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STATE OF WASHINGTON
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DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JUST DIRT, INC.,

Respondent,

vs.

KNIGHT EXCAVATING, INC.,

Appellant.

BRIEF OF APPELLANT
KNIGHT EXCAVATING, INC.

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A. INTRODUCTION

Knight Excavating, Inc. (Knight) appeals the award of over \$20,000 in attorney fees the trial court awarded against Knight and in favor of Just Dirt, Inc. Just Dirt argued it was entitled to attorney fees as sanctions under several theories. The trial court failed, however, to issue findings of fact and conclusions of law explaining the basis for its award. The trial court further failed to identify the conduct or filings it deemed sanctionable, the way in which it arrived at the amount awarded, and the reason it awarded Just Dirt more fees than it asked for. Accordingly, meaningful appellate review is not possible given the court's failure to "show its work."

Further, this appeal presents the issue of whether a trial court abuses its discretion by imposing substantial sanctions against a client where the acts and omissions the court found sanctionable were those of the attorney, not the client. Here, Knight had no responsibility for the conduct on which Just Dirt based its request for sanctions, nor did it participate in, have knowledge of, or authorize the conduct. Rather, the conduct was that of Knight's trial counsel, Michael Siefkes. Just Dirt sought sanctions for Siefkes' discovery violations, allegedly untruthful representations to the court, failure to abide by court-imposed deadlines, refusal to accept service by fax after a long course of conduct of accepting

service by fax, attacks in pleadings on opposing counsel's integrity and professional ability, and other unprofessional conduct. The trial court ordered Knight to pay over \$20,000 in attorney fees, but sanctioned Siefkes only \$3,000. Under these circumstances, the trial court abused its discretion by requiring Knight to bear the overwhelming burden of the sanctions, where trial counsel committed the acts and omissions on which the award was based.

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error

The trial court erred in ordering Knight to pay Just Dirt attorney fees in the amount of \$20,240.79.

(2) Issues Pertaining to Assignment of Error

1. Did the trial court err in ordering Knight to pay attorney fees to Just Dirt where, assuming the award was intended as an award of sanctions under CR 11, the court failed to specify in its order the ground upon which it awarded fees, the sanctionable conduct, and the specific filings it deemed sanctionable and failed to issue findings of fact and conclusions of law in order to create an adequate record on its fee award decision?

2. Did the trial court err in ordering Knight to pay attorney fees to Just Dirt where, assuming the award was intended as an award of

sanctions under CR 11, the trial court failed to limit the fees to the amounts reasonably expended in responding to the sanctionable filing?

3. Did the trial court err in ordering Knight to pay attorney fees to Just Dirt where, assuming the award was intended as an award of sanctions under CR 11, the sanctionable conduct of which Just Dirt complained consisted of acts and omissions of Knight's trial counsel, not Knight?

4. Did the trial court err in ordering Knight to pay attorney fees to Just Dirt where, assuming the award was based upon one or more violation of the Rules of Professional Conduct (RPCs), the conduct constituting the violation was that of Knight's trial counsel, not Knight, and, where the remedy for a violation of the RPCs is a request for discipline by the bar association, not the award of sanctions?

5. Did the trial court err in ordering Knight to pay attorney fees to Just Dirt where, assuming the award was based on the trial court's finding of a violation of CR 56(g), Just Dirt failed to identify any affidavits allegedly presented in violation of CR 56(g)?

6. Did the trial court err in ordering Knight to pay attorney fees to Just Dirt where, assuming the award was based on the trial court's finding of a violation of CR 26(b)(5)(A)(i), the conduct underlying the violation was that of Knight's trial counsel in committing discovery

violations and where Knight did not participate in the conduct and had no reason to know its trial counsel was not complying with the rules of discovery?

C. STATEMENT OF THE CASE

Litigation between Just Dirt and Knight resulted in a judgment against Knight and in favor of Just Dirt.¹ Just Dirt subsequently filed a motion for attorney fees, which the trial court granted. CP 918-24, 1121-23. Knight did not appeal the principal judgment. This appeal involves only the trial court's order on Just Dirt's motion for attorney fees.

In order to understand the bases for Just Dirt's motion for attorney fees and the trial court's award of sanctions, however, Knight must describe in some detail the progression of the underlying lawsuit.

In the underlying lawsuit, Just Dirt alleged that Knight breached a contract for the rental of its equipment. CP 4-6. The contract for the rental and use of the equipment was not reduced to writing. The parties to the contract did not have an agreement for the payment of the other's attorney fees should a dispute arise under the contract. CP 1085-86. The case was filed in the Pierce County Superior Court and assigned to the Honorable Katherine M. Stolz.

¹ Knight has fully satisfied the judgment. CP 1173-74.

Knight was represented by attorney Michael Siefkes. Siefkes prepared and filed an answer and counterclaim on behalf of Knight. CP 11-14. The ensuing litigation was as much about the breach of contract claim as it was about the disagreements between the parties' counsel and allegations of professional incompetence.

Just Dirt moved for summary judgment. CP 47-65. In support of Knight's response to Just Dirt's motion, Siefkes prepared a declaration of Malcolm Knight, president of Knight Excavating. The declaration contained an allegation that the business partner of Craig Shipman, president of Just Dirt, was in jail awaiting trial on charges of child rape. CP 77. Just Dirt's counsel filed a declaration alleging it was "an abuse of process" to include information about Shipman's partner. CP 90. Counsel requested sanctions against Knight and/or Siefkes for the inclusion of this information. *Id.* The trial court denied the motion for summary judgment, but gave Just Dirt leave to renew its motion after the discovery cut-off. CP 109-11. The court's order does not address Just Dirt's request for sanctions.

