

NO. 38777-8-II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

KEVIN MICHAEL MITCHELL,

Appellant,

v.

WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY,

Respondent.

**RESPONSE BRIEF OF WASHINGTON STATE INSTITUTE FOR  
PUBLIC POLICY**

ROBERT M. MCKENNA  
Attorney General

Dierk J. Meierbachtol  
Assistant Attorney General  
WSBA No. 31010  
1125 Washington Street SE  
Olympia, WA 98504-0100  
360-586-2940

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## I. INTRODUCTION

This matter began as a Public Records Act case arising under chapter 42.56 RCW. Appellant Kevin Michael Mitchell brought suit in Thurston County Superior Court and claimed that Respondent Washington State Institute for Public Policy (“WSIPP”), a state agency, violated the Act by failing to timely provide a record he had requested. The trial court agreed with Mr. Mitchell that WSIPP violated the Act when it failed to provide the first document and accordingly assessed statutory penalties and costs. The court agreed with WSIPP that the second record was exempt from disclosure. CP 5.

Mr. Mitchell has not appealed the trial court’s determination that the second record is exempt from disclosure. Nor has he assigned error to the trial court’s assessment of statutory penalties. Instead, the issues presented in this appeal are related to what happened *after* the trial court entered its judgment: Following judgment, WSIPP learned that Mr. Mitchell had engaged in misconduct related to the trial court’s awarding of costs. WSIPP promptly brought this misconduct to the attention of the trial court and asked the court to vacate the cost award and impose sanctions. After a series of hearings and extensive briefing, the court modified the judgment by setting aside a portion of the cost award and ordered sanctions against Mr. Mitchell pursuant to Civil Rule 11.

The narrow question here is whether the trial court abused its discretion in vacating part of the cost award and by imposing sanctions. Because the trial court's order was reasonable and supported by substantial evidence, the answer to the question is no. The trial court did not abuse its discretion. The judgment below should therefore be affirmed.

## **II. RESTATEMENT OF THE ISSUES RELATED TO ASSIGNED ERRORS**

1. Does substantial evidence in the record support the trial court's findings of facts and conclusions of law?

2. Did the trial court abuse its discretion when it set aside a portion of the cost award in this matter pursuant to Civil Rule 60(b)(4) based on clear and convincing evidence of Mr. Mitchell's fraud, misrepresentation, and misconduct?

3. Did the trial court abuse its discretion in imposing CR 11 sanctions against Mr. Mitchell for filing a cost bill for improper purposes?

### III. RESTATEMENT OF THE CASE

#### A. Background

Mr. Mitchell is an inmate in the custody of the Washington State Department of Corrections (“DOC”) and is currently incarcerated at Stafford Creek Corrections Center (“SCCC”) in Aberdeen, Washington. CP 144. In May of 2007, Mr. Mitchell sent a request for records to WSIPP under the Public Records Act (“PRA”). CP 4. WSIPP erroneously failed to timely respond to Mr. Mitchell’s request, and, nearly a year later, he filed a complaint under the Act requesting the court to order WSIPP to disclose the requested documents. CP 3-6. Following a show cause hearing, the trial court entered judgment on November 14, 2008, ordered WSIPP to pay a total of \$2,225.00 in statutory penalties to Mr. Mitchell, and directed him to submit a cost bill to the clerk of the court. CP 3-6.

Mr. Mitchell timely filed his cost bill with the clerk of the superior court on November 25, 2008 (along with several other documents, including a motion to reconsider, a motion to recuse Judge Pomeroy from the case, and a notarized statement assigning the judgment to a Washington corporation called MCS Global, Inc. *See, e.g.*, CP 8.) The cost bill was signed by Mr. Mitchell and he “certifie[d] that the following costs were incurred as a result of this action”: (1) The clerk’s filing fee in

the amount of \$200.00; (2) Process server fees in the amount of \$60.00; (3) Postage costs in the amount of \$16.23; (4) Statutory attorney fees in the amount of \$200.00 pursuant to RCW 4.84.080(1); and (5) “Common law publication/Legal Typeservice fees” in the amount of \$898.43. CP 10.

