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I. INTRODUCTION

This appeal is presented by Appellant-Plaintiff KEVIN MICHAEL MITCHELL ("Mr. Mitchell") who, after prevailing in the trial court on his Public Records Act ("PRA") claims that the responding agency, Respondent-Defendant WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY ("WSIPP"), denied Mitchell access to requested records for 445 days. Mitchell timely filed a cost bill. On December 12, 2008, WSIPP filed a motion seeking to vacate the entire award of costs and seeking CR 11 sanctions. The trial sanctioned Mitchell under CR 11 in an amount of \$2,316.86 and, sua sponte, denied several items of claimed costs and refused to honor Mitchell's assignment of judgment. This appeal seeks review of these sanctions and trial court actions.

Mitchell has repeatedly raised the issue that if a party fails to act within specified timeframes, such inaction results in waiver of rights. Here, WSIPP failed to timely object to Mitchell's cost bill within the six (6) day timeframe explicitly set forth in CR 78(e). The trial court lacked jurisdiction to entertain WSIPP's untimely cost bill objections.

With this appeal, this court can establish the issue of first impression presented here of a party failing to timely object to a cost bill waives any objections thereto and that CR 11 does not apply to a cost bill.

Finally this court can outline the jurisdictional authority for trial courts refusing to honor an assignment of judgment and the statutory attorney fee under RCW 4.84.080(1) is a recoverable cost for Pro Se litigants.

II. ASSIGNMENTS OF ERROR

1) Error is assigned to the trial court considering the untimely objections to Mitchell's cost bill, outside of the six (6) day timeframe of CR 78(e).

2) Error is assigned to the trial court's order entered January 13, 2009 denying Mitchell's claimed costs, dishonoring Mitchell's assignment of judgment, and imposing sanctions under CR 11.

3) Error is assigned to the trial court's order entered March 05, 2009 denying reconsideration of the January 13, 2009 order.

III. ISSUES RELATED TO ASSIGNED ERRORS

1) Whether a trial court retains jurisdiction to consider objections to a cost bill, filed after the six (6) day deadline of CR 78(e)? (Error 1).

2) Whether CR 78(e) provides the exclusive remedy for an aggrieved party to contest a cost bill? (Error 2).

3) Whether WSIPP waived any objections to Mitchell's cost bill by failing to timely object? (Error 2).

4) Whether a verified cost bill falls within the confines of CR 11 or CR 60? (Error 2).

5) Whether the trial court abused it's discretion when imposing CR 11 sanctions against Mitchell? (Error 2).

6) Whether substantial evidence supports the trial court's imposition of sanctions, denial of costs and dishonor of Mitchell's assignment of judgment? (Error 2).

7) Whether the trial court abused it's discretion when sanctioning Mitchell in the amount of \$2,316.86? (Error 2).

8) Whether the trial court abused it's discretion when denying Mitchell's claimed costs for service of process, common law research/publication, typeservice, service of process, and statutory attorney fees? (Error 2).

9) Whether the trial court abused it's discretion when dishonoring Mitchell's assignment of judgment? (Error 2).

10) Whether the trial court abused it's discretion when denying Mitchell's motion to reconsider the January 13, 2009 order? (Error 3).

IV. STATEMENT OF THE CASE

A. BACKGROUND FACTS

The underlying action was presented by Mr. Mitchell who asserted claims under the Public Records Act ("PRA") that the Washington State Institute for Public Policy ("WSIPP") violated the PRA by improperly withholding records for 445 days and challenging exempted records. Thurston county Superior court Judge Christine A. Pomeroy entered an order on November 14, 2007 that awarded Mitchell five dollars (\$5.00) per day

for the 445 days he was denied access to requested records, for a total of \$2,225.00 penalty award. Judge Pomeroy upheld the exemptions claimed for the requested records. CP 3-6.

Mitchell filed an Assignment of Judgment (CP 8); Judgment Summary (CP 9); and Cost Bill (CP 10) on November 23, 2008.

