and Williamson indicated that based on the objective evidence before them, BB and Whitaker were likely the victims of fraud and forgery. CP 1064. Accordingly, they informed Whitaker and Mr. Bariault that they would begin an investigation into the facts of this case.⁷ CP 1064.

In sum, defense counsel engaged in the following before filing a single pleading in this case: (1) reviewed all of the pleadings filed in King County Superior Court Case Nos. 14-2-29631-2 and 14-2-31833-2; (2) reviewed documents received from Whitaker; (3) conducted a records search associated with the subject property; (4) obtained documents from the

⁷ Upon learning of Whitaker's death, the prosecutor's office elected not to move forward because of the difficulty of proceeding without a complaining victim.

Secretary of State re: service as well as business formation documents; (5) conducted an information search regarding Dean Kalivas, Adam Greenhalgh, Debra Wilson, Srdan Nikolic, Jon Krieg, Luciano Greenhalgh Giovanni, Geri McNeil, and William Rogers; (6) contacted the Valley View Sewer District; (7) contacted the Burien planning department; (8) contacted the Bravern Residences regarding process for service of documents as well as information regarding building access and (9) and researched case law regarding vacating judgments on the basis of fraud in obtaining the judgment and improper service. CP 1063.

C. Filing of the case and procedural history thereafter.

BB filed its motion to vacate judgment on October 2, 2015, along with a *Lis Pendens* on the Subject Property. CP 24-27. In its motion to vacate judgment, defendant provided the Court with all of the underlying facts that led up to the judgment and argued service was improper as BB never received notice and/or the judgment was obtained through fraud. CP 28-38. However, Mr. Bariault made the tactical decision not to include Kalivas' Affidavit of Attempted Service. CP 1065. Bariault suspected that if he argued that plaintiff had not demonstrated reasonable diligence, plaintiff would opt to present and rely upon the false Kalivas declaration, which would only further solidify BB's claim of improper service. *Id.* Indeed, plaintiff reacted exactly as Mr. Bariault expected, relying on the false

Kalivas declaration in opposition to the motion. CP 405. In reply, defendant pointed out that the declaration contained false information, supporting the contention that plaintiff engaged in fraud to bypass the reasonable diligence requirements of RCW 25.15.025. CP 412-18. There was ample evidence to satisfy an objective belief that judgment was obtained through improper service and/or fraud.

However, after receiving defendant's reply on its motion to vacate, plaintiff filed a *praecipe* seeking to change the language in Kalivas' Affidavit of Attempted Service. CP 476-82. Defendant objected and pointed out to the trial court that although the *praecipe* signed by plaintiff's counsel indicated plaintiff accidentally printed the wrong document (an earlier version), the metadata on the documents demonstrated that Kalivas did not change his declaration until *after* receiving defendant's reply; the metadata showed that the plaintiff was misrepresenting information to the trial court to avoid the judgment being vacated. CP 459-66; 468-75.

Without holding oral argument or an evidentiary hearing to clear up the factual issues presented to by the parties, on October 30, 2015, the trial court signed an order denying BB's motion to vacate the judgment. CP 490-91. The trial court's order makes no findings that defendant's arguments were not based on law or fact, or that Mr. Bariault misrepresented

information to the court or otherwise engaged in any conduct that would warrant sanctions under CR 11 or any other theory.

On November 3, 2015, plaintiff filed a Motion to Cancel Lis Pendens based on the trial court's denial of defendant's motion to vacate. CP 562-65. Defendant opposed the motion on the basis that the action had not been "settled, discontinued, or abated" as required by RCW 4.28.320 because defendant was going to seek reconsideration. CP 566-70.

On or about November 6, 2015, Mr. Bariault was contacted by Marc Sellers, a partner at Schwabe, Williamson & Wyatt in Portland, Oregon. CP 1066. Mr. Bariault had been trying to contact Mr. Sellers to discuss his interactions with Dean Kalivas. CP 1066. Sellers had previously been involved in litigation with Kalivas and was very familiar with his history in and outside the courts. CP 1066. Based on discussions with Mr. Sellers, Mr. Bariault learned that Kalivas had previously engaged in fraud and made false statements to a tribunal. CP 1066. This evidence further supported defense counsel's belief that Kalivas was misrepresenting information to the Court as well as information surrounding his attempts to serve BB's registered agent. CP 1066.

On November 9, 2015, defendant filed its motion for reconsideration and pointed out that objective evidence demonstrated plaintiff, its counsel and Kalivas had engaged in misconduct and misrepresented information to

the Court. CP 804-17. Defense counsel also submitted the Declaration of Mark Sellers that contained significant information regarding Kalivas' credibility and the declaration of Allison Goodman, a metadata expert. CP 620-649. Defendant's evidence on reconsideration was so strong that plaintiff finally abandoned its story; it admitted in its response to reconsideration, though still trying to cover its tracks, that Kalivas' undated declaration filed with the trial court on October 27, 2015, did not exist prior to receiving defendant's reply to its motion to vacate. CP 835.

Notwithstanding the evidence, on November 12, 2015 the trial court granted Plaintiff's Motion to Cancel Lis Pendens and Award Attorney's Fees and Costs. CP 822-23. However, this order was not provided to the parties at the time. CP 1066. The parties did not become aware of the order until approximately one month later. CP 1066. On December 17, 2015, plaintiff's counsel emailed the trial court indicating that no decision had been made on plaintiff's motion to cancel *lis pendens*. CP 1081. The court responded the following day, stating it did not have that motion and asked plaintiff counsel to refile it, despite having ruled on the motion a month prior. *Id.* As had become an unfortunate routine, the order contained findings that were objectively false. For example, a reconsideration motion was pending at the time the order was entered, yet the order states that "there are no further proceedings with respect to this case pending before the Court." CP 822. The

order also contained language awarding attorney fees to plaintiff but included no findings of fact or conclusions of law to support the imposition of an attorney fee award. CP 823. Here again the trial court appeared to sign the order without ever reading it.