Mr. Mitchell affirmed under penalty of perjury that the amounts listed in his cost bill were true and accurate to the best of his knowledge and belief. CP 10.

WSIPP did not object to any of the claimed costs and did not move to re-tax costs within the six days allowed under CR 78(e).

Subsequently discovered evidence, however, showed—and the trial court accordingly later found—that Mr. Mitchell’s cost bill was knowingly false.

**B. WSIPP Discovers Evidence That Mr. Mitchell Engaged in Misconduct in Claiming Costs.**

On December 10, 2008—a week after the expiration of the period set by CR 78(e) to object to claimed costs—WSIPP learned for the first time that on November 14, 2008, SCCC staff seized an envelope addressed to Mr. Mitchell that purported to be from “KING, BRIAN M. & ASSOC., ATTY.” CP 22; CP 27. That envelope enclosed an invoice for “publication and typeservice fees” that allegedly came from a company called NRGETX, Inc., of Auburn, Washington. CP 26. The amount of

fees identified in the invoice was identical to the amount Mr. Mitchell would later identify in his bill of costs.

Included with the invoice was a letter dated November 11, 2008, from “the Law Offices of Brian M. King & Associates, Attorneys at Law,” of Lakewood, Washington. CP 25. It read as follows:

Please find enclosed invoice # 082013411kmm for cause no: 08-2-01341-1. As per your request we maintained your accounts receivable open to accommodate your filing and work schedule. As you are the judgment creditor over the State, this invoice is issued accordingly.

Please convey tender of payment forthwith.

The letter was signed by “Phuk Diocee,” who claimed to be a “Senior Paralegal and Personal Assistant to Mr. King.”

The trial court would conclude that this letter and the accompanying NRGETX invoice were frauds. CP 145-146. Indeed, there is in fact no Law Offices of Brian M. King & Associates in this state. The sole attorney with that name in Washington is a shareholder at a law firm located in Tacoma—and he has no association with the firm identified in the letter, did not generate the letter, and has never performed legal work for Mr. Mitchell. CP 14-15. There is no such business licensed in Lakewood—or anywhere else in the state. CP 15.

Moreover, Brian King—the real Brian King—has never employed an individual named Phuk Diocee. CP 15. In fact, the name appears to be a crude joke: “Phuk Diocee” is pronounced “f--k DOC”.

Because this letter and the attached invoice were so clearly fraudulent, DOC impounded them, and they were not released to Mr. Mitchell. CP 23. There is no evidence that Mr. Mitchell ever received the letter or the invoice.

Having learned of this letter for the first time, WSIPP uncovered further evidence showing that Mr. Mitchell, acting with several associates, had over the years set up several corporations in furtherance of a scheme to extract money from the State of Washington under the pretext of, among other things, filing PRA lawsuits. NRGETX, Inc. was founded by Mr. Mitchell’s father, and its directors include Mr. Mitchell’s father and an associate of Mr. Mitchell named Brian David Matthews. CP 15. NRGETX’s official location and mailing address are the same as Mr. Mitchell’s father’s home. CP 16; CP 28.

WSIPP further learned that MCS Global Legal Services—the company that, according to Mr. Mitchell, served his complaint on the Attorney General’s Office to the tune of \$60.00—shares the same location in Auburn as NRGETX (and of Mr. Mitchell’s father’s home). CP 16. Its registered agent, too, is Mr. Mitchell’s father, and its governing officials

include Mr. Mitchell's father and Mr. Mitchell himself. CP 16. (MCS Global, it will be recalled, is the company to which Mr. Mitchell sought to assign the judgment in this case.)

WSIPP further learned that the costs Mr. Mitchell claimed in relation to the service of the summons and complaint were also deceptive. The individual who was identified as the process server in papers provided by Mr. Mitchell was in fact not registered as a process server in King County (where the summons and complaint were served). In fact, the process server license number identified in the Return of Service was registered to MCS Global, Inc.—and to Mr. Mitchell himself. CP 14. Mr. Mitchell, it turns out, had claimed costs for a service performed by a company that he owned and directly controlled. But nothing in the cost bill or in any of the documents Mr. Mitchell submitted to support it suggested that this was so. Indeed, if Mr. Mitchell had been upfront about the fact that he was the owner of the company that served the summons in this case, the summons would likely have been deemed to be defective under CR 4(c) (providing that a party to an action shall not serve the summons or process for that action).