Siefkes filed a motion to quash various subpoenas and notices of depositions Just Dirt filed, arguing the depositions were set after the discovery cut-off date and in violation of the notice requirement of CR 30(b)(1). CP 228-30. Counsel for Just Dirt filed a declaration in response

to the motion to quash, arguing that Siefkes failed to timely provide answers to discovery requests and arguing further that Siefkes had not only orally agreed to the scheduling of the depositions on the date beyond discovery cut-off, but also filed a notice of deposition of Shipman scheduled for a date beyond discovery cut-off. CP 235-38. The trial court quashed all subpoenas by both sides and set specific dates on which the parties' depositions were to be conducted. CP 241-42.

Just Dirt moved to amend the complaint to exclude Shipman personally as a plaintiff and to add Knight's surety as a defendant. CP 246-52. Siefkes prepared and filed Knight's response to the motion to amend the complaint, arguing a lack of a legal basis to attach Knight's bond and prejudice if Just Dirt were to allowed to amend its complaint. CP 260-70. Just Dirt filed a reply to the response to the motion to amend the complaint. CP 331-36. Siefkes filed, on behalf of Knight, a "Response to Defendant's Reply to Plaintiff's Motion to Amend the Complaint." CP 271-76. In it, Siefkes accused Just Dirt's trial counsel of misleading the trial court and filing a response "rife with inaccuracies." CP 271, 272. He also accused Just Dirt's trial counsel of lying to the court, at one point arguing that an entire section of Just Dirt's response was "a complete lie." CP 272. The trial court granted the motion to amend. CP 341-42. Just Dirt filed an amended complaint dropping

Shipman as a plaintiff and adding Developers Surety and Indemnity Company, Knight's surety, as a defendant. CP 343-45.

A major point of contention between counsel, and a basis for Just Dirt's request for sanctions, was service of documents by facsimile. Siefkes, on behalf of Knight, filed a motion to strike various filings of Just Dirt on the ground of lack of service. CP 828-30. He alleged that Just Dirt's counsel faxed various documents to his office, but did not send them by mail or courier. Accordingly, he argued, the documents were never served on him and should be stricken. *Id.* He also claimed to have instructed counsel to stop serving documents on him by facsimile.

Counsel for Just Dirt responded with a scathing declaration. CP 833-83. Counsel alleged that she and Siefkes had a pattern of allowing service by facsimile and, in fact, Siefkes had served the very motion to strike in which he complained about service by facsimile upon counsel *by facsimile*. Counsel for Just Dirt accused Siefkes of misrepresenting facts in his motion to strike and denied that Siefkes ever instructed her to discontinue service by facsimile. Counsel alleged that during the week in which Siefkes filed the motion to strike, he served seven documents on her by facsimile. CP 834. Counsel also alleged that her office attempted to fax certain documents to Siefkes six different times on one day, but was unsuccessful on each attempt. However, in between the six attempts,

counsel's office received documents from Siefkes sent by facsimile. CP 835-36. Counsel further accused Siefkes of perpetrating a fraud on the court with regard to a notice of withdrawal and substitution of counsel. CP 836. There does not appear to be an order of the trial court addressing the motion to strike.

Claiming to be the attorney for Developers Surety, Siefkes filed an answer, CP 354-55, and a motion for summary judgment, CP 392-412, on behalf of the company. Just Dirt moved to strike the motion for summary judgment. CP 693-97. In counsel's declaration in support of the motion to strike, she alleged that attorney Alexander Friedrich had entered a notice of appearance as attorney for Developers Surety on December 5, 2005 and that Siefkes had not filed a notice of appearance as attorney for Developers Surety at the time he filed the motion for summary judgment. CP 694. Counsel alleged further that Siefkes served on Just Dirt an offer of judgment on behalf of Developers Surety, even though he had not entered an appearance as counsel for Developers Surety. *Id.* Counsel requested sanctions for violation of Pierce County Local Rule 7 and CR 11. CP 695. Siefkes and Friedrich filed a notice of association of counsel and, on the same day, filed a notice of withdrawal and substitution of counsel, in which Friedrich withdrew as attorney for Developers Security and Siefkes appeared at the company's attorney. CP 1004-07. The trial

court neither granted or denied the motion, but rather noted the apparent conflict of interest in Siefkes' representing both Knight and Developers Surety. CP 885. Accordingly, the trial court ordered Siefkes to obtain a waiver from Developers Surety before the matter would be heard. CP 885-86. The trial court reserved the issue of terms and sanctions. CP 886. The trial court granted Developers Security's motion for summary judgment. CP 1044-45.

Just Dirt again moved for summary judgment. CP 372-91. Counsel for Just Dirt filed a declaration seeking \$1,500 in attorney fees should the trial court grant Just Dirt's motion for summary judgment. CP 413-15. Counsel identified no ground upon which an award of attorney fees was warranted in the summary judgment proceeding. *Id.* In its reply to Knight's response to the motion for summary judgment, Just Dirt, through its counsel, accused Knight, through its counsel, of "blathering," obfuscating the issues, and failing to adhere to rules of evidence. CP 723-24. Once again, Just Dirt requested sanctions. CP 723. The trial court granted Just Dirt's motion for summary judgment and awarded Just Dirt judgment in the amount of \$24,875.80. CP 1038-41. The court reserved the issue of attorney fees and costs. CP 1040.

Just Dirt filed a motion for attorney fees, seeking "terms, sanctions and/or attorney fees for the Defendants [sic] flagrant violation of the Civil

Rules, Rules of Discovery and Rules of Professional Responsibility.” CP 918-24. In the motion, Just Dirt requested an award of \$4,500 in fees. CP 924.² Over a month later, Just Dirt filed a declaration of its counsel in support of the motion. CP 1055-84. In the declaration, counsel requested an award of \$20,240.79 in fees and \$476.24 in costs, but gave no explanation for the substantial increase in the amount of fees requested from its initial request for \$4,500 in fees. Counsel asked the court to award fees for (1) over 26 hours spent “responding to motions filed by the Defendants and their attorney that were completely baseless”; (2) 69 hours spent “responding to and propounding discovery, preparing and taking depositions in addition to responding to multiple discovery requests”; (3) over 19 hours “in general trial preparation of this matter”; and (4) an additional \$800 for “drafting a reply brief and presenting oral argument to the Court on this motion” for attorney fees. CP 1056.