Counsel for WSIPP, AAG Dierk J. Meierbachtol, filed a motion with the trial court on December 12, 2008 requesting the court to vacate the costs claimed by Mitchell based on allegations of 'fraud' pursuant to CR 60(b), and to sanction Mitchell under CR 11(a). CP 58-71.

Mr. Mitchell responded to WSIPP's motion by asserting CR 78(e) precludes the court from entertaining an untimely cost bill objection and rebutting each of the allegations made by WSIPP regarding the alleged 'fraud.' CP 72-83.

On January 13, 2009, Judge Pomeroy entered an order that denied Mitchell's claimed costs for process server fees, common law publication/typeservice fees, and statutory attorney fees; denied Mitchell from freely assigning the judgment; and, imposed sanctions in the amount of \$2,316.86. CP 85-86.

Mitchell motioned Judge Pomeroy to reconsider the January 13, 2009 order. CP 88-94. In this motion, Mitchell introduced the issue that the order lacks any specification of the sanctionable conduct, which is required by common law. WSIPP responded by conceding that the order lacks any specification of sanctionable conduct. CP 95-101. Mitchell replied and

introduced additional evidence in support of his claimed costs and the absence of any fraudulent conduct on his behalf. CP 102-128. Mitchell requested WSIPP to respond to his reply, as new evidence was introduced. WSIPP filed a Sur-Reply that left unchallenged Mitchell's newly introduced evidence.

CP 129-132.

To date, Judge Pomeroy has not entered further findings as to the sanctionable conduct that warranted CR 11 sanctions.

As a sidenote, WSIPP filed a reply to Mitchell's response to WSIPP's motion to vacate, yet this reply is not located in the court file. Mitchell has brought this to the attention of WSIPP's counsel who will supplement the record on review.

V. DISCUSSION

A. STANDARD OF REVIEW - DE NOVO

The primary issue presented in this appeal involves the interpretation and application of CR 78(e) (objections to a cost bill). The appellate court review the interpretation and application of a court rule de novo. See *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997) ("[C]onstruction of a statute is a matter of law requiring de novo review, so is the interpretation of a court rule."); *Wiley v. Rehak*, 101 Wn.App 198, 2 P.3d 497 (2000), *aff'd* 143 Wn.2d 339 (2001) (Application of a court rule to a particular set of facts is a question of law reviewed de novo.)

As such, this court reviews Issues 1-3 above de novo.

B. CR 78(e) IS EXPLICIT AND UNAMBIGUOUS.

"The clerk shall enter judgment or decree pursuant to the provisions of rule 58 and the same shall then be entered for the sum found due or the relief awarded, with costs and disbursements, if any, to be taxed. Entry of judgment shall not be delayed for the taxing of costs. If no cost bill is filed by the party to whom costs are awarded within 10 days after the entry of the judgment or decree, the clerk shall proceed to tax the following costs and disbursements, namely:

- (1) The statutory attorney fee;
- (2) The clerk's fee; and
- (3) The sheriff's fee.

"If a cost bill is filed, the clerk shall enter as the amount to be recovered the amount claimed in such cost bill, and no motion to retax costs shall be considered unless the same be filed within 6 days after the filing of the cost bill."

CR 78(e).

At issue is the trial court's failure to adhere to the explicit mandates of CR 78(e) in the present action. After Mitchell timely filed a cost bill (CP 10) and served a copy on WSIPP's counsel, more than six (6) days elapsed when WSIPP filed a motion challenging the cost's claimed by Mitchell in his cost bill. CP 58-71. This motion was filed on December 12, 2008. Any timely objection by WSIPP to the cost bill would have had to been filed by December 03, 2008.

CR 78(e) explicitly states that "[N]o motion to retax costs shall be considered unless the same be filed within 6 days after the filing of the cost bill." The rule is clear and unambiguous. Also, the rule uses mandatory language (i.e., non-discretionary) by repeated use of the command word "shall."

("It is well settled that the word 'shall' in a statute is presumptively imperative.") *Erection Co. v. Dept. of L&I*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993).