In subsequent filings and in statements to the trial court, Mr. Mitchell attempted to explain his conduct. He admitted that his associate Brian David Matthews was the true author of the fake

November 11 “Phuk Diocee” letter. CP 107-108. But he denied that he was aware that Mr. Matthews would use the prison mail system to transmit the cost bill, and he insisted that he acted in good faith at all times in claiming costs. According to Mr. Mitchell, the “typeservice” costs that he claimed as a part of the judgment were performed by a “volunteer” who was incarcerated alongside Mr. Mitchell and who was a member the NRGETX “reparations committee”. CP 105-106. Mr. Mitchell further told the trial court that the phrase “KING, BRIAN M. & ASSOC., ATTY.” that appeared on the front of the envelope containing the NRGETX invoice was in fact a pseudonym used by Brian David Matthews: “King”, it was said, represents the sovereign Brian Matthews and “Assoc.” refers to the association between Mr. Matthews and his fraternal brothers from the Neo Ordo ab Anunnaki. CP 107-108. The members of that order, according to Mr. Mitchell, commonly refer to themselves as “atty” (pronounced “uh-teah”). CP 108. Mr. Mitchell also explained that the name “Phuk Diocee” is not pronounced “f-k DOC”; it is in fact pronounced “fook de-awchay” and is the religious name that Mr. Matthews declared long ago and by which he is known among the believers of his faith and members of his fraternal order. CP 108. The letterhead on the cover letter—which purported to be from the “Law Offices of Brian M. King & Associates”—was intended to be a

“novelty only”, a private joke to be shared with Mr. Mitchell. CP 108-109. And Mr. Matthews stamped “Legal Mail” on the face of the envelope because the contents were, he said, of a legal nature. CP 108.

As for the process server fee, Mr. Mitchell told the trial court that the individual who served the summons and complaint was lawfully employed by MCS Global Legal Services—a company Mr. Mitchell owns and which is registered to serve process in the state. Mr. Mitchell has never provided any evidence that the individual he allegedly employed as a process server was in fact a *bona fide* employee of MCS Global.

**C. The Trial Court Agrees That Mr. Mitchell’s Conduct Was Fraudulent and Improper.**

The trial court heard all of this evidence and ultimately found that Mr. Mitchell had engaged in misconduct. Noting that the typeset in Mr. Mitchell’s briefs did not appear to be generated from a professional typesetter and that the service charges were from a company sharing the home of Mr. Mitchell’s father, the trial court observed that WSIPP made a “strong showing that the invoices generated were fraudulent.” RP (Dec. 19, 2008) at 4-5. The court went on to find that Mr. Mitchell had filed a signed and dated cost bill that knowingly contained false and/or misleading information regarding the process server fee. CP 146. And the court further found that Mr. Mitchell knowingly attempted to use DOC’s

legal mail system to obtain false documentation supporting his cost bill. CP 146. From this, the court concluded that Mr. Mitchell filed his cost bill with the improper purpose of inflating the costs that he was to be awarded under the judgment. CP 146.

The trial court accordingly vacated a portion of its judgment and denied Mr. Mitchell an award of costs for “typesetting” and process server fees. CP 147. The court also sanctioned Mr. Mitchell for his misconduct by imposing \$2,441.23 in monetary sanctions (and requiring that those sanctions offset the award), denying Mr. Mitchell his statutory attorneys fees, and ordering that the judgment be made payable solely to Mr. Mitchell and not to MCS Global.<sup>1</sup> CP 148.