The order is even more perplexing given the trial court's later action. On November 18, 2015, the trial court requested that plaintiff file a response to Defendant's Motion for Reconsideration, the "further proceedings" the *lis pendens* cancellation order specifically disavowed. CP 1066. Pursuant to the civil rules, a response to a motion for reconsideration is only provided at the court's request; in practice courts request responses when the reconsideration motion raises potentially meritorious issues the court would like the non-moving party to address. In common experience, if a court does not believe the motion has merit it will generally deny the motion without requesting a response. *See* King County LCR 59.

Plaintiff filed its response to reconsideration on November 30, 2015. CP 824-37. In its response plaintiff argued that the State served Whitaker. CP 833-35. Plaintiff relied on a declaration from the State wherein its representative confirmed the State had mailed the documents by certified mail to the address provided by the plaintiff. CP 838-39. However, the State's declaration acknowledged it had no certified receipt on file and this was held by the US Postal Service. *Id.*, ¶ 6. Nowhere in the plaintiff's

response to the reconsideration motion is there any claim that defendant or its counsel violated CR 11, the Washington Rules of Professional Conduct or otherwise engaged in any misconduct. CP 824-37.

After receiving the response, Mr. Bariault contacted the Postal Service and obtained a copy of the certified receipt. CP 976-79. The certified receipt clearly contains the wrong address for **BB's registered agent**, specifically an incorrect unit number. CP 967; 979. Defendant filed its reply on December 2, 2015, focusing primarily on the fact that the objective evidence demonstrated that the service via the secretary of state never reached **BB's registered agent**. CP 965-87.

On December 4, 2015, plaintiff filed an **Objection to defendant's** reply to reconsideration arguing it was overlength and that objective evidence shows that the summons and complaints in both matters were properly mailed by the State and received by Bravern Residences. CP 988-94. **Plaintiff's primary argument was that the signatures on the certified receipts were those of Bravern Residences concierges.** CP 990-92. Plaintiff posited no argument or evidence that the summons and complaint, however, had been placed in Mr. Whitaker's mail slot despite being addressed to a different unit. Indeed, plaintiff submitted the Declaration of Kathleen Beeby (the Bravern Residences Manager) to support its objection, however, her declaration acknowledged that while Bravern employees were authorized to

sign certified mail receipts for residents, it was the postal carrier, not Bravern employees, who was responsible for placing mail in the appropriate unit mail slot. CP 1023-24, ¶ 3. In short, the postal carrier put the summons and complaint mailed by the secretary of state in a mail box belonging to another resident, again confirming Mr. Whitaker's claim that he had received no notice of the lawsuit before judgment was entered. The Bravern Residences Assistant Manager, Rebekka Gardner, confirmed the Bravern Residences had no ability to confirm whether the postal carrier placed the mail in the correct mailbox. CP 1083-84, ¶ 5. Notwithstanding its lack of evidence, plaintiff argued that "Defense counsel has willfully concealed or, in the case of the current Reply, purposefully misrepresented to the Court the fact that Mr. Whitaker received these documents." CP 993. Plaintiff concluded its **Objection by requesting "this Court sanction Defendant and Defense counsel for the willful misrepresentations regarding receipt of the summons and complaint in both its Motion to Vacate and its Reply to the Motion for Reconsideration, as well as the frivolous nature of the legal arguments propounded in the Motion to Vacate."** *Id.*

That same day Mr. Bariault was contacted by Special Agent Hillary Sallee from the Federal Bureau of Investigation (FBI) inquiring into the facts of the present case as well as transactions involving the subject property. CP 1068. Ms. Sallee also inquired into Dean Kalivas, other properties attached

to his name as well as his bankruptcy filings. CP 1068. Mr. Bariault's conversation with Ms. Sallee bolstered his conclusion that BB and Mr. Whitaker had been the victims of wrongdoing. SA Sallee even suggested that BB should file a complaint with the Washington State Department of Licensing (DOL) regarding real estate agent Greenhalgh's actions of drafting an operating agreement for Whitaker and then having the property foreclosed on. CP 1068.

Without holding oral argument or conducting an evidentiary hearing, on December 9, 2015, the trial court signed an order denying defendant's motion for reconsideration provided by the plaintiff. CP 1033-34. As usual, the trial court made no changes to the proposed order, which contained the following language:

Defendant is further ORDERED to pay Plaintiff's reasonable attorney's fees and costs incurred to date. Plaintiff and its counsel misrepresented information to this Court and Plaintiff in violation of CR 11 and the Washington Rules of Professional Conduct. Plaintiff shall submit a motion for reasonable attorney's fees and costs within 14 days of this order.

The trial court's order contains no findings of fact or conclusions of law supporting the imposition of CR 11 sanctions. Also, the order contains an obvious error as the term "Plaintiff" is transposed with the term "Defendant,"⁸ again evidencing the trial court's failure to thoroughly read a

⁸ Plaintiff later filed a motion to correct this clerical error that was granted by the court.

court order prior to signing. Here again the order did not dismiss or even **discuss defendant's substantial evidence** - it simply ignored it. The order provided no explanation of what the defendant or its attorney had allegedly misrepresented.

On Tuesday, December 22, 2015, defense counsel learned that his client, Whitaker, had unexpectedly passed away on December 20, 2015, while visiting family in South Carolina for the holidays. CP 1062. Defense **counsel immediately contacted plaintiff's counsel** about the news. *Id.*

The following day, December 23, 2015, plaintiff filed a Motion to Establish Amount of CR 11 Sanctions and for Supersedeas Bond against Whitaker and Bariault. CP 1043-47. The motion contained no facts with citations to the record and instead was accompanied by proposed findings of fact and conclusions of law. Appendix A. The findings and conclusion were also bereft of any citation to the record for support.⁹

In response to plaintiff's motion, defense counsel pointed out that the findings (1) were not supported by the record, (2) required the court to improperly rely on speculation and witness credibility and (3) could not support sanctions under CR 11. CP 1086-98.

⁹ The trial court had clearly put the cart before the horse because it sanctioned counsel under CR 11 without any facts to support said finding. Accordingly, plaintiff sought to cure this issue by presenting findings after the fact.