Siefkes filed a declaration in response to Just Dirt’s motion for attorney fees. CP 1085-89. Siefkes entirely ignored Just Dirt’s allegations that fees were warranted because of his violation of CR 11, discovery rules, and the RPCs. Instead, Siefkes argued that fees were not warranted because the oral contract between the parties did not provide for an award

² The substance of Just Dirt’s motion is integral to Knight’s argument on appeal and will be discussed in detail below in the Argument section of this brief.

of fees in any litigation under the contract and because Just Dirt did not request fees in its amended complaint. CP 1085-86. Once again, Siefkes accused Just Dirt's counsel of deceiving the trial court and acting contrary to the facts and "all known law." CP 1086. Siefkes filed an "additional response" to Just Dirt's motion for attorney fees, arguing again that the parties did not agree to the payment of the other party's attorney fees and arguing for the first time that the amount of fees requested was unreasonable. CP 1090-94. In reply, counsel for Just Dirt took umbrage at Siefkes' attacks on her personal character and then accused Siefkes of perjuring himself at several points during the course of the litigation. CP 1095-1118.

The trial court heard oral argument on Just Dirt's motion for attorney fees. RP 68-73. The trial court granted Just Dirt's motion and awarded the full amount of attorney fees and costs requested against Knight plus \$3,000 in sanctions against Siefkes. RP 73. In total, the amount the trial court awarded was *greater than* the amount Just Dirt asked for. In its motion, Just Dirt requested \$20,240.79 in attorney fees and \$476.24 in costs. CP 1056. In its reply to the response to its motion, Just Dirt requested the same amount as costs, \$476.24, but increased the amount of attorney fees requested to \$20,717.03. CP 1099. Notably, Just Dirt asked for \$5,676.24 in sanctions against Siefkes *out of the amount of*

fees requested. Id. The total amount of fees Just Dirt requested in its reply was \$20,717.03, and the total amount of costs was \$476.24, for a total requested award of \$21,193.27. Under Just Dirt's argument, it asked for \$5,676.24 in sanctions against Siefkes out of the total amount requested, which was \$20,717.03. Instead, the trial court awarded \$20,240.79 in fees against Knight *plus* \$3,000 in sanctions against Siefkes, for a total award in favor of Just Dirt of \$23,240.79, over \$2,500 more than it asked for in its motion. CP 1121-23.

The trial court's order awarding fees and sanctions fails to specify the grounds upon which the court made the award. CP 1121-23. The order states in its entirety:

THIS MATTER having come before the court on Plaintiff's *Motion for Attorney's Fees and/or Sanctions*, and the court having reviewed the files and records herein and good cause appearing, now, therefore,

IT IS HEREBY ORDERED that the Defendant Knight Excavating, Inc. are [sic] Ordered to pay to Plaintiff the sum of \$20,240.79 as attorney fees.

Counsel for defendant, Knight Excavating, Inc., Michael Siefkes is hereby ordered to pay as sanctions the amount of \$3,000.00.

CP 1121-22 (emphasis by the Court). The trial court did not issue findings of fact or conclusions of law on its fee award.

In its oral ruling, the court noted the "extraordinary posture" of the case from the outset and the personal attacks in the documents Siefkes

prepared and filed on behalf of Knight. CP 73. The court noted further: “Mr. Siefkes unilaterally decided to refuse to accept faxes from counsel thereby incurring additional expenses, even though he, himself, continued to fax documents to the other side.” *Id.*

Siefkes filed a notice of appeal on behalf of Knight, appealing the court’s order on Just Dirt’s motion for attorney fees. CP 1128-32. Siefkes designated every single document filed in the entire litigation as clerk’s papers to be transmitted to this Court for review of the order awarding attorney fees, including 30 notes for motion, several notices of absence and unavailability, and numerous other documents having no relevance to the issues presented in this appeal and not necessary to the preparation of this brief. CP 1168-72. He also ordered the transcription of six hearings, only one of which pertained to Just Dirt’s motion for attorney fees. *See* Statement of Arrangements. The undersigned associated with Siefkes for purposes of appeal subsequent to his filing the designation of clerk’s papers and statement of arrangements. CP 1175-76. Siefkes withdrew from representing Knight both in this Court and the trial court on August 28, 2006. CP 1177-79.

D. SUMMARY OF ARGUMENT

The record presented to this Court on the trial court’s attorney fee award is wholly insufficient to permit meaningful appellate review. The

trial court failed to abide by the requirement that it “show its work” by issuing findings of fact and conclusions of law. The record contains no explanation of the conduct or the filings the trial court found sanctionable, the basis on which the trial court awarded fees and sanctions to Just Dirt, and the reason for the court’s imposition of the overwhelming amount of the sanctions on Knight rather than Siefkes. The court likewise failed to explain its rationale for turning a sanction award into a fee-shifting mechanism and for awarding Just Dirt over \$2,500 more in fees than it asked for. Remand is necessary for the entry of appropriate findings of fact and conclusions of law, including findings of fact identifying the sanctionable conduct and/or filings. Remand is also necessary for a reduction in the amount of the award against Knight, if any such award is even warranted, to an amount reasonably expended in responding to the sanctionable conduct or filings.