#### IV. ARGUMENT

##### A. Substantial Evidence in the Record Supports the Trial Court’s Findings of Fact.

In his supplemental brief filed on May 28, 2009, Mr. Mitchell contends that the trial court’s findings of fact entered on May 15, 2009,

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<sup>1</sup> The trial court reduced its conclusions to a written order on January 13, 2009. CP 85-87. On April 16, 2009, the court—acting *sua sponte*—withdrew that order and issued a corrected order pursuant to CR 60(a) that included detailed findings of fact in support of its sanctions order. CP 150-155. In response to objections from Mr. Mitchell, the trial court allowed Mr. Mitchell to formally object to the findings of fact contained in the April 16 order and, following more briefing and a hearing, issued a new corrected order on May 15, 2009. CP 143-148.

are not supported by substantial evidence in the record. We will begin there.

On appeal, this Court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993). The party challenging a finding of fact bears the burden of demonstrating that the finding is not supported by substantial evidence. *Id.* at 940 (citing *Grein v. Cavano*, 61 Wn.2d 498, 507, 379 P.2d 209 (1963)). Appellate courts view the evidence in the light most favorable to the prevailing party, and defer to the trier of fact regarding witness credibility or conflicting testimony. *Pilcher v. State*, 112 Wn. App. 428, 435, 49 P.3d 947 (2002).

Here, Mr. Mitchell has failed to meet his burden to demonstrate that the findings of fact are not supported by substantial evidence.

In Finding of Fact 6, the trial court found that "According to the records of King County's Records and Services Division, Plaintiff is registered as a process server in King County under the license number 0741428-13414." CP 145. The finding is inescapable: The King County Process Service Registration that Mr. Mitchell himself submitted to the trial court states that the process server license is held by "MCS Global,

Inc. For: Kevin Michael Mitchell.” Mr. Mitchell acknowledges this, as he must. Suppl. Br. at 4. But he claims—without pointing to any additional evidence—that King County simply erred when it listed his name on the license. The trial court acted well within its discretion in discounting this explanation. Finding of Fact 6 is supported by sufficient evidence in the record.

Finding of Fact 7 provides that “Plaintiff’s cost bill did not disclose that he was an owner of MCS Global Legal Services.” CP 145. Nothing in the record contradicts this finding and, indeed, Mr. Mitchell concedes in his supplemental brief that it is true. Suppl. Br. at 5. It is therefore supported by sufficient evidence.

Findings of Fact 9 through 15 set forth facts related to DOC’s impounding of the envelope containing the invoice for Mr. Mitchell’s alleged “common law publication/typesetting” costs. CP 145-146. All of the evidence that Mr. Mitchell has proffered to rebut these findings is simply not credible, and the trial court acted reasonably in rejecting that evidence out of hand. The court’s findings are supported by substantial evidence in the record.

Finding of Fact 17 states that “Plaintiff never received a copy of the NRGETX invoice.” CP 146. Substantial evidence in the record shows that, prior to submitting his cost bill to the trial court, Mr. Mitchell in fact

did not receive a copy of the invoice. Mr. Mitchell has never disputed this, and his contention here that he later received copies of the invoice in connection with this litigation is immaterial. The finding is accordingly supported by sufficient evidence in the record.

And finally, Findings of Fact 16 and 18 through 21 are reasonable, fact-based inferences and conclusions of law that are drawn from substantial evidence in the record. They should be sustained.

**B. The Trial Court Did Not Abuse Its Discretion in Vacating a Portion of the Cost Award Pursuant to CR 60(b)(2).**

Mr. Mitchell also contends that the trial court erred as a matter of law in vacating its judgment and relieving WSIPP of its order to pay costs because WSIPP did not timely move to re-tax costs pursuant to CR 78(e). This contention is without merit.

Civil Rule 60(b)(4) authorizes a trial court to relieve a party from a final judgment or order for “[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.”<sup>2</sup> An appellate court reviews a trial court’s disposition of a motion under CR 60(b) for abuse of discretion. An abuse of discretion

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<sup>2</sup> CR 60(b)(4) derives from RCW 4.72.010, which provides in relevant part that “[t]he trial court in which a judgment or final order has been rendered, or made, shall have power to vacate or modify such judgment or order: . . . (4) For fraud practiced by the successful party in obtaining the judgment or order.”

exists only when no reasonable person would take the position adopted by the trial court. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000).