Again, without holding oral argument or an evidentiary hearing, the trial court entered plaintiff's proposed findings on February 8, 2016, with limited alterations to the proposed document. CP 1156-62. The trial court sanctioned defense counsel and his client \$3,875.00 each. Whitaker had no opportunity to defend himself as his estate was never substituted. To date, defense counsel has never been before the trial court judge in this proceeding as defendant was never provided an opportunity for oral argument or an evidentiary hearing, although substantial disputed issues of fact existed at every step along the way.

Defense counsel filed a reconsideration motion with respect to the trial court's findings and conclusions of law. CP 1163-75. That motion was accompanied by the Declaration of Thomas Fitzpatrick, a legal expert on attorney conduct. CP 1177-83. Plaintiff responded and defense counsel replied. CP 1184-1216. Again, with no oral argument or evidentiary hearing, the motion was denied. CP 1218-19. The trial court signed an order and judgment against Bariault in the sum of \$3,875.00 on March 29, 2016, CP 1233-34, and this appeal was noticed on April 5, 2016. CP 1235-36.

D. AUTHORITY

A. Standard of Review.

1. Standard for review of CR 11 sanctions.

The standard of appellate review for CR 11 sanctions is the abuse of discretion standard. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). In deciding whether the trial court abused its discretion, this Court must keep in mind that “[t]he purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). “CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings.” *Biggs*, 124 Wn.2d at 197 (citing *Bryant*, 119 Wn.2d at 220). It is a remedy reserved only for the most egregious of circumstances. *Bryant*, 119 Wn.2d at 198, n.2. CR 11 is directed to remedy situations “where it is patently clear that a claim has absolutely no chance of success,” and courts “must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer.” *John Doe v. Spokane Inland Empire Blood Bank*, 55 Wn. App. 106, 122, 780 P.2d 853 (1989).

When assessing attorney conduct, the court should employ an objective standard. *Id.* “[T]he appropriate level of pre-filing investigation is to be tested by inquiring what was reasonable to believe at the time the

pleading, motion or legal memorandum was submitted.” *Id.* (internal quotation marks omitted). When determining a sanction, the trial court should impose the least severe sanction necessary to carry out the purpose of the rule. *Bryant*, 119 Wn.2d at 225. “CR 11 sanctions are not appropriate where other court rules more specifically apply.” *Biggs*, 124 Wn.2d at 197 (citing *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339-40, 858 P.2d 1054 (1993)).

“[T]he imposition of a CR 11 sanction is not a judgment on the merits of an action. ‘Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.’” *Biggs*, 124 Wn.2d at 198 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 L. Ed. 2d 259, 110 S. Ct. 2447 (1990)).

“Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party’s attention as soon as possible. Without such notice, CR 11 sanctions are unwarranted.” *Biggs*, 124 Wn.2d at 198 (citing *Bryant*, 119 Wn. 2d at 224).

Here there was ample evidence to support BB’s claim that it had not been properly serviced process and that the resulting judgments were invalid. Moreover, neither the trial court nor the plaintiff ever identified any information allegedly misrepresented to the court, nor did either alert

the defendant to numerous acts of alleged misconduct contained in plaintiff's proposed findings signed by the court.¹⁰ This same authority regarding the propriety of CR 11 sanctions was presented to the trial court; it was ignored.

2. Evidentiary hearing requirement.

A trial court abuses its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of witness credibility. *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994) (fact disputes can only be resolved by determining credibility, matter remanded for evidentiary hearing); *see also Carson v. Northstar Dev. Co.*, 62 Wn. App. 310, 317, 814 P.2d 217 (1991) (trial court abused its discretion by vacating the default judgment without holding an evidentiary hearing to resolve factual issues); *Crown Plaza v. Synapse Software*, 87 Wn. App. 495, 500-01, 962 P.2d 824 (1997)

¹⁰ Plaintiff sent defense counsel a Rule 11 Safe Harbor Notice on November 1, 2015, stating it would seek sanctions because (1) defendant filed certain documents (plaintiff only identified one document – the DLW-BB JV) it believed were fraudulent or falsely identified, (2) defendant's argument that service is invalid because plaintiff did not file an affidavit with the court is not supported by case law – an argument defendant never made and (3) that defendant's argument that the judgment should be vacated under CR 60(b)(4) was not supported by case law. Plaintiff informed Bariault it would seek CR 11 if he filed reconsideration with respect to the trial court's order denying defendant's motion to vacate. Considering the trial court's order denying defendant's motion to vacate did not contain any findings that Bariault submitted false or fraudulent documents in support of the motion to vacate, it never entered any findings suggesting Bariault made any arguments unsupported by the law, and the facts clearly supported defendant's legal theories, Bariault perceived plaintiff's threat of CR 11 sanctions as meritless.

(disputes about the existence of an agreement are not properly decided on summary judgment because “[o]nly a factfinder can determine which of these statements is more credible, considering all the evidence, including the unsigned written agreement and the reasonableness of the agreement.”). It is improper to impose sanctions on an attorney based solely on the ultimate determination of his client’s credibility. *See Saldivar v. Momah*, 145 Wn. App. 365, 403-04, 186 P.3d 1117 (2006).

Here the trial court conducted no hearing at all related to the disputed facts, and instead appears to have simply concluded the Mr. Whitaker, despite substantial evidence supporting his claims, was not credible. This authority too was presented to the trial court without avail.

B. The trial court abused its direction when it sanctioned defense counsel under CR 11 and signed plaintiff’s proposed findings of fact and conclusions of law.

On December 9, 2015, the trial court entered an order stating that defense counsel misrepresented information to the court and plaintiff in violation of CR 11 and the Washington Rules of Professional Conduct. CP 1033-34. The order contained no findings or any explanation whatsoever as to what defense counsel allegedly misrepresented.

Two months later on February 8, 2016, the trial court entered Findings of Fact and Conclusions of Law, holding “[t]he actions of defense counsel referenced in Findings of Fact constitute CR 11

violations.” CP 1161. The court’s factual findings are (1) erroneous, (2) improperly rely on witness credibility absent a requisite hearing and (3) do not support CR 11 sanctions. A thorough review of the trial court’s findings makes obvious it made little to no effort to assess the accuracy of plaintiff’s proposed findings prior to signing its order; indeed, the court made very limited alterations to the proposed findings and conclusions (e.g., sanctioning defense counsel under CR 11 for allegedly submitting hearsay and failing to interview one of plaintiff’s declarants). CP 1160. Mr. Bariault conducted a reasonable inquiry into the factual and legal bases of the claims in this matter and the trial court abused its discretion when it awarded CR 11 sanctions.