This Court should also instruct the trial court to abide, on remand, by the principles to be followed in awarding sanctions, including principles regarding when sanctions are appropriately imposed against the lawyer, not the client. The trial court abused its discretion in putting the burden of over \$20,000 in sanctions on Knight when the sanctionable conduct was that of Knight’s trial counsel, not Knight. It is not appropriate for a court to compel a client to pay for the procedural

missteps, discovery abuses, and other unprofessional conduct of its attorney. The attorney, not the client, should bear the burden of sanctions for such conduct. Most, if not all, of the sanctions should have been imposed against Siefkes, not Knight.

E. ARGUMENT

(1) Standard of Review

In its motion for attorney fees, Just Dirt alleged it was entitled to sanctions under a number of theories: Siefkes' alleged violation of several RPCs; Siefkes' and Knight's alleged violations of CR 11 and CR 56(g); and Knight's alleged violation of "CR 26(5)(A)(i)," which presumably was intended to be an alleged violation of CR 26(b)(5)(A)(i). CP 918-24. In its order on Just Dirt's motion for attorney fees, the trial court did not identify the grounds for its award of over \$20,000 in fees against Knight and its award of \$3,000 in sanctions against Siefkes. *See* CP 1130-31.³ The applicable standard of review of awards under the Civil Rules is the abuse of discretion standard. As discussed below, the applicable standard of review of an award of sanctions for an attorney's violation of the RPCs, particularly an award against the client for the attorney's conduct, is irrelevant because such an award is wholly unsupported.

³ As discussed below, the trial court's failure to issue findings of fact and conclusions of law in support of its award is error.

The standard of review of an award of sanctions under CR 11 is the abuse of discretion standard. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). Courts apply an objective standard to determine whether sanctions are merited, inquiring whether a reasonable attorney in a like circumstance could believe his or her actions to be factually and legally justified. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

There does not appear to be a reported Washington case discussing the standard of review of an award of attorney fees under CR 56(g). An award of fees under the identically-worded federal rule, Fed. R. Civ. P. 56(g), is reviewed for abuse of discretion. *United Steelworkers, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 203 (6th Cir. 1988).⁴ An award of sanctions under CR 26 is likewise reviewed for abuse of discretion. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993); *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 805-06, 98 P.3d 1264 (2004).

Because the trial court's order does not identify the basis of the award of attorney fees, Knight will address each argument Just Dirt raised

⁴ This Court may look to federal law when construing a comparable state rule. *Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 44 n.6, 14 P.3d 879 (2000).

in support of its motion for attorney fees. Regardless of the basis, the award against Knight was an abuse of discretion and must be reversed.

(2) The Trial Court Abused Its Discretion in Failing to Specify the Sanctionable Conduct and Failing to Issue the Requisite Findings of Fact and Conclusions of Law in Support of Its Order

It is firmly settled under Washington law that a trial court must make an adequate record to support its fee award. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998); *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707, *review denied*, 152 Wn.2d 1016 (2004). This record must be adequate to permit appellate review of the sanction award. *Rhinehart v. The Seattle Times, Inc.*, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990). The trial court must issue findings of fact and conclusions of law in support of its fee award in order to establish an adequate record. *Mahler*, 135 Wn.2d at 652.

It is likewise well settled that when a trial court imposes sanctions under CR 11, the court must specify the sanctionable conduct in its order. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 904, 969 P.2d 64 (1998); *Biggs*, 124 Wn.2d at 201. “The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose.” *Biggs*, 124 Wn.2d at 201; *McNeil v.*

Powers, 123 Wn. App. 577, 590-91, 97 P.3d 760 (2004). The trial court must also identify the specific filings that violate CR 11. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 892, 912 P.2d 1052 (1996). Without relevant findings of fact and conclusions of law, this Court is unable to objectively evaluate the attorney's conduct and the imposition of sanctions under CR 11. *Blair v. GIM Corp., Inc.*, 88 Wn. App. 475, 483, 945 P.2d 1149 (1997).

Where, as here, the sanctions imposed are substantial in amount, appellate review of the award of sanctions will be inherently more rigorous. *MacDonald*, 80 Wn. App. at 892. "Such sanctions must be quantifiable with some precision. Therefore, justification for the Rule 11 decision in the record must correspond to the amount, type, and effect of the sanctions applied." *Id.*

Here, assuming the trial court's award of sanctions against Knight was pursuant to CR 11, there can be no dispute that the trial court's order is deficient under the foregoing case law. The trial court made no findings whatsoever to indicate the basis for its award, let alone findings either that the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose. *See* CP 1121-23. The court also failed to identify the specific filings it found violated CR 11. In fact, the trial court entirely

failed to issue any findings of fact and conclusions of law to create an adequate record for the fee award.

In some cases, a deficiency in the trial court's written order and the record can be cured by resort to the court's oral opinion. However, this is not such a case. Where the trial court intended its oral decision to constitute the court's findings and conclusions on the sanction issue and specifically incorporates its oral decision into the order awarding sanctions, and where such oral decision is comprehensive and details the court's reasons for concluding sanctions were warranted, the failure of the order to include the requisite findings and conclusions is not fatal. *Johnson v. Jones*, 91 Wn. App. 127, 136, 955 P.2d 826 (1998). Here, however, there is no indication the trial court intended its oral opinion to be incorporated into its written order. Further, the court's oral opinion is far from comprehensive and does not identify which basis under CR 11 supported its order. *See* RP 73. The court's oral decision indicates that it found some documents Knight filed were improper because they were personal against Just Dirt and its counsel, but the court failed to specify which documents. The only conduct the trial court identified with specificity is Siefkes' decision to refuse to accept service by facsimile from Just Dirt's counsel while at the same time continuing to serve his

documents by facsimile. As discussed, this conduct cannot be attributable to Knight.