Under the rule allowing vacation of a judgment on the basis of fraud, 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. *Momah v. Bharti*, 144 Wn. App. 731, 182 P.3d 455 (2008).

Here, the trial court did not abuse its discretion when it vacated a portion of its prior judgment and relieved WSIPP of its obligation to pay a portion of the costs. Well after the trial court entered its order of final judgment on November 14, 2008—and 10 days after the six-day period allowed under CR 78 to re-tax costs had elapsed—WSIPP learned for the first time of Mr. Mitchell’s misconduct related to the court’s award of costs. The trial court heard clear and convincing evidence that, even before the court entered its November 14 order, Mr. Mitchell conspired with Mr. Matthews to improperly obtain an invoice supporting “common law research/typesetting” costs. Clear and convincing evidence further showed that Mr. Mitchell hid the fact that the individual who served the summons and complaint in this case used Mr. Mitchell’s own process server registration number—and that the costs were allegedly incurred by a company Mr. Mitchell owns. Had WSIPP been aware of these facts, it

would have opposed the awarding of these costs to Mr. Mitchell. And, certainly, it would have had a basis to object to the cost bill.

Mr. Mitchell appears to argue that WSIPP's motion under CR 60(b) was in fact a motion to re-tax costs under another name. From this, Mr. Mitchell contends that because WSIPP's motion to vacate came later than the six-day period mandated under CR 78, the trial court erred in granting the motion to vacate. But Mr. Mitchell misses the point. WSIPP has never moved to re-tax costs, nor has it formally objected to any of the discrete costs enumerated in plaintiff's cost bill. WSIPP's CR 60 motion to vacate was precisely what it purported to be: A motion to vacate the cost award based on WSIPP's discovery of evidence of misconduct and material misrepresentations. Once WSIPP learned of these misrepresentations, it acted promptly to bring them to the court's attention. And, taking all of the relevant evidence into account, the court properly exercised its discretion to modify the judgment and set aside a portion of the cost award.<sup>3</sup>

To the extent that Mr. Mitchell is suggesting that CR 78(e) is jurisdictional and that a trial court has no authority to vacate a cost award

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<sup>3</sup> Because the trial court's modified order below was issued pursuant to CR 60(b), Mr. Mitchell's lengthy analysis of the scope and meaning of CR 78(e) is not relevant to this case. WSIPP never objected to the costs, and the trial court accordingly had no occasion to re-tax the costs under CR 78. The rule simply has no bearing on this appeal.

pursuant to CR 60(b) if the losing party failed to timely object to the cost bill, that argument also fails. The purpose of CR 60(b), after all, is to allow parties to seek relief from a defective judgment up to a year after the judgment is entered. By its terms, the rule contemplates that the time limitations set in other rules will likely have run. And that is why courts routinely entertain motions to vacate judgments in cases where the losing party did not—or could not—avail itself of another rule. *See, e.g., White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968) (CR 60 is the mechanism for defendants to use to set aside default judgment); *Seattle-First Nat'l Bank Connell Branch v. Treiber*, 13 Wn. App. 478, 534 P.2d 1376 (1975) (CR 60 provides the only means to modify a judgment after the expiration of the time period allowed for modifications under CR 59); *Wiley v. Rehak*, 143 Wn.2d 339, 20 P.3d 404 (2001) (judgment on a mandatory arbitration award may only be set aside by a motion to vacate under CR 60).

*Pybas v. Paolino*, 73 Wn. App. 393, 869 P.2d 427 (1994), does not command otherwise. In *Pybas*, the Court of Appeals considered for the first time what constitutes “excusable neglect” under CR 60(b)(1) in cases where a party to a mandatory arbitration waives its right to appeal the arbitrator’s decision by failing to timely serve and file a request for a trial *de novo* pursuant to Mandatory Arbitration Rule (“MAR”) 7.1. The

opinion merely stands for the proposition that extraordinary circumstances must be shown before a trial court may vacate a judgment on an arbitration award under CR 60(b)(1). *Pybas* at 402-403. Absent such a showing, the rule cannot be used to simply circumvent the time constraints of other rules. *Id.* at 393. But where, as here, one or more of the criteria for vacating a judgment or order is shown, the judgment may certainly be vacated pursuant to CR 60—even if the moving party waived the right to challenge the judgment under another rule. *Id.* at 397-399.