- 1. The trial court’s proposed findings with respect to the DLW-BB joint venture are erroneous as (1) the joint venture had nothing to do with defendant’s claims under CR 60(b)(4), (2) defense counsel reasonably inquired into the joint venture and (3) any conclusion that the joint venture did not exist improperly relies witness credibility absent a requisite evidentiary hearing.**

The trial court’s first ten findings address a joint venture agreement between DLW and BB. CP 1156-58. The joint venture was referenced in BB’s motion to vacate merely to provide the trial court factual context. The DLW JV was not raised as an independent basis for vacating the judgment, and the court abused its discretion by relying on the mere reference to the DLW JV as a basis to sanction Mr. Bariault. Indeed, in

response to defendant's motion to vacate plaintiff never argued defendant sought to overturn the judgment pursuant to the DLW BB JV. Its argument was limited to a single paragraph alleging it did not exist. CP 403. Bariault was completely caught off guard by plaintiff's proposed findings related to the DLW JV BB because plaintiff had never made such arguments previously and the findings did not reflect the record.

a. Mr. Bariault referenced the DLW-BB joint venture to provide a factual context in the case and never argued it served as grounds to vacate the judgment (Findings 1-10).

Defendant's motion to set aside the default judgment did not rely on the DLW JV on its plain language. There is but scant reference to the JV in the original motion. CP 30-31. Accordingly, the trial court's finding that "[d]efense counsel failed to make a reasonable inquiry into the required legal elements of his motion under CR 60(b)(4)" and that "[t]his failure to reasonably investigate the existence of a singed joint venture in an attempt to overturn Plaintiff's default judgment upon an improper legal theory is sanctionable under CR 11" is unfounded and contrary to the record. CP 1158 (Finding no. 10).

Indeed, the DLW JV *could* not have affected the motion, because the motion was premised upon procedural issues – namely proper service of process – not substantive issues (the validity of the JV). Whether the DLW JV existed or not, consequently, was irrelevant to the motion and

could not affect the validity of the defendant's theories that service was improper or that the default was obtained through fraud. Notwithstanding, it appears the trial court simply accepted this argument from plaintiff without reference back to the original motion or otherwise inquiring as to its validity.

The defendant's motion was instead premised upon plaintiff's effort to service process through the secretary of state pursuant to a false declaration submitted by Kalivas. The facts surrounding the Kalivas declaration supported an objective belief that judgment was obtained through fraud. This fraudulent conduct caused the entry of the judgment without proper notice and prevented BB from fully and fairly presenting its case. *See Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). Even if the trial court determined that Kalivas's affidavit of attempted service merely contained a clerical error, there was patent disagreement between Kalivas's declarations on the subject that raised the specter to fraud. Mr. Bariault's assessment of the factual record related to the manner of service of process was not unreasonable; the joint venture was irrelevant. The trial court abused its discretion in sanctioning Mr. Bariault under these circumstances.

b. Even if the DLW JV was critical, Mr. Bariault engaged in a reasonable inquiry surrounding its existence (Findings 8-10).

Even if the DLW JV was critical to this matter, the evidence before the trial court established without contradiction that Mr. Bariault's pre-filing investigation was reasonable and supported a view that the JV existed:

1. Whitaker testified under oath that BB entered in to a joint venture with DLW and informed defense counsel of the same.
2. Whitaker provided defense counsel with an unsigned copy stating he never received a final signed copy and thus did not possess one.
3. Whitaker informed defense counsel that he signed the joint venture agreements around March 2014. The joint venture lists a date of March 25, 2014.
4. The unsigned DLW JV provides that DLW was required to provide **all capital and labor. Plaintiff's complaint admits that DLW did just that. See Complaint, ¶ 3.2 (Sub #1).** There was no evidence of a standard construction contract between DLW and BB, no evidence of periodic invoicing by DLW, and accordingly no basis to believe that DLW's performance was anything other than pursuant to a joint venture with DLW providing precisely the service referenced in the alleged joint venture.

It is unclear what further inquiry defense counsel could have undertaken. The reasonableness of an attorney's inquiry is evaluated by an objective standard, and must take into account all the circumstances of the case. *See Townsend v. Holman Consulting Corp.*, 929, F.2d 1358, 1364 (9th Cir. 1990); *Bryant*, 119 Wn.2d at 220; *Harrington v. Palithorp*, 67 Wn. App. 901, 911, 841 P.2d 1258 (1992). "The court should inquire whether a

reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.” *Bryant*, 119 Wn.2d at 220. The burden is on the moving party to justify Rule 11 sanctions. *See Building Industry Association of Washington v. McCarthy*, 152 Wn. App. 720, 745, 218 P.3d 196 (2009). Every inquiry into the joint venture suggested it existed.

The trial court ignored these facts; it appears the trial court concluded that Whitaker had to have a signed version to allege a joint venture existed. That conclusion is plainly contrary to Washington law. “Joint ventures are not created by operation of law. They arise by express or implied contract.” *Adam v. Johnston*, 71 Wn. App. 599, 611, 860 P.2d 423 (1993). (emphasis added). Sanctioning counsel under these circumstances is without foundation and an abuse of discretion. CP 1182-83.

c. The trial court’s conclusion that no DLW JV existed improperly relies on witness credibility absent a required evidentiary hearing or discovery (Findings 1-10).

The trial court’s findings are also erroneous in that they are improperly premised upon a determination of Whitaker’s credibility. The trial court apparently concluded that because Whitaker alleged a joint venture between DLW and BB but could not produce the signed copy of

the agreement, he falsified its existence. See CP 1157 (Finding nos. 3, 4, 6). This conclusion is flawed for two reasons.

