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

WIVES AND MOTHERS OF PRISONERS OF THE STATE, a
Washington Non-Profit Corporation,

Plaintiff / Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, a Subdivision
of the State of Washington,

Defendant / Respondent.

CORRECTED BRIEF OF RESPONDENT

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STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
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COURT OF APPEALS
DIVISION II

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I. INTRODUCTION

Richard Scott is the incorporator and sole officer of Appellant Wives and Mothers of Prisoners of the State (WMPS). Mr. Scott is a sexually violent predator committed to the Special Commitment Center (SCC), a state facility operated by the Department of Social and Health Services (the department). During his six-year commitment Mr. Scott has repeatedly used the law and the legal system as a tool for harassment and as an avenue for pursuing money-making schemes that included asking for damages or for sanctions under the Public Records Act. Mr. Scott uses WMPS to advance these aims.

This case was brought by WMPS asking for sanctions under the Public Records Act.¹ During the course of the proceedings, Mr. Scott fired WMPS's attorney and then tried to represent the corporation "*pro se*." He knew this was unlawful and the trial court sanctioned him under CR 11 for his conduct. When he failed to comply with the court's order, choosing instead to file alternative lawsuits, the trial court dismissed the case. WMPS appeals, claiming that the trial court had no authority to dismiss the case or that, if it did have such authority, it abused its discretion in doing so.

¹ The department denies that the records request at issue was made by WMPS. CP at 42.

II. RESTATEMENT OF THE ISSUES

- A. Does CR 41(b) prohibit a trial court from a dismissing an action based on the failure of the plaintiff corporation's director to comply with a court order?
- B. Did the trial court abuse its discretion in dismissing the complaint with prejudice after the plaintiff's director failed to comply with the trial court's CR 11 order imposing monetary sanctions?
- C. Is an award of attorney fees and costs appropriate based on the record in this case?

III. COUNTER-STATEMENT OF THE CASE

Richard Scott is a sexually violent predator who has been detained at the Special Commitment Center since May 2003.² *In re Detention of Scott*, No. 61121-6-I, 2009 WL 1544265, ¶¶ 5, 6 (Wash. Ct. App. June 1, 2009).

In 2005, while at the SCC, Mr. Scott established Wives and Mothers of Prisoners of the State (WMPS), a Washington non-profit corporation. CP at 188. He is the sole incorporator and sole officer of WMPS, and holds himself out variously as the "director" and "president" of WMPS. *Id.* The purported purpose of the corporation is to more narrowly define sexually violent predator civil commitment laws. *Id.* Mr. Scott is not an attorney.

² The SCC is a total confinement treatment and care facility for sexually violent predators operated under the umbrella of the department.

WMPS through counsel, Michael Kahrs, filed this lawsuit in March 2008 alleging a violation the Public Records Act, RCW 42.56. In August 2008, Mr. Scott, director of the corporation, terminated attorney Kahrs' representation of WMPS.³ In July 2008, before his services were terminated, Mr. Kahrs advised Mr. Scott by letter that WMPS must be represented by an attorney to proceed with the case. He wrote:

Finally, I would be more than happy to substitute in any other attorney you can name. All I need to know is who it is. Remember, WMPS cannot be represented *pro se*. You might want to consider changing the plaintiff to you so you can pursue the claim *pro se*.

CP at 81. Days after Mr. Kahrs withdrew as attorney for WMPS, Mr. Scott filed a motion asking the court for permission to proceed *pro se* on behalf of WMPS. CP at 86. The department objected and sought CR 11 sanctions, based on Mr. Scott's clear understanding that he could not represent WMPS *pro se*. CP at 47-52.

The trial court heard Mr. Scott's motion on October 10, 2008. Attorney Kahrs re-appeared for WMPS in time for the hearing. The department provided evidence in support of CR 11 sanctions, including evidence of Mr. Scott's history of abusive litigation practices. Mr. Scott

³ Attorney