Mr. Mitchell further argues that the trial court erred here because his misconduct occurred *after* the entry of the final order, and WSIPP accordingly was not prevented from fully and fairly conducting its case or defense. Br. of Appellant at 13. But, in fact, Mr. Mitchell's actions took place *before* the trial court entered its November 14, 2008, judgment awarding costs. The record shows that SCCC seized the fraudulent NRGETX typeservice invoice on the same day that the court entered judgment. The accompanying "Phuk Diocee" letter was itself dated November 11, 2008. The summons and complaint were served well before the entering of the judgment. And, as detailed above, the trial court appropriately inferred from all of this that Mr. Mitchell had designed a plan well before November 14, 2008, to support his judgment with costs that he did not incur and which would be memorialized with fake invoices.

Had the trial court been aware of Mr. Mitchell's conduct before November 14, 2008, it simply would not have awarded those costs.<sup>4</sup>

Clear and convincing evidence supported the trial court's conclusion that a portion of Mr. Mitchell's claimed costs was fraudulent.<sup>5</sup> The court's decision to vacate those costs was reasonable and, accordingly, the court acted well within its discretion under CR 60(b)(4).

**C. The Trial Court Did Not Abuse Its Discretion in Ordering CR 11 Sanctions.**

Mr. Mitchell next contends that the trial court abused its discretion in ordering sanctions. This contention, too, is without merit.

CR 11(a) reads in pertinent part as follows:

The signature of a party . . . constitutes a certificate by the party . . . that the party . . . has read the pleading, motion, or legal memorandum, and that to the best of the party's . . .

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<sup>4</sup> Mr. Mitchell argues that he is entitled to all of his claimed costs because the PRA allows for liberal cost recovery. Br. of Appellant at 17. Even if Mr. Mitchell's interpretation of the Act is correct as a matter of law, it would certainly not apply in a case such as this where clear and convincing evidence shows that the claimed costs were essentially fraudulent.

<sup>5</sup> Mr. Mitchell maintains that the trial court erred in not entering findings of fact pertaining to each element of common law fraud. Br. of Appellant at 21. No Washington court has held that the elements of fraud must be met in every case where CR 60(b)(4) is invoked. Indeed, the court in *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 308 n.8, 863 P.2d 1377 (1993), noted that CR 60(b)(4) "contemplates a very broad definition of fraud when it refers both to extrinsic and intrinsic fraud and includes misrepresentation and other misconduct by an adverse party." While it is true that the Court of Appeals in *Marriage of Maddix*, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985), instructed the trial court on remand to make findings and conclusions with respect to each element of common law fraud in the event it determines that vacating the judgment for "fraud" under CR 60(b)(4) is warranted, the trial court in that case had taken *no evidence* regarding fraud, misrepresentation, or other misconduct before vacating the judgment. And the appellate court further observed that, even if the trial court did not find fraud on remand, "'misrepresentation or other misconduct' would also justify vacation of the judgment under CR 60(b)(4)." *Id.*

knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; . . . (3) it is not interposed for any improper purpose, such as . . . needless increase in the cost of litigation. . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court upon motion or upon its own initiative, may impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party . . . the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

Rule 11 applies to *pro se* litigants such as Mr. Mitchell in this case.

Such parties are held to the same standard as an attorney and may be sanctioned for the same reasons. *Harrington v. Pailthorp*, 67 Wn. App. 901, 910, 841 P.2d 1258 (1992). In general, the trial court has broad discretion in fashioning and imposing sanctions under CR 11. *Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530 (1988), *review denied*, 111 Wn.2d 1007 (1988). This court reviews a trial court's decision to impose sanctions under CR 11 for abuse of discretion. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 415, 157 P.3d 431 (2007).