First, it assumes no agreement may exist unless Whitaker maintained a signed copy. Parties to contract, however, frequently do not receive or maintain the fully executed version, which certainly has no effect on the validity of the contract. Moreover, a signed agreement is not even required for a valid joint venture agreement. *Paulson v. County of Pierce*, 99 Wn.2d 645, 654, 664 P.2d 1202 (1983) (an express or implied contract is an essential element in demonstrating a joint venture); *Henson v. Employment Sec. Dep't*, 113 Wn.2d 374, 379, 779 P.2d 715 (1989) (“This court has repeatedly defined an implied contract as an agreement of the parties arrived at from their acts and conduct viewed in the light of surrounding circumstances.”) (internal quotation marks omitted).

Notwithstanding these well-established legal principles, and despite unrefuted evidence that DLW acted in a fashion in keeping with the alleged JV, the trial court seems to have simply determined Whitaker was not credible. A trial court abuses its discretion, however, by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of witness credibility. *Woodruff*, *supra*; *Carson*, *supra*; *Crown Plaza*, *supra*. In short, the trial court impermissibly resolved an immaterial disputed issue of fact without an evidentiary

hearing and then inexplicably awarded sanctions contrary to Washington law. It is improper to impose sanctions on an attorney based solely on the ultimate determination of his client's credibility. *Saldivar v. Momah*, 145 Wn. App. at 403-04.

Second, even if the JV was necessary to the relief requested in the motion, the trial court compounded its error by sanctioning without providing an opportunity for discovery; a trial court should be "reluctant to impose sanctions for factual errors or deficiencies in a complaint before there has been an opportunity for discovery." *Bryant*, 119 Wn.2d at 222. Sanctions should not be encouraged for these errors because "[t]he notice pleading rule contemplates that discovery will provide parties with the opportunity to learn more detailed information about the nature of a complaint." *Id.* Here, without any discovery, the trial court perfunctorily held that no joint venture existed in spite of or by ignoring substantial evidence to the contrary. Founding sanctions on that error is an abuse of discretion.

2. **The trial court abused its discretion by finding that "defense counsel failed to allege a single fact demonstrating fraud in how Plaintiff obtained its default judgment."(Finding 9).**

Defendant specifically alleged that Kalivas' Declaration of Attempted Service contained false information and that this fraud was utilized to bypass the reasonable diligence requirements of RCW

25.15.025. CP 413-14. It cannot be disputed that if a party falsified a service declaration used to ultimately obtain judgment against another party, that constitutes fraud under CR 60(b)(4).

Here, the Kalivas declaration supporting service through the secretary of state was plainly false; Plaintiff admitted as much but attempted to minimize the falsity by describing it as a “**typographical omission.**” **Kalivas did not inform the trial court of his alleged “typographical omission,”** however, until *after* defendant pointed out the fallacy of his declaration and argued plaintiff submitted this false information to the State to bypass RCW 25.15.025. CP 476; 478. The defendant also pointed out that **the plaintiff’s** agents were in contact with Whitaker *at the same time* that Kalivas was allegedly unsuccessfully seeking to contact or serve him at the Bravern Residences; the plaintiff plainly knew how to locate and communicate with Whitaker. CP 414. **Plaintiff’s suspect explanation is even more questionable given its subsequent attempt to claim that the wrong declaration had inadvertently been printed, a claim later shown to be baloney when the metadata on the allegedly correct declaration showed it was not created until after the alleged printing error (a fact plaintiff later reluctantly admitted). CP 459-66.** It again appears the trial court simply ignored this evidence. Even if the trial court believed Kalivas’ story that the declaration contained a

“typographical omission,” there is no foundation to find that defendant did not assert facts that, if true, would constitute fraud. “Hindsight is not an appropriate standard for applying CR 11.” *Piper v. Dep’t of Labor & Indus.*, 120 Wn. App. 886, 891, 86 P.3d 1231 (2004). The Court’s finding is unsupported by the record. CP 1183.

3. Contrary to the trial court’s findings Mr. Bariault never argued plaintiff’s judgment should be overturned in part because plaintiff failed to file a declaration with the Court regarding service on BB (Findings 11-13).

The trial court further founded sanctions upon a finding that the defendant inaccurately argued that plaintiff was required to file a declaration with the court in order to validate service. CP 1158-59 (Finding nos. 11-13). The allegations in defendant’s motion to vacate, however, are plain on their face; Mr. Bariault never argued plaintiff was “required” to file an affidavit. The motion instead stated:

None of the documents Washington Capital submitted in support of default demonstrate it attempted service directly on Defendant’s registered agent or acted “with reasonable diligence” to serve Defendant’s agent.

CP 37. This is a true factual statement, not an argument. Defendant did not argue a declaration was necessary, and any sanction based on such claim is unfounded.

4. The trial court abused its discretion where it held that Whitaker was served with summons and complaint and that defense counsel falsely averred he was not, allegedly violating CR 11 (Findings 20-23).

Whitaker testified under oath that he never received summons and complaint in this matter; there was no evidence presented that refuted his sworn testimony. CP 986. Nothing from the secretary of state, the plaintiff, the post office nor any employee of the Bravern Residences establishes that the summons and complaint ever ended up in Whitaker's mailbox. Indeed, compelling evidence suggests the summons and complaint were delivered to the wrong mailbox, since the return receipt on file with the US Postal Service shows an incorrect mailbox number. CP 979. The undisputed testimony from the Bravern Residences manager and assistant manager establishes that the postal carrier places registered mail in a resident's mailbox, not the concierge who signs for it. CP 1023-24; 1083-84. In fact, plaintiff¹¹ even argued "[t]he signature of the concierge official matches the handwriting of the four digit number [the Unit number] on the Certified Mail Receipt." CP 1113. Simply put, the only piece of objective evidence shows that the Bravern concierge directed the postal worker to the wrong mailbox, so Whitaker never received the Summons and Complaint, just as he testified.

¹¹ It should be noted that this argument was submitted with no foundation as plaintiff's counsel is not a handwriting expert and cannot testify whether certain handwriting matched.