Further, the trial court gave no explanation in its oral opinion for the amount of sanctions awarded. This is particularly troublesome given the trial court's award to Just Dirt of sanctions in an amount greater than it asked for. Nor does the trial court's oral opinion explain the court's reasons for imposing the overwhelming burden of the sanctions on Knight, rather than Siefkes, even though, as discussed below, the conduct of which Just Dirt complained is that of Siefkes in the conduct of this litigation, not Knight. In sum, the oral decision is far from sufficiently specific to allow meaningful appellate review, particularly the more rigorous review necessitated by the substantial amount of sanctions the court imposed against Knight.

Where, as here, the trial court fails to make the requisite findings of fact and conclusions of law to support its award of sanctions and the record is therefore insufficient to permit appellate review of the attorney fee award, remand is appropriate for the entry of findings. *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 112, 780 P.2d 853 (1989); *Blair*, 88 Wn. App. at 483. Accordingly, if this Court does not agree that the entire award against Knight must be reversed because

sanctions were warranted only against Siefkes, this matter must still be remanded for the entry of appropriate findings.

(3) The Trial Court Failed to Limit the Amount of the Attorney Fees Awarded to the Amount Reasonably Expended in Responding to Sanctionable Filings

When the trial court decides an award of attorney fees is an appropriate sanction under CR 11, the court must limit the amount of attorney fees awarded to an amount reasonably expended in responding to the sanctionable filings. *Biggs*, 124 Wn.2d at 201. “Attorney fee sanctions should not exceed the amount expended by the nonoffending party in responding to the sanctionable conduct.” *MacDonald*, 80 Wn. App. at 892. CR 11 sanctions are not designed to be a fee-shifting mechanism. *Biggs*, 124 Wn.2d at 201-02; *Bryant*, 119 Wn.2d at 220.

The requirement that trial courts specify in the record the specific filings that violate CR 11 is to allow appellate courts to adequately determine whether the trial court properly limited the amount of fees awarded. *MacDonald*, 80 Wn. App. at 892. The requirement of adequate specification is particularly important in cases such as this one, where the fee award is substantial. *Id.* Here, because the trial court failed to identify those filings it deemed sanctionable, it is impossible to determine whether the court properly limited the fees awarded to the amount Just Dirt

reasonably expended in responding to the filings the trial court deemed sanctionable.

Even without knowing what filings the trial court deemed sanctionable, it is patently evident that the court failed to properly limit the fees. As discussed, the trial court awarded Just Dirt the entire amount of fees it requested, plus over \$2,500 more. By Just Dirt's counsel's own admission, she requested fees for, *inter alia*, "general trial preparation" and propounding discovery. CP 1056. Such matters clearly do not constitute responses to sanctionable filings. A significant portion of the matters for which Just Dirt's counsel requested, and was awarded, attorney fees cannot reasonably be construed as responses to sanctionable filings and should not have been included in the trial court's award. These matters include:

- "Meeting with client" CP 1057.
- "Phone conference with client regarding case status" CP 1059.
- "Prepared draft complaint against Knight Excavating" CP 1059.
- "Prepared letter to client" CP 1060.
- "Pierce County Clerk – Filing Fee" CP 1060.
- "Review of email from opposing counsel" CP 1061.
- "Preparation of letter to client (re: case status)" CP 1061.
- "Pierce County Clerk – Filing Fee" CP 1061.
- "Process Service on Knight Excavation, Inc." CP 1061.
- "Phone conference with client" CP 1062.
- "Preparation of Plaintiff's witness list and filed same with court" CP 1063.

- “Began preparation of Summary Judgement [sic] Motion” CP 1064.
- “Legal research for Motion and revised Motion” CP 1064.
- “Review and revision to Shipman Memo” CP 1064.
- “Preparation of Admissions” CP 1066.
- “Preparation of Interrogetories [sic] and Request for Production for Defendants; prepare answers to Knights [sic] Discovery to Shipman; Final revision to Summary Judgement [sic] Motion” CP 1066.
- “Review and revision to Summary Judgment Motion; client Declaration; McMahan Declaration and prepared Motion for filing” CP 1067.
- “Finalized Interrogatories; Request for Production and Admissions” CP 1068.
- “Travel to court for hearing” CP 1069.
- “Motion for Summary Judgment” CP 1069.
- “Pierce County – Fax Filing Fee” CP 1070.

The foregoing are but a sampling of the matters for which Just Dirt’s counsel was awarded attorney fees that cannot reasonably be construed as responses to sanctionable filings. There are many more examples; rather than enumerate them here, Knight refers the Court to the declaration of Just Dirt’s trial counsel and the invoices attached thereto. CP 1055-84.

This Court held the imposition of a sanction equal to the entire amount expended by a party in attorney fees was an abuse of discretion in *MacDonald*. The court held it improper to award fees for trial counsel’s time acquainting herself with and organizing the file, initiating discovery, and preparing for trial. The court stated that the award for those amounts transformed CR 11 into a fee shifting mechanism, which is not what CR

11 was intended to be. *MacDonald*, 80 Wn. App. at 892-93. Similarly here, the trial court's award included fees for Just Dirt's trial counsel's initiating discovery, filing the complaint, and "general trial preparation." The trial court improperly turned CR 11 into a fee-shifting mechanism. An award of fees for these matters as sanctions constitutes an abuse of the trial court's discretion. Accordingly, if this Court does not reverse the award against Knight in its entirety, remand is necessary for a reduction of the fee award to the amount reasonably expended in responding to the filings deemed sanctionable.

- (4) The Trial Court Abused Its Discretion In Imposing Over \$20,000 In Sanctions Against Knight, Where the Sanctionable Conduct Was That of Knight's Trial Counsel, Not Knight

One possible basis for the trial court's award of attorney fees against Knight is CR 11. That rule authorizes the trial court to sanction either the party or the party's attorney. *Blair*, 88 Wn. App. at 481-82. However, CR 11 sanctions are appropriately imposed directly on a party only under certain circumstances. For example, sanctions against a party, rather than the attorney, are appropriate where the party is responsible for the frivolous filing. *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999). However:

a party represented by an attorney should not be sanctioned for papers signed by the attorney unless the party had actual

knowledge that filing the paper constituted wrongful conduct, *e.g.*, the paper made false statements or was filed for an improper purpose.