Judicial interpretation of CR 78(e) is unwarranted as the rule is plain and clear on its face. See *Marquis v. Spokane*, 130 Wn.2d 97, 107, 922 P.2d 43 (1996) ("[A] statute which is clear on its face is not subject to judicial interpretation.") Also, *Nevers*, 133 Wn.2d at 809 (All court rules "are interpreted as through they were drafted by the Legislature. As such, we construe them in accord with their purpose.") Instead, this court is asked to give meaning to the clear language and declare the purpose and mechanics of CR 78(e).

C. UNDER CR 78(e) TRIAL COURTS ARE WITHOUT AUTHORITY TO CONSIDER UNTIMELY OBJECTIONS TO A COST BILL.

The precise language of CR 78(e) plainly states that "[N]o motion to retax costs shall be considered unless the same be filed within 6 days." By use of the command word 'shall' which creates a mandatory duty upon the courts, the operation of CR 78(e) revokes authority for courts to entertain an untimely objection to a cost bill.

The trial court disregarded Mitchell's objections to the lack of "authority to entertain [WSIPP's] cost bill objections" (CP 74) and proceeded to entertain WSIPP's objections.

This court is asked to give meaning to CR 78(e).

D. CR 78(e) PROVIDES THE EXCLUSIVE REMEDY FOR CONTESTING
A COST BILL

As presented above, the language of CR 78(e) is explicit:
A timely motion to retax costs within six days must be filed
if a party objects to a cost bill. However, in this case,
WSIPP moved the court under CR 60(b)(3) to vacate the award
of costs based on allegations of 'fraud.'

However, the Court of Appeals has previously held: "CR
60 cannot be used merely to circumvent the time constraints
of other rules." *Pybas v. Paolino*, 73 Wn.App 393, 398, 869
P.2d 427 (1994).

As CR 78(e) is the only civil rule to address the precise
method an aggrieved party must follow if costs are objected
to, logically a party must preserve those objections by timely
filing a motion as mandated by CR 78(e).

E. WAIVER OF ANY OBJECTIONS IS THE RESULT OF FAILING
TO TIMELY OBJECT TO A COST BILL

"As a general rule, failure to assert a statutory or
constitutional right in the trial court is a waiver of that
right. In civil cases, where procedural rules not rising to
the level of constitutionally protected rights are not
involved, a waiver may be found by the failure to assert
those rights."

31 CJS § 71 (Estoppel and Waiver) (West, 1996) (Footnotes
omitted).

The general doctrine of waiver provides that a failure
to assert a right results in waiver of such right. While
no Washington cases have dealt with the primary issues herein
that an aggrieved party waives any right to object to a cost

bill by failing to timely object within the six day period delineated in CR 78(e); although ample authority supports the waiver doctrine in various situations, presented below.

1) COSTS MAY NOT BE CONTESTED ON APPEAL UNLESS RETAXED AT THE TRIAL COURT LEVEL

The Washington Supreme Court has held in *Hatzenbuehler v. Harrison*, 49 Wn.2d 691, 700, 306 P.2d 745 (1957) that: "Unless a motion was made in the trial court for retaxation [of costs] and was denied," those claimed costs "cannot be retaxed on appeal." Further, the following year, the same court reiterated that a party who fails to motion the trial court to retax costs, cannot allege error to those costs on appeal. *Silhavy v. Doane*, 50 Wn.2d 110, 114, 309 P.2d 1047 (1957).

2) UNTIMELY OBJECTIONS TO A COST AWARD ON APPEALS RESULTS IN WAIVER OF ANY OBJECTIONS.

The Washington Court of Appeals has held that: "The state has waived any objection to the untimely filing by not raising it until after the clerk has made a ruling. See RAP 14.5 (Objections to cost bill shall be served on all parties and filed with the court within 10 days after service of the cost bill upon the party)." *Family Medical Building v. DSHS*, 38 Wn.App 738, 740 <fn2>, 689 P.2d 413 (1984).