Further, trial court seems to have concluded that had Bariault inquired of particular witnesses, he would have concluded Whitaker was properly served. Specifically, the trial court held “Defense counsel failed to inquire of witnesses propounded in Response to Reconsideration, viz. of Woodley, Beeby, Saffarni.” CP 1160 (Finding no. 22). Not only is this finding unfounded, but these witnesses only further support the conclusion that Whitaker was never served. CP 1183, ¶ 15. Beeby and Saffarini were not propounded in Response to Reconsideration. They were propounded only after defendant submitted its reply to reconsideration,¹² too late to allow Mr. Bariault the opportunity to inquire. CP 991; 1020-21; 1023-24. Moreover, Mr. Bariault did inquire after Woodley was timely propounded in plaintiff’s response; Woodley testified “[t]he OSOS does not utilize the optional green return receipt card when using this process. Accordingly, there would not be a green return receipt card on file to evidence that service of process was effected.” CP 839, ¶ 6. Knowing it would be futile to contact Woodley because she testified the State does not keep the return receipt on file, Mr. Bariault instead contacted the US Postal Service – the most sensible, reasonable and diligent approach. After speaking with a

¹² Plaintiff objected to defendant’s reply including two new declarations never previously filed for Beeby and Saffarini.

representative from the US Postal Service, Mr. Bariault obtained a copy of the return receipt showing the wrong mailbox number.¹³

Accordingly, in addition to the defendant's sworn testimony that he did not receive the documents, defense counsel had objective evidence they never reached the correct destination. This belief was further solidified by Beeby's declaration that "the postal employee will put the certified mail in the appropriate box." CP 1023, ¶ 3. While the State did send the summons and complaint and the post office did deliver it to the Bravern Residences, the only evidence shows it was placed in the wrong mailbox. Accordingly, the only basis to sanction defense counsel would be a finding that Whitaker, despite this objective evidence, was not credible. Any sanction on counsel based upon a credibility finding against Whitaker, however, is not justified. *See Saldivar*, 145 Wn. App. at 404. As previously noted such finding is also an abuse of discretion where the trial court conducted no evidentiary hearing on clearly disputed facts and rejected Whitaker's testimony despite no contrary testimony. *See Woodruff, supra; Carson, supra; Crown Plaza, supra.*

¹³ This argument itself renders the trial court process questionable. There is no precedent known to appellant that suggests a failure to inquire of a specific witness is sanctionable, particularly when other, substantial evidence already supports a claim or position.

5. **The trial court abused its discretion by sanctioning defense counsel under CR 11 for allegedly submitting inadmissible evidence although the trial court never made any formal rulings with respect to the submitted evidence or gave counsel an opportunity to respond to plaintiff's objections regarding said evidence (Findings 14-16; 18-19; 24).**

Defense counsel has been unable to find a case justifying sanctions for the submission of allegedly inadmissible evidence. Evidence is routinely rejected for foundation or authenticity reasons – rejecting the evidence is the appropriate remedy. *See Biggs*, 124 Wn.2d at 197. Not only are sanctions inappropriate under such circumstances, but neither the trial court nor plaintiff has ever explained why the alleged information/evidence was inadmissible. The trial court's findings with respect to ER 901, ER 608 and the hearsay rules are belied by the record. CP 1159-60.

Finding No. 15 states "Plaintiff suffered the burden of having to respond generally to some thirty-two (32) unauthenticated documents, thus causing an unnecessary expenditure of substantial time by both counsel for Plaintiff." CP 1159. That finding referred to an October 2, 2015 declaration submitted by Mr. Bariault. That declaration, however, did not even contain 32 exhibits. CP 75-78. Moreover, the plaintiff only objected to 12 of the attached exhibits and numerous exhibits were pleadings previously filed in the case. CP 410. Plaintiff's response merely noted that the 12 exhibits were not authenticated under ER 901. *Id.* Yet

plaintiff never claimed the documents were not exactly what they were purported to be. ER 901 provides “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by *evidence to support a finding that the matter in question is what its proponent claims.*” Plaintiff has never submitted a shred of evidence or argument that the exhibits are not what counsel claimed. There is simply no basis for the trial court’s **finding on authentication**, let alone any basis for a sanction based on authentication. It again appears the trial court simply accepted plaintiff’s charge without assessing its accuracy.¹⁴

Moreover, although the trial court **denied defendant’s motion to vacate**, it never ruled the exhibits were inadmissible, such that counsel had no notice of the alleged fault as required for CR 11 sanction. CP 490-91. “[W]ithout prompt notice regarding a potential violation of the rule, the

¹⁴ The Court also accepted Finding No. 2 without assessing its accuracy. That finding states “**Defense counsel’s declaration of 10/2/15 (sub-number 19)** refers to his **Ex. 4** as evidence of the alleged DLW-Bravern joint venture (J-V); however, **Ex. 4** refers to a different joint venture between Gonzalez-Bravern. **Ex. 5 attached to defense counsel’s** declaration contains an alleged J-V between Bravern and DLW but it is unsigned by the parties.” CP 1156. This is patently false as demonstrated by the Bariault Declaration. CP 76, that reads:

4. Attached hereto as Exhibit 3 is a true and correct copy of the Joint Venture Agreement between Bravern & Carlos & Leonor Gonzalez.

5. Attached hereto as Exhibit 4 is a true and correct copy of the Joint Venture Agreement between Bravern and DLW General Contractors (“DLW”).

A cursory review of Bariault’s declaration demonstrates Ex. 3 is the Gonzalez-Bravern joint venture as alleged and Ex. 4 is the DLW-Bravern joint venture as alleged. CP 103-4; 113-14. Ex. 5 is not an unsigned JV as stated in the findings. The court’s finding is inexplicable.

offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper.” *Biggs*, 124 Wn.2d at 198.

“[Deterrence] is not well served by tolerating abuses during the course of an action and the punishing the offender after the trial is at end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions.”

Biggs, 124 Wn. 2d at 198 (quoting *In re Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986)). “Both practitioners **and judges** who perceive a possible violation of CR 11 must bring it to the offending party’s attention as soon as possible.” *Biggs*, 124 Wn.2d at 198. “Without such notice, CR 11 sanctions are unwarranted.” *Biggs*, 124 Wn.2d at 198.

Defense counsel also never submitted any hearsay in response to Plaintiff’s request for CR 11 sanctions or its Motion to Correct Clerical Error. CP 1160 (Finding no. 24). Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). None of the statements attributed to third parties in defense counsel’s response were “offered to prove the truth of the matter asserted.” Instead, those statements were offered to show counsel’s reasonable inquiry and explain why counsel believed he had a good faith basis to pursue the defendant’s claims. None of the statements were offered to establish their truth.