Calloway v. Marvel Entm't Group, 854 F.2d 1452, 1474 (2d Cir. 1988), *rev'd on other grounds*, *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 110 S. Ct. 456, 107 L.Ed.2d 438 (1989).⁵ Also, “[w]here a party misleads an attorney as to facts or the purposes of a lawsuit, but the attorney nevertheless had an objectively reasonable basis to sign the papers in question, then sanctions on the party alone are appropriate.” *Calloway*, 854 F.2d at 1475. In sum, the imposition of Rule 11 sanctions on a client, rather than on the attorney, is proper only where the client is personally aware of or otherwise responsible for the bad faith procedural action. *Friesing v. Vandergrift*, 126 F.R.D. 527, 529 (S.D. Tex. 1989).

Sanctions against both the attorney and the party are appropriate “where the party does know that the filing and signing is wrongful and the attorney reasonably should know.” *Calloway*, 854 F.2d at 1475.

Sanctions are not appropriately imposed on a client, but rather should be imposed on the attorney alone “where a represented party either did not knowingly authorize or participate in the filing of a paper that violated Rule 11.” *Id.* at 1474. Similarly, “when a party has participated

⁵ This Court looks to federal courts for guidance in construing CR 11. *Splash Design*, 104 Wn. App. at 44 n.6.

in the filing of a paper signed by the attorney or has signed a paper himself but did not realize that such participation or signing was wrongful, then sanctions against the party are also not appropriate.” *Id.* In both of these situations,

the attorney, because of professional standards, is held to know of the wrongfulness of the conduct and, because of professional responsibility, should act to prevent it. Where the attorney fails to advise an unwary client of the wrongfulness of such conduct, the burden of sanctions should fall entirely upon the attorney.

Id. at 1474-75. Further, Rule 11 sanctions for procedural errors and discovery abuses are properly imposed against the attorney rather than the client. *Allender v. Raytheon Aircraft Co.*, 220 F.R.D. 661, 667 (D. Kan. 2004).

Under the foregoing principles, the trial court abused its discretion by ordering Knight to pay over \$20,000 in fees to Just Dirt, while imposing only \$3,000 in sanctions against Siefkes. Both Just Dirt’s motion for attorney fees and the trial court’s brief oral opinion show that the conduct for which Just Dirt requested sanctions and for which the trial court awarded sanctions was that of Siefkes, not Knight. There is no evidence to suggest Knight had any knowledge of Siefkes’ wrongful conduct.

This is most evident from an examination of Just Dirt’s motion for attorney fees and the supporting declaration of counsel. Just Dirt’s argument in support of its motion focuses overwhelmingly on the conduct of Siefkes. For example, it cites Siefkes’ decision to stop accepting service by fax, which required Just Dirt’s counsel’s legal assistant to drive from her office in Orting to Siefkes’ office in Burien to deliver documents. CP 919. In its enumeration of the several discovery violations for which Just Dirt sought sanctions, it specifically attributes the action or inaction constituting the violation to Siefkes. *See, e.g.*, CP 919 (“*Mr. Siefkes*,” in response to Plaintiff [sic] Motion for Summary Judgment, filed additional documents day [sic] before the Motion was to be hear [sic].” “On the day of the discovery cutoff . . ., *Mr. Siefkes* added 14 additional witnesses on day of deadline in violation of Court’s Order of October, 2005.” “*Mr. Siefkes* filed a Motion to quash subpoenas to conduct depositions when he had agreed to the dates for the depositions prior to the subpoena’s being issued.”) (emphasis added). The other discovery violations Just Dirt enumerates, although they do not identify Siefkes as the actor, are clearly the actions or inactions of Siefkes as counsel for Knight, not Knight. *See* CP 919.

Another ground on which Just Dirt sought an award of attorney fees was Siefkes’ objections to its ER 904 notice, CP 920, which is

undoubtedly a filing of which Knight was unaware. Just Dirt also sought sanctions for Siefkes' filing a motion for summary judgment and an offer of judgment on behalf of Developers Surety, the bond company, when he did not represent the company. CP 920. Knight cannot reasonably be held responsible for Siefkes' improper filings on behalf of Developers Surety.

Just Dirt also based its request for sanctions on Siefkes' statement "in open Court . . . that he 'still had not received the requested discovery information and that is why he filed a Motion to Compel.'" CP 920. Again, this conduct cannot reasonably be attributed to Knight. Nor can the final two grounds upon which Just Dirt based its request for sanctions. In these two allegations, Just Dirt specifically attributes the conduct to Siefkes, not Knight. *See* CP 920, paragraph 8 (entitled "Untruthfulness with court" and specifically referring to acts and statements of "Counsel for Knight"); paragraph 9 (entitled "Unprofessional conduct," referring to conduct of Siefkes, namely, "calling Ms. McMahon a liar in his pleadings" and "submitting declarations containing information about the Plaintiff that was untruthful and without any relevance, basis in fact or legally relevant to those proceedings.").

In Just Dirt's counsel's reply declaration in support of its motion for attorney fees, counsel focused exclusively on Siefkes' conduct in

support of the motion. *See* CP 1095-1118. She alleges no action, inaction, or statements by Knight as a basis for her motion. Each and every action or inaction counsel cites was that of Siefkes. This reply declaration is strong evidence that the conduct on which Just Dirt based its motion for attorney fees was conduct in which Knight did not participate and was unaware. If Knight did “participate” to the extent of providing Siefkes with documents or other information Siefkes incorporated into his filings, there is no evidence that Knight was aware the filings were sanctionable. Nor should a client be held to knowledge of CR 11’s requirements and of whether its counsel is abiding by them. Further, an attorney’s blind reliance on a client will seldom constitute discharge of the attorney’s obligation to conduct pre-filing investigations. *MacDonald*, 80 Wn. App. at 890.