3) FAILURE TO TIMELY ACT RESULTS IN WAIVER IN VARIOUS SITUATIONS.

A brief compilation of several Washington cases that address

the result of a party's failure to timely assert a right under various authorities:

-(A party's right to object to bias of judge may be waived by failing to timely assert the objection). *Brauhn v. Brauhn*, 10 Wn.App 592, 518 P.2d 1089 (1974).

-(Failure to serve a written response within 30 days under CR 34 may waive right to object.) *Rhinehart v. Seattle Times Co.*, 51 Wn.App 561, 754 P.2d 1243, rev. den., 111 Wn.2d 1025 (1988).

-(Generally, affirmative defenses are waived unless they are affirmatively pleaded or asserted in motion.) *Bernsen v. Big Bend Elec. Coop. Inc.*, 68 Wn.App 427, 842 P.2d 1047 (1993).

-(Under CrR 3.3(e), failure to object at the time of arraignment is a waiver of any objections.) *State v. Parker*, 99 Wn.App 639, 994 P.2d 294, rev. den., 142 Wn.2d 1002 (2001).

-(Under JuCR 7.8(c), an objecting party must file a timely motion or objection, and failure to do so waives any objection.) *State v. Dassow*, 95 Wn.App 454, 975 P.2d 559, rev. den., 138 Wn.2d 1024 (1999).

-(Under ER 904, absent a timely objection, the evidence will be admitted.) *Miller v. Artic Alaska Fisheries*, 133 Wn.2d 250, 260, 944 P.2d 1005 (1997).

-(Failure to comply strictly with MAR 7.1(a)'s filing and service requirements prevents the trial court from conducting a trial de novo; substantial compliance is insufficient.)

Wiley v. Rehak, 101 Wn.App 198, 202, 2 P.3d 497 (2000).

Each of the foregoing decisions address the resultant waiver of a parties failure to act within specified timeframes.

4) FEDERAL COURTS HAVE ADOPTED WAIVER DOCTRINE REGARDING
UNTIMELY COST BILL OBJECTIONS

Under the Federal Rules of Civil Procedure ("FRCP"), located at FRCP 54(d)(1) is a parallel rule to CR 78(e), which provides:

"Except when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs....Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

FRCP 54(d)(1). The mechanics of this rule is a near mirror image of CR 78(e): An aggrieved party must object within a set time period. One controlling case that interprets FRCP 54(d)(1) provides in pertinent part:

"We decline to reach the merits of this appeal because we find that Appellants have waived their right to challenge the cost award. Rule 54(d)(1) of the Federal Rules of Civil Procedure authorizes the district court to review a cost award upon 'motion served within 5 days' after the court clerk as taxed such costs. Although the Ninth Circuit has never ruled on whether a failure to make a timely objection to a cost award results in waiver of the right to challenge the award, the Fourth, Fifth, and Seventh Circuits have. [Citations omitted.] All three of these circuits rely on the language of Rule 54(d)(1) to conclude that a failure to make a timely objection to a cost award constitutes a waiver of the right to challenge the award[.]

"District courts in the Third, Sixth, Tenth, and Eleventh Circuits similarly have read Rule 54(d)(1) to require a party to make a timely objection to a cost

award if such party seeks judicial review of the award as a matter of right. [Citations omitted.]

"In light of the language of Rule 54(d)(1) and ample persuasive authority from our sister circuits, we hold that a party may demand judicial review of a cost award only if such party has filed a proper motion within the five-day period specified in Rule 54(d)(1). In the instant case, Appellants never moved the district court to review the award. That fact, by itself, is dispositive. Moreover, even if we were to construe Appellants' Notice of Appeal as a motion for review within the meaning of Rule 54(d)(1), such motion was filed twenty-five days after the end of the specified five-day period--in other words, twenty-five days too late.

"Based on these facts, we find that Appellants have waived their right to challenge the cost award[.]

"Our finding of waiver is consistent with Ninth Circuit precedent in analogous contexts. For several of the Federal Rules of Civil Procedure we have held that a failure to file a motion or to object within the allotted time results in forfeiture of the right provided by such rule. [Citations omitted.] Rule 54(d)(1) is no exception."