Because the trial court never held a hearing on the issue, Mr. Bariault was not provided an opportunity to contradict the “hearsay” claim.

Further, Mr. Bariault was never given notice by the trial court or plaintiff that the Marc Sellers declaration supporting defendant’s reconsideration motion was sanctionable. Sellers’ information plainly informed Mr. Bariault as to significant potential questions concerning Mr. Kalivas’s credibility and the likelihood of fraud in the underlying judgments – the very issue at the heart of the trial court’s sanctions. Indeed, Plaintiff’s objection to the Sellers declaration makes no mention of CR 11 violations; plaintiff simply asked the Court to exclude it. CP 819-21. While the trial court denied reconsideration, it never provided any indication that introducing the declaration was potentially sanctionable. Absent notice and opportunity to cure, CR 11 sanctions are unwarranted.

Last, the evidence referenced in the Sellers’ declaration did not violate ER 608(b) because it was not submitted to address specific instances of conduct in order to attack Kalivas’ credibility. The declaration was “Reputation evidence of character” pursuant to ER 608(a). Under the rule, “[t]he credibility of a witness may be attacked or supported by the evidence in the form of reputation.” The declaration demonstrated Kalivas’ reputation for untruthfulness in litigation. Consequently, the

Sellers declaration was arguably admissible evidence to the issues before this Court, and its introduction cannot found a sanction award.

The bottom line is that the appropriate response to the allegedly inappropriate evidence was to strike it, not to sanction Mr. Bariault under CR 11, particularly where the trial court failed to even explain the basis for the rejection.

E. CONCLUSION AND RELIEF REQUESTED

The trial court repeatedly abused its discretion by signing plaintiff's proposed orders without thoroughly reading them and without assessing their accuracy against the record in this case. The trial court never allowed oral argument and failed to hold any evidentiary hearings prior to denying defendant's motion to vacate, denying defendant's reconsideration motion, sanctioning defense counsel and denying defense counsel's reconsideration of said sanctions. The trial court's sanction is contrary to well-established Washington precedent, is unfounded, and is contrary to the evidence in the record. The trial court simply ignored evidence in issuing its erroneous rulings, findings and a sanction award against Mr. Bariault. Accordingly, Mr. Bariault respectfully requests the following: (1) that this Court reverse the trial court's order entered on December 9, 2015, finding that Mr. Bariault misrepresented information to the court and plaintiff in violation of CR 11 and the Washington Rules of

Professional Conduct; (2) reverse the trial court's findings and its legal conclusions finding that Mr. Bariault violated CR 11 contained in its February 8, 2016 order; and (3) vacate the judgment entered against Mr. Bariault in the sum of \$3,875.00 on March 29, 2016. Reversal as opposed to remand is appropriate at this juncture because Mr. Bariault's client is now deceased, making a remand for further proceedings virtually impossible.

RESPECTFULLY SUBMITTED this 1st day of July, 2016.



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APPENDIX A

Hon. Julie Spector
January 4, 2016

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

WASHINGTON CAPITAL)	NO. 14-2-29631-2 SEA
MORTGAGE, INC., a Washington)	
Corporation,)	
)	FINDINGS OF FACT AND
Plaintiff,)	CONCLUSIONS OF LAW
)	
vs.)	
)	(Proposed)
BRAVERN BUSINESSES LLC, a)	
Washington Limited Liability)	
Corporation,)	
)	
Defendant.)	
)	

FINDINGS OF FACT

1. In the captioned case Defendant's attorney Evans Bariault attempted to overturn Plaintiff's judgment by alleging in part that his client, Barvern Businesses LLC ("Bravern") was deprived of the business expectancy of a joint-venture ("J-V") between Bravern and Plaitniff's assignor, DLW General Contractors, Inc. **Ex. 1.**

FINDNGS OF FACT AND CONCLUSIONS
OF LAW - 1

LAW OFFICES OF RICHARD MCKINNEY
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SEATTLE, WASHINGTON 98116
PHONE:206/933-1605; FAX: 206/937-5276

1 2. Bariault's declaration of 10/2/15 refers to his **Ex. 4** as evidence of the alleged
2 DLW-Bravern J-V, but **Ex. 4** is the Gonzalez-Bravern J-V. **Ex. 5** to Bariault's declaration
3 contains an alleged J-V between Bravern and DLW but it is unsigned by the parties.

4 3. Despite requests by Plaintiff's counsel (**Ex. 2**) for clarification regarding
5 Bariault's submission of an alleged DLW-Bravern J-V agreement which was unsigned,
6 Bariault never produced a signed copy of that agreement.

7 4. There was no J-V between DLW and Bravern.

8 5. Ernie Whitaker, principal owner of Bravern, swore under penalty of perjury
9 that there was a J-V between DLW and Bravern. **Ex. 3**.

10 6. Whitaker misrepresented to this Court a material fact in claiming that there
11 was a DLW-Bravern J-V. This is a CR 11 violation by Whitaker.

12 7. Without the assertion of the purported DLW-Bravern J-V, Bravern's only
13 expectancy of financial gain from this transaction was from the Bravern-Gonzalez J-V
14 (contained on p. 2 of **Ex. 4** to Bariault's declaration of 10/2/15). This document promises to
15 Bravern, "After the distribution to Gonzalez as described following [sic], Bravern shall
16 receive a mutually agreed upon nominal fee for participating in the joint venture. (emphasis
17 supplied.)

18 8. Bariault either knew that the purported DLW-Bravern J-V was non-existent, or
19 in the exercise of reasonable investigative effort he should have ascertained the non-existence
20 of this J-V before asserting it in pleadings which he signed. Bariault's failure to do so was a
21 CR 11 violation.

22 9. Bariault sought to overturn the judgment in the captioned case based in part
23 upon a theory of fraud under CR 60(b)(4). However, Bariault failed to allege a single fact
24

1 demonstrating fraud in the means of Plaintiff obtaining its judgment as distinguished from
2 Bariault's allegation of fraudulent facts supporting the judgment.