The trial court’s oral opinion provides further support for the conclusion that the conduct the court found sanctionable is attributable wholly to Siefkes. In its oral opinion, the trial court found sanctionable Siefkes’ decision to stop accepting service by facsimile from Just Dirt’s counsel, while continuing to serve documents on Just Dirt’s counsel by facsimile. RP 73. Clearly, the issue of Siefkes’ accepting or refusing service by facsimile does not involve Knight’s participation, authorization,

or knowledge. The burden of sanctions for this conduct should be borne entirely by Siefkes.

The trial court also found sanctionable certain unspecified filings by Siefkes because they amounted to personal attacks on Just Dirt and its counsel. RP 73. The burden of sanctions for the filing of documents containing personal attacks against Just Dirt and its counsel should be borne entirely by Siefkes. As to the personal attacks against Just Dirt's counsel, it cannot reasonably be argued that Knight had anything to do with them. There is no evidence that Knight knowingly authorized or participated in the filing of papers containing personal attacks against Just Dirt's counsel. Accordingly, the imposition of sanctions against Knight for this conduct was an abuse of discretion. *Calloway*, 854 F.2d at 1474.

Similarly, the imposition of sanctions against Knight for filing papers containing personal attacks against Just Dirt was likewise an abuse of discretion. While Knight may have supplied Siefkes with the information Siefkes used to construct improper personal attacks against Just Dirt, Knight had no reason to know Siefkes would include this information in his filings or that the inclusion of this information was wrongful. Siefkes, not his client, is held to professional standards under which he is deemed to know the wrongfulness of including such information in his filings. Nonetheless, Siefkes prepared, signed, and filed

the documents containing the improper personal attacks. Under these circumstances, sanctions should have been imposed against Siefkes, not Knight. *Calloway*, 854 F.2d at 1474-75.

Knight is an excavation company, not a law firm. Knight was the “unwary client” against whom sanctions for its attorney’s conduct should not be imposed. *Calloway*, 854 F.2d at 1474. Knight had no reason to know that Siefkes’ actions in the defense of Just Dirt’s lawsuit were sanctionable. The burden of sanctions for this wrongful conduct should have been borne entirely by Siefkes, not Knight. The trial court abused its discretion in imposing over \$20,000 in sanctions against Knight. This Court should reverse the award against Knight.

(5) The Award of Attorney Fees Against Knight Is Not Proper if the Basis for the Award is Knight’s Counsel’s Violation of the RPCs

One ground upon which Just Dirt sought an award of attorney fees was Siefkes’ alleged violations of several RPCs. CP 921-22. Just Dirt argued Siefkes violated RPC 3.3, requiring candor toward the tribunal; RPC 3.4, requiring fairness to the opposing party and counsel; RPC 3.1, prohibiting an attorney from bringing or defending a proceeding or asserting or controverting an issue unless there is a basis for doing so that is not frivolous; and RPC 4.1, prohibiting an attorney from making a false statement of material fact or law to a third person. *Id.* If the trial court’s

award of attorney fees in favor of Just Dirt and against Knight was based upon Siefkes' violation of the RPCs, the award is not sustainable for several reasons.

First, an attorney's violation of the RPCs is not a proper basis upon which to impose sanctions in the form of attorney fees against the attorney's client. "[B]reach of an ethics rules provides only a public, *e.g.*, disciplinary, remedy, and not a private remedy." *Hizey v. Carpenter*, 119 Wn.2d 251, 259, 830 P.2d 646 (1992). Accordingly, the remedy for a claimed violation of an RPC is a request for discipline by the bar association, not a monetary award. *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). It follows, then, that an attorney's violation of an RPC cannot properly form the basis of an award of attorney fees as sanctions particularly against the attorney's client who had nothing to do with the violation.

Further, the conduct Just Dirt claims to violate the RPCs is that of Siefkes, not Knight. Indeed, Just Dirt's argument heading states: "The actions of *Mr. Siefkes* violated the Rules of Professional Conduct." CP 921 (emphasis added). Its entire argument on this issue unquestionably demonstrates that the conduct for which Just Dirt sought attorney fees was that of Siefkes, not Knight:

In the case at hand, *Mr. Siefkes* made accusations regarding opposing counsel and presented Motions having no legal basis or justification. The conduct of *counsel*, as specified in the facts set forth herein, violated multiple rules of Professional Conduct and caused the Plaintiff to incur needless attorney's fees. The actions of *Knight's attorney* necessitate sanctions and terms.

CP 922 (emphasis added).

Accordingly, even if a violation of the RPCs can properly be grounds for the imposition of sanctions, any sanction for violation of the RPCs would be properly assessed against Siefkes, not Knight. If the basis for the trial court's order awarding attorney fees in favor of Just Dirt and against Knight was Siefkes' violation of the RPCs, the award constitutes an abuse of discretion and must be reversed.

(6) Although Just Dirt Alleged Knight's Actions Violated CR 56(g), It Provided No Argument to Support This Allegation; Sanctions Imposed Under CR 56(g) Were Therefore Improper

In its motion for attorney fees, Just Dirt cited and quoted CR 56(g), apparently as a basis for its request for sanctions. *See* CP 923. Under that provision, if the court determines that an affidavit presented in support of or in opposition to a motion for summary judgment was presented in bad faith or solely for the purpose of delay, the court must order the party employing such affidavit the reasonable expenses, including attorney fees, the other party incurred by reason of filing the affidavit. CR 56(g).