Walker v. State of California, 200 F.3d 624 (9th Cir. 1999) (Citations and footnotes omitted). In Walker, supra, the court ruled that a party who fails to timely object to a cost award constitutes a waiver of any objections to such cost award.

While it is acknowledged that Walker, supra, is not controlling upon this court, the reasoning based on the well recognized waiver doctrine compels a similar result here. The language of CR 78(e) is further explicit than that of FRCP 54(d)(1), which is more the reason to give purpose to the rule.

F. CR 60 DOES NOT APPLY TO A COST BILL

WSIPP's untimely objections to Mitchell's cost bill were based upon CR 60(b)(3) and (4) (Relief from judgment or order due to newly discovered evidence or fraud of an adverse party.) CR 60(b)(4) does not "permit a party to assert an underlying cause of action for fraud that does not relate to the procurement of the judgment. Thus, the fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense." *Lindgren v. Lindgren*, 58 Wn.App 588, 596, 794 P.2d 526 (1990).

Here, WSIPP was not prevented from fully presenting their defense as the alleged fraudulent conduct (discussed *infra*) allegedly occurred after judgment was entered, and allegedly with the filing of Mitchell's cost bill (10 days after judgment entered). Further, the remaining alleged fraud was again allegedly conducted after judgment was entered and has no bearing upon the judgment entered.

Again, as CR 78(e) provides the remedy for retaxing costs, CR 60 does not apply in this instance.

G. CR 11 DOES NOT APPLY TO A COST BILL

WSIPP sought sanctions under CR 11 for Mitchell's alleged 'improper conduct in claiming costs. CP 69. Yet, analogous to above, CR 11 only "applies to 'every pleading, motion, and legal memorandum.'" *Clipse v. State*, 61 Wn.App 94, 97,

808 P.2d 777 (1991) (quoting CR 11). Further, "CR 11 sanctions are not appropriate where...other court rules more properly apply." Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339-40, 858 P.2d 1054 (1993). Again, CR 78(e) addresses the procedure to object to a cost bill, and CR 11 does not apply.

H. STANDARD OF REVIEW - ABUSE OF DISCRETION

This court reviews the following issues presented under the abuse of discretion standard. See Colacurcio v. Burger, 110 Wn.App 488, 494-95, 41 P.3d 506 (2002) (CR 60 motions reviewed for abuse of discretion generally); Roeber v. Dowtry Aerospace Yakima, 116 Wn.App 127, 141, 64 P.3d 691 (2003) (CR 11 sanctions reviewed for abuse of discretion).

"Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

"Whether the discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other."

State ex rel. Carrol v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Also, "A decision based on a misapplication of law rests on untenable grounds." *Ausler v. Ramsey*, 73 Wn.App, 231, 235, 868 P.2d 877 (1994).

I. TRIAL COURT ERRED IN IMPOSING SANCTIONS

A concise summary of the facts relevant to comprehending the following issues would prove helpful. Mitchell filed a cost bill with the trial court on November 23, 2008. CP 10. Mitchell claimed costs for filing fees-\$200.00; Process Server Fees-\$60.00; Postage costs-\$16.23; Common law publication/legal typeservice-\$898.43; and Statutory attorney fee-\$200.00.

On November 24, 2008, NRGETX Inc., by and through it's President, Mr. BRIAN DAVID MATTHEWS, ("Mr. Matthews") faxed a copy of the Invoice that details the common law publication and legal typeservice fees claimed by Mitchell, to WSIPP's counsel, Mr. Meierbachtol. CP 18-19. Meierbachtol acknowledged receipt of this invoice (CP 13-14 ¶ 3) along with receiving Mitchell's cost bill with copy of return of service. Id. ¶ 4.

On December 11, 2008, Mr. Meierbachtol first questioned claimed costs by contacting King County Records Division and inquiring as to whether Mr. Jeffrey McKee was a registered Process Server. Id ¶ 6.