3 10. Bariault failed to make reasonable inquiry into the required legal elements of
4 his motion under CR 60(b)(4). This failure caused Bariault to attempt to overturn Plaintiff's
5 judgment upon an improper legal theory, thus violating CR 11 once again.
6

7 11. Bariault moved to overturn Plaintiff's judgment in part because DLW (the
8 assignor to Plaintiff) and Plaintiff failed to file with the Court a declaration demonstrating
9 their failed efforts to personally serve Whitaker, the registered agent of service of Bravern.

10 12. There is no statutory requirement that DLW or Plaintiff must have filed an
11 affidavit of attempted service with the Court. See RCW 25.15.025 which does not require
12 filing with the court a declaration of attempted service.
13

14 13. Bariault's assertion in his pleading that DLW or Plaintiff should have filed
15 with the court a declaration of attempted service upon Whitaker was not warranted by existing
16 law. Accordingly the part of Bariault's motion asserting this requirement constituted yet
17 another CR 11 violation.

18 14. Bariault in his declaration of 10/2/15 attempted to self-authenticate numerous
19 documents, all contrary to the requirements of case law and of ER 901(a).
20

21 15. Plaintiff suffered the burden of having to respond generally to some 32
22 unauthenticated documents, thus causing expenditure of substantial time by both counsel for
23 Plaintiff.

24 16. Bariault's improper authentication of these documents constituted a pleading
25 that was not warranted by existing law. (in the parlance of CR 11(a)(2)). This self-
26 authentication was another CR 11 violation.
27

1 17. On October 12, 2015, and November 1, 2015, Huguenin advised Bariault of
2 his violation of CR 11 (**Ex. 4** to these Findings). However, neither Bravern nor Bariault
3 modified their position with respect to the issues contained in the warning letters of Huguenin.
4 Instead Bariault and Bravern committed additional CR 11 violations thereafter. See Findings
5 Nos. 18, 21-22, 24, 25.
6

7 18. In Bairault's Motion for Reconsideration he alleged numerous derogatory
8 factual allegations against Dean Kalivas, an agent of Plaintiff. Those allegations referenced
9 prior specific acts of bad conduct in transactions unrelated to this case. These allegations
10 were contained in the declaration of Mark Sellers, but these allegations are not admissible
11 under ER 608.
12

13 19. Bariault failed to make proper inquiry into the legally correct means of
14 impeachment under ER 608. Bariault's placement before the court of inadmissible evidence,
15 based upon inadequate legal research, constituted a CR 11 violation.

16 20. In Bravern's Motion for Reconsideration Whitaker stated that he had not been
17 served by the Secretary of State in the present case. Whitaker misstated these facts to this
18 Court and therefore violated CR 11(a).

19 21. Bariault also stated that Whitaker had not been served with process by the
20 Secretary of State.
21

22 22. Bariault failed to adequately inquire of witnesses propounded in Response to
23 Reconsideration, viz. of Woodley, Beeby, Saffarini. Adequate factual inquiry would have
24 disclosed the compelling evidence that the Secretary of State properly served Whitaker with
25 the Summons and Complaint in this case via certified mail. A reasonable factual investigation
26 by Bariault would have been inconsistent with Bariault's assertion in his 12/2/15 declaration
27

1 that service of the Summons and Complaint was sent to the wrong address. Bariault's failure
2 to interview the above-named witnesses constituted an inadequate factual investigation and
3 therefore yet another CR 11 violation.

4 23. Whitaker flatly lied to this Court in his 12/2/15 declaration when he denied that
5 he was served with the Summons and Complaint in thi case. That misrepresentation to this
6 Court constituted another CR 11 violation by Whitaker.

7 24. Bariault violated LR 7 by filing an overlength brief without permission. This
8 action was another CR 11 violation.

9 25. Bariault also violated CR 11 by filing an unauthorized surreply to Plaintiff's
10 reply in the Motion for Reconsideration. This surreply was also a CR 11 violation as it was
11 was not authorized by law.

12 26. Attorney Frances Huguenin reasonable devoted ____ hours to the defense of
13 Plaintiff against the various allegations of Defendant which was violative of CR 11 by both
14 Whitaker and Baurialt. The reasonable value of Huguenin's time is \$ ____ per hour.

15 27. _____ of Huguenin's hours expended is attributable to the CR 11
16 violation of both Whitaker and Bariault. ____ hours are attributable only to the CR 11
17 violation of Bariault which were not the joint responsibility of Whitaker.

18 28. Richard McKinney reasonably devoted ____ hours to the defense of Plaintiff
19 against the allegations of Whitaker and Bariault which were CR 11 violation of one or both of
20 them. McKinney also reasonably devoted ____ hours to preparing all documents associated
21 with this Motion to establish the quantum of CR 11 sanctions and the amount of the
22 supersedeas bond.

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3. The actions of Whitaker set forth in paragraphs 5-6 and 20 and 23 constitute CR 11 violations.

4. Judgment shall enter jointly and severally against Bariault and Frey Buck in the amount of \$ _____.

5. Judgment shall be entered jointly and severally against Bravern Businesses LLC and Ernie Whitaker in the amount of \$ _____. This judgment is joint and several with the judgment referenced in Conclusion of Law No. 4

DATED this _____ day of December, 2015.

HONORABLE JULIE SPECTOR

Presented by:

Richard McKinney

RICHARD MCKINNEY, WSBA No. 4895
Attorney for Plaintiff

FILED
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STATE OF WASHINGTON

2016 JUL -7 PM 12:59

No. 75017-8

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

WASHINGTON CAPITAL MORTGAGE INC.,

Plaintiff/Respondent,

vs.

BRAVERN BUSINESSES LLC,

EVAN BARIAULT,

Aggrieved Non-Party/Attorney/Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(The Honorable Julie Spector)

CERTIFICATE OF SERVICE

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Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on July 1st, 2016, I caused to be served in the manner noted below a copy of the following document on the following individuals at the following address:

1. Appellant's Opening Brief.

[X] Via email to:

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Richard McKinney
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Seattle, WA 98116
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r_mckinney@qwestoffice.net

RESPECTFULLY SUBMITTED this 7th day of July, 2016.



Brooke A. Bassetti
Paralegal to Theron A. Buck and
Evan D. Bariault