As described above, substantial evidence in the record shows that Mr. Mitchell filed a materially false cost bill with the improper purpose of inflating the costs he would be awarded under the judgment. Substantial evidence further shows that Mr. Mitchell failed to disclose to the court the nexus of financial interests he held in the companies that purportedly

provided the services for which he sought costs. This was not a case, as Mr. Mitchell contends, where he was sanctioned solely for an item of legal mail sent by another party. *See* Br. of Appellant at 16. In filing his bill of costs, Mr. Mitchell affirmed that the amounts he listed in the bill were true and accurate to the best of his knowledge and belief. Substantial evidence in the record supports the trial court's conclusion that this affirmation was false. The court was correct to conclude that sanctions were warranted.

Mr. Mitchell maintains that CR 11 does not apply, as a matter of law, to a bill of costs. But typically, courts recognize that the mandates of CR 11 “apply to *all signed documents* filed in the course of a lawsuit.” *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 114, 780 P.2d 853 (1989) (emphasis added). Courts in other jurisdictions have treated cost bills as motions for the purpose of imposing sanctions. *See, e.g., Staples v. Hoefke*, 189 Cal. App. 3d 1397, 1418, 235 Cal. Rptr. 165, 178-79 (1987) (“Under the circumstances, the trial court properly determined the cost bill was frivolous. A motion is frivolous and in bad faith where any reasonable attorney would agree such motion is totally devoid of merit.”). What's more, at least one court in Washington has held that frivolous or improper *objections* filed in response to a cost bill may be sanctioned. *See King Cy. Water Dist. No. 90 v. City of Renton*, 88 Wn. App. 214, 228-230, 944 P.2d 1067 (1997). It would make little sense

to hold that an attorney's misconduct in objecting to a cost bill may be sanctioned, but misconduct related to the filing of the bill of costs itself is untouchable.

Mr. Mitchell's reliance on *Clipse v. State*, 61 Wn. App. 94, 808 P.2d 777 (1991), is misplaced. That case simply stands for the well-settled principle that discovery disclosures are not subject to sanctions under CR 11 because other court rules—namely CR 26(g)—provide appropriate sanctions for discovery abuse. See *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339-40, 858 P.2d 1054 (1993). Here, the only apparent avenue to sanction Mr. Mitchell under the Civil Rules lay in Rule 11.

But even if, for the sake of argument, the requirements of CR 11 did not apply to a signed and certified bill of costs like the one filed in this case, the trial court nevertheless acted well within its inherent authority in ordering sanctions. "Every court of justice has power [t]o enforce order in the proceedings before it [and to] provide for the orderly conduct of proceedings before it." RCW 2.28.010(2)-(3) . And "[w]hen jurisdiction is . . . conferred on a court or judicial officer all the means to carry it into effect are also given." RCW 2.28.150. Accordingly, where sanctions are not expressly authorized in court rules, the trial court may "fashion and impose appropriate sanctions under its inherent authority to control

litigation” and apply the principles embodied in CR 11. *Matter of Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996). Whether CR 11 strictly applies in this case or not, sanctions were properly imposed below. They should not be disturbed.

Finally, Mr. Mitchell assigns error to the scope of the sanctions leveled against him. He contends that the monetary penalty fixed by the trial court was arbitrary and that the court abused its discretion in ordering that the monetary sanction offset the judgment award, refusing to allow the award to be assigned to MCS Global, and denying statutory costs. All of these contentions are without merit.

In determining what sanctions are appropriate, the trial court is given wide latitude. *Fisons*, 122 Wn.2d at 355. “The purposes of sanctions orders are to deter, to punish, to compensate and to educate.” *Id.* at 356. Although courts should take care that they impose the least severe sanction that is adequate to serve the purpose of the particular sanction, the sanction should insure that the wrongdoer does not profit from the wrong. *Id.* at 355-56. And, while CR 11 is not intended to be a “fee shifting” rule, sanctions should include a compensation award when compensation is appropriate. *Id.* at 356.