On December 12, 2008 WSIPP filed a motion seeking to vacate the entire award of costs and sanction Mitchell based on allegations of fraud associated with the cost bill filed by Mitchell. CP 58-71.

The claimed reason for WSIPP's failure to timely object to Mitchell's cost bill was that a letter and duplicate copy of the Invoice (CP 25-27) were sent to Mr. Mitchell to his current location by a disinterested party acting of his own accord. CP 107-108 ¶ 21, 25; CP 109-110 ¶ 29. It is admitted this item was sent by Mr. Matthews via 'legal mail' and which was meant solely so Mitchell would obtain the invoice timely. The letter, invoice and envelope were seized by prison officials as the law firm was not an approved legal source.

Yet the item of legal mail does not change the fact that WSIPP was presented with all necessary information on November 24 and 25, 2008 which would allow WSIPP to timely object to Mitchell's cost bill. Instead, WSIPP slept on it's rights to object timely, thereby waiving any objections.

Condensed to it's essence, Mitchell was sanctioned for an item of legal mail sent by Mr. Matthews. The trial court abused its discretion by applying CR 11 sanctions as Mitchell has no authority, nor did he request, the invoice be sent via legal mail.

J. THE TRIAL COURT ABUSED ITS DISCRETION WHEN APPLYING
CR 11 AND CR 60 TO THE COST BILL

As presented above, both CR 11 and CR 60 do not apply to a cost bill. The trial court abused it's discretion by applying CR 11 and CR 60 to the cost bill. By applying the incorrect law, this action is prima facie based on untenable grounds. See Ausler, 73 Wn.App at 235.

K. PUBLIC RECORDS ACT CONTAINS LIBERAL COST RECOVERY

Under the Public Records Act ("PRA"), it expressly states that a party prevailing over an agency "shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4) (emphasis added). Cases interpreting the above cost provision state:

"We find that the [PRA]'s use of the phrase 'all costs' provides for a more liberal recovery of costs than statutory cost recovery under RCW 4.84.010 for two reasons. First, the wording of the PRA differs from other statutes where recovery has been limited to statutory costs. Second, permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access public records."

"The PRA does not contain a definition of what it means by 'all costs,' but the plain meaning of the word 'all' logically leads to the conclusion that the drafters of the PRA intended that the prevailing party could recover all of the reasonable expenses it incurred in gaining access to the requested records."

ACLU v. Blaine Sch. Dist. No. 503, 95 Wn.App 106, 115, 117, 975 P.2d 536 (1999). Also, in Doe I v. WSP, 80 Wn.App 296, 908 P.2d 914 (1996), the trial court allowed the prevailing party costs that included photocopy and travel expenses. The Court of Appeals affirmed the trial court judgment.

L. EACH OF THE COSTS CLAIMED BY MITCHELL WERE PROPER

1) COMMON LAW PUBLICATION/TYPESERVICE

Mitchell entered into a contract with NRGETX Inc., on April 26, 2008 (CP 112-13) to obtain typeservice (verbatim typing from drafts prepared by Mitchell) and Common law research/

publication (locating and compiling relevant portions of common law that fit criteria requested by Mitchell). Under Wa. const. Art. IV § 21 (all opinions shall be free for publication by any person), NRGETX Inc., has offered their expertise in providing the above services in accordance with the terms of the contract.

Typeservice work was subcontracted and performed by Mr. SEAN BROOKS SKIRLAW ("Mr. Skirlaw") who attested to performing the typeservice. CP 115-16 ¶'s 2-9.

These costs were claimed in accord with *Absher Constr. Co. v. Kent Sch. Dist.*, 79 Wn.App 841, 845-46, 905 P.2d 1229 (1995), wherein the court of appeals affirmed costs for a legal assistant preparing briefs and a legal editor verifying cites and quotes.

The trial court abused it's discretion when denying the common law publication/typeservice costs as this violates the obligation of the contract between Mitchell and NRGETX Inc., and is contrary to the liberal cost provision of the PRA.

2) PROCESS SERVER FEES

Under RCW 4.84.010(2), fees for the service of process by a registered process server are recoverable costs. RCW 18.180.010(2)(d) provides that an "employee of a person who is registered" is exempted from needing a separate license. Further, the employee "shall indicate the employer's registration number" on any proof of service." RCW 18.180.030(2).

WSIPP contests that the process server fees claimed by Mitchell are improper since the person who served process, JEFFERY MCKEE ("Mr. McKee") does not possess his own license. Yet under the foregoing statutes governing process servers, Mr. McKee is an employee of MCS GLOBAL INC., and as such is licensed to serve process under MCS GLOBAL, INC's license, which is the case here. The license plainly states on it's face: MCS GLOBAL INC. CP 83. It also erroneously contains the name of the MCS GLOBAL INC., President and CEO, Mr. Mitchell, yet the application for this license was made only for the corporation in accordance with RCW 18.180.010(2)(d).

The trial court abused it's discretion in denying the process server costs by misapplying the applicable law to the facts of the case.

3) STATUTORY ATTORNEY FEES

Under RCW 4.84.080(1), the prevailing party is allowed a two-hundred dollar (\$200) fee, commonly referred to as the statutory attorney fee. See also CR 78(e).

The trial court abused it's discretion when denying Mitchell the statutory attorney fee costs, sua sponte. This statute grants the prevailing party this fee without regard to pro se nor licensed attorney status; The court again misapplied the plain language of the law.

M. NO EVIDENCE SUPPORTS THE ALLEGATIONS NOR THE REASONING
OF THE TRIAL COURT

Each and every claim presented by WSIPP in the trial court was based on alleged 'fraud' and was rebutted in full by Mitchell. All allegations were made via written motion and documentary evidence. CP 58-71; CP 72-83; CP 88-94; CP 95-101; CP 123-28; CP 102-122; CP 129-132. In turn, each claim made by WSIPP is further rebutted herein.

WSIPP claimed that Mitchell claimed false costs, yet as shown above each of the claimed items were properly made and lawful recoverable costs. The claims that Mr. Matthews and Mr. McKee assisted in inflating costs is rebutted above, and each individual acted within their legal rights. WSIPP also claimed the company Mitchell founded, MCS GLOBAL INC., is a 'shell corporation;' Yet contrary to such, MCS GLOBAL INC., operates within the confines of all applicable authorities and was lawfully chartered. Mitchell has continuously affirmed that each of the claimed costs were proper and made in good faith. CP 80 ¶ 5-6; CP 102 ¶ 3. The sole intention of Mr. Matthews in sending the Invoice via legal mail was so Mitchell would receive such timely to the filed cost bill and provide a copy to Mr. Meierbachtol. CP 109 ¶ 27.

Further, each of these blind allegations made by WSIPP were fully rebutted in the trial court with competent evidence. Also, WSIPP failed to satisfy it's burden under CR 60, which

must be proved by WSIPP with "clear and convincing evidence." Peoples State Bank v. Hickney, 56 Wn.App 367, 372, 777 P.2d 1056 (1989). The evidence introduced by WSIPP is far from satisfying the above burden: An article of legal mail and blind assertions fall far short.

Also, the trial court refused to enter findings of fact regarding the elements of fraud, which is required under Marriage of Maddix, 41 Wn.App 248, 252, 703 P.2d 1062 (1985) (Findings and conclusions required for each of the nine elements of fraud when vacating under CR 60). The trial court's order fails to even mention the word fraud. See CP 85-87.

Finally the trial court refused to specify the sanctionable conduct in the order as required by Biggs v. Vail, 124 Wn.2d 193, 201, 876 P.2d 448 (1994):

"[I]n imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order. 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. CR 11." (Emphasis in original).

After Mitchell notified the court of this omission, as with the above fraud elements omission, CP 91-94, WSIPP conceded that the Biggs findings should be made. CP 100-1. Yet, to date, the trial court has refused to enter the findings.

Based on the above, the lack of clear and convincing evidence coupled with the refusal to enter findings required by common law, the trial court flagrantly abused it's discretion.

N. 'SET-OFF' SANCTIONS ARE ABUSE OF DISCRETION

"CR 11 is not meant to act as a fee shifting mechanism[.]"
Biggs, 124 Wn.2d at 197. Here, the trial court sanctioned Mitchell and treated such as a 'set-off' against the amount awarded to Mitchell under the judgment. (\$2,441.23 with allowed costs. The amount of the sanctions was an arbitrary amount: \$2,316.86. After sanctions, Mitchell was awarded only \$124.37. CP 86-87. No reason for this odd amount of sanctions, yet it is far from reasonable and as described above an abuse of discretion.

O. TRIAL COURT ABUSED IT'S DISCRETION WHEN REFUSING TO HONOR MITCHELL'S ASSIGNMENT OF JUDGMENT

In accordance with RCW 4.56.090, Mitchell assigned the underlying judgment to MCS GLOBAL INC. CP 8. The trial court acted sua sponte when refusing to honor such assignment and ordered WSIPP to pay the final judgment only to Mitchell himself and not an assignee. CP 87 ¶ 8.

This is an abuse of discretion since the Legislature has specifically granted Mitchell the authority to assign this judgment (RCW 4.56.090) and "Courts are bound by [legislative] decisions even when they disagree with them." Dependency of A.N., 92 Wn.App 249, 254, 973 P.2d 1 (1998). Dishonoring the assignment is contrary to law and is therefore based on untenable grounds.

P. RECONSIDERATION SHOULD HAVE BEEN GRANTED

Each of the issues addressed above were fully briefed in the trial court level when Mitchell moved for reconsideration of the sanctions order. CP 89-94. Yet the trial court refused to acknowledge the applicable laws and denied reconsideration. CP _____. This was an abuse of discretion as the trial court applied the incorrect laws, constituting an abuse of discretion. See Ausler, 73 Wn.App at 253.

VI. REQUEST FOR COSTS/ATTORNEY FEES

Mitchell moves this court to grant Mitchell all costs incurred as a result of this appeal, in accordance with RAP 14.3(a) and 18.1. Further, Mitchell seeks a statutory attorney fee pursuant to RCW 4.84.080(2).

VII. CONCLUSION

Based upon the foregoing, Mitchell respectfully moves this court to vacate the trial court's January 13, 2008 order (CP 85-87) and to award Mitchell costs and statutory attorney fees on appeal.

Dated this 07th day of April, 2009.

~~UNDER PROTEST~~
~~MM 1-207/308 APPEAL~~
MITCHELL, KEVIN (1-207/308)
Appellant Pro Per, WITHOUT PREJUDICE
[SCCC 880933 ARR/TDC
c/o 191 Constantine Way
Aberdeen, Washington (98520)]
(360) 537-1800.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

Washington court of Appeals
At Division II

KEVIN MICHAEL MITCHELL,)	
Appellant,)	No. 38777-8-II
)	
AND)	DECLARATION OF SERVICE BY MAIL
)	GR 3.1(c)
WA STATE INSTITUTE FOR PUBLIC POLICY,)	
Respondent.)	

The undersigned affirms that on this 09th day of April, 2009, the following documents:

1) Brief of Appellant;

along with a copy of this declaration, were logged as institutional legal mail, with first class postage prepaid, addressed to each of the following:

Washington court of Appeals, Div. 2
David Ponzoha, Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Dierk J. Meierbachtol, AAG
Counsel for Resondent WSIPP
1125 Washington Street SE
Po Box 40100
Olympia, WA 98504-0100

The undersigned affirms under penalty of perjury that the foregoing is true and correct, to the best of available knowledge and belief, without prejudice.

Dated this 09th day of April, 2009.

UNDER PROTEST

1-207/308 ARR/ARR

MITCHELL, KEVIN (1-207/308)
Appellant Pro Per, WITHOUT PREJUDICE.
[SCCC 880933 TDC/ARR
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