Although Just Dirt cites and quotes CR 56(g), it provides no argument on this issue, nor does it identify any affidavits it claims were presented in violation of this provision. *See* CP 918-24. In fact, its argument purporting to pertain to CR 56(g) is combined with its argument pertaining to CR 11, and focuses entirely on CR 11, without mentioning any affidavits whatsoever. CP 922-23. If the trial court's award of attorney fees against Knight and in favor of Just Dirt was based on Just Dirt's bare citation to and quotation of CR 56(g), the award was an abuse of discretion and must be reversed.

(7) If the Award of Attorney Fees Against Knight Was Based on CR 26(b), the Award Was an Abuse of Discretion Because Knight's Trial Counsel Is Responsible for Discovery Abuses

If the trial court's award of over \$20,000 in attorney fees against Knight was based on the trial court's finding of a violation of CR 26(b)(5)(A)(i), the award was an abuse of discretion. Pursuant to that provision, a party may through interrogatories require another party to identify each person whom such other party expects to call as an expert witness at trial, state the subject matter on which the expert is expected to testify, state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and state such other information about the expert as is discoverable under the

Civil Rules. The provision authorizing sanctions for discovery abuses is CR 26(g). That provision allows the trial court to impose sanctions on either the party or the party's attorney. CR 26(g); *see also Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon Ltd. P'ship*, 76 F.3d 1003, 1007 (9th Cir. 1996) (under the federal Rule 26(g), the district court may sanction either the parties or their attorneys at its discretion).⁶

Just Dirt argued it was entitled to sanctions because Knight failed to timely identify all witnesses it expected to call at trial, but rather waited until the discovery cut-off date to identify 14 additional witnesses. CP 923. As discussed with respect to sanctions under CR 11, imposing sanctions against Knight for this conduct was an abuse of discretion. Siefkes, as an attorney, was obligated to comply with court-imposed deadlines and the rules of discovery. Knight should not be held accountable for Siefkes' failure to comply with the discovery rules or deadlines. Nor should Knight be held to have knowledge of discovery rules and of its counsel's failure to comply with them. Witness disclosure and supplementation of discovery responses are matters within the province and knowledge of an attorney, not a client. Sanctions for

⁶ Because CR 26(g) is essentially identical to Fed. R. Civ. P. 26(g), this Court may look to federal court decisions interpreting the federal rule for guidance in construing CR 26. *Washington State Physicians Ins. Exchange & Ass'n*, 122 Wn.2d at 341.

discovery abuses should be borne by the attorney, not the client. See *Allender, supra*, 220 F.R.D. at 667.

Further, CR 26(g) is not meant to be a fee-shifting mechanism. *Washington State Physicians Ins. Exchange & Ass'n*, 122 Wn.2d at 356. As evident from the declaration of Just Dirt's counsel submitted in support of its motion for attorney fees, CP 1055-84, a very small percentage of the fees for which she sought compensation were related to Knight's witness list. Even assuming Knight could be held responsible for the failings of Siefkes, the award of over \$20,000 in fees for this conduct was an abuse of discretion.

F. CONCLUSION

Assuming, *arguendo*, sanctions against Knight were proper, the trial court erred in failing to issue findings of fact and conclusions of law in support of its order, identifying the specific sanctionable filings, the grounds on which it imposed sanctions, the reasons for awarding over \$23,000 in sanctions, and the reasons for ordering Knight to pay over \$20,000 of this award. Meaningful appellate review is precluded by the trial court's failure to abide by settled case law requiring such findings.

The trial court also erred in failing limit the amount of the fee award to the amount Just Dirt reasonably expended in responding to the sanctionable filings, and in turning its sanction award into a fee-shifting

mechanism. Further, the trial court erred in awarding Just Dirt over \$2,500 more in sanctions than it requested, particularly in awarding this excess amount with no accompanying explanation.

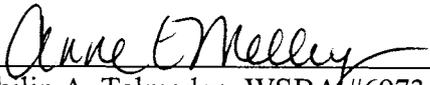
Moreover, the trial court abused its discretion in ordering Knight to pay over \$20,000 in attorney fees as sanctions, where the conduct alleged to be sanctionable was that of Knight's trial counsel, Michael Siefkes. Knight did not participate in or authorize the conduct of its counsel. Nor should Knight be held to have knowledge that its counsel's conduct was wrongful under professional standards and was sanctionable.

For the reasons set forth here, this Court should reverse the order awarding Just Dirt attorney fees against Knight because the sanctionable conduct and filings are attributable to Siefkes, not Knight. Alternatively, this Court should remand this matter to the trial court for entry of appropriate findings of fact and conclusions of law to support its decision to impose sanctions against Knight and to support the amount of sanctions ordered. This Court should direct the trial court to, on remand, abide by the principles governing the creation of a record to support a fee award and the principles requiring a limitation of a sanction award to the amount reasonably expended in responding to the sanctionable conduct or filings. This Court should also direct the trial court to abide by the principles governing the circumstances under which a fee award is properly imposed

against the lawyer, not the client. Costs on appeal should be awarded
Knight.

DATED this 25th day of September, 2006.

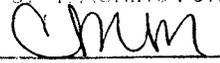
Respectfully submitted,


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DECLARATION OF SERVICE

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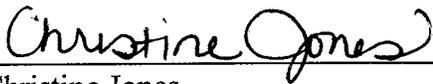
On said day below I deposited in the U.S. Mail a true and accurate copy of the following document: Brief of Appellant in Court of Appeals No. 34815-2-II, to the following:

Jacqueline A. McMahon
PO Box 1569
Orting, WA 98360-1569

Original sent by ABC Legal Messengers for filing with:
Court of Appeals, Division II
Clerk's Office
Tacoma, WA

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 27, 2006, at Tukwila, Washington.


Christine Jones
Legal Assistant
Talmadge Law Group PLLC