Here, the trial court’s sanction order was narrowly tailored, reasonable, and well within the court’s broad discretion. The court

ordered Mr. Mitchell to pay \$2,316.86 in money sanctions and to forego an additional \$200 in statutory attorney fees. All of this clearly was designed to discourage Mr. Mitchell from engaging in similar misconduct in the future, educate him regarding the gravity of his actions, and insure he does not profit from his actions. Having only recovered a nominal amount in this case, perhaps Mr. Mitchell will think twice before he tries to use the PRA in the future to recover phantom costs.

It was likewise reasonable for the trial court to offset the judgment with the monetary sanctions instead of, for example, directing Mr. Mitchell to pay the sanctions to a court fund. It took considerable time, after all, for WSIPP to investigate Mr. Mitchell's conduct and to fully advise the trial court of its findings. *See* CP 13-17. Moreover, in a case like this where the amount of the judgment and the sum of the sanctions are relatively minor, judicial economy militates in favor of simply providing for an offset rather than requiring Mr. Mitchell to pay into a court fund.

Similarly, the trial court's refusal to allow Mr. Mitchell to assign his award to MCS Global was intended to insure that the award would go to *Mr. Mitchell* and not to a previously undisclosed corporation that he controls. Indeed, there is no evidence in the record that MCS Global is a creditor of Mr. Mitchell: it simply appears to be his alter-ego. And his

attempt to assign the judgment in this case to MCS Global was therefore clearly an effort to avoid subjecting the award to the reach of RCW 72.09.480(3) (providing that when an inmate receives funds from an award resulting from a legal action, those funds are subject to certain mandatory deductions under the law). Irrespective of any right Appellant had to assign his judgment under the law, the trial court plainly had the discretion to fashion a sanctions order that prevented Mr. Mitchell from assigning the judgment in this case. The decision was reasonable and not an abuse of discretion.<sup>6</sup>

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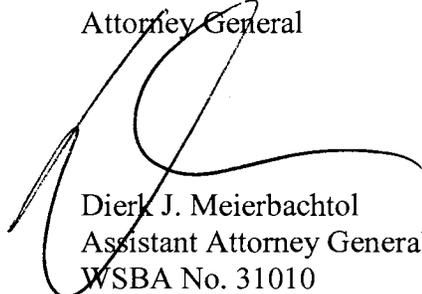
<sup>6</sup> At the conclusion of his brief, Mr. Mitchell assigns error to the trial court's March 5, 2009, denial of his motion for reconsideration. This Court reviews a trial's courts ruling on a CR 59 motion for reconsideration under the abuse of discretion standard. *McCallum v. Allstate Property and Cas. Ins. Co.*, 149 Wn. App. 3d 412, 428, 204 P.3d 944 (2009) (citing *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002)). Because the trial court properly vacated the cost award and imposed sanctions, it also properly denied Mr. Mitchell's motion for reconsideration of that order. *Id.* There was no abuse of discretion.

V. CONCLUSION

The trial court did not abuse its discretion in vacating a portion of the cost award or imposing sanctions in this case. This Court should therefore affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June, 2009.

ROBERT M. MCKENNA  
Attorney General



Dierk J. Meierbachtol  
Assistant Attorney General  
WSBA No. 31010  
1125 Washington Street SE  
Olympia, WA 98504-0100  
360-586-2940

NO. 38777-8-II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

KEVIN MICHAEL MITCHELL,

Appellant,

v.

WASHINGTON STATE INSTITUTE  
FOR PUBLIC POLICY,

Respondent.

CERTIFICATE OF  
SERVICE

09 JUN 30 11:00 AM  
STATE OF WASHINGTON  
BY *RP*  
COURT OF APPEALS, DIVISION II

I certify that I mailed, via Consolidated Mail Service, postage prepaid, a copy of the foregoing Response Brief of Washington State Institute for Public Policy to Kevin Michael Mitchell, Appellant, at SCCC 880933 H2A07, TDC, c/o 191 Constantine Way, Aberdeen, WA 98520 on June 30, 2009.

*Raelynn Poulin*  
RAELYNN POULIN

~~09 JUN 30 11:00 AM  
STATE OF WASHINGTON  
BY DEPUTY  
COURT OF APPEALS, DIVISION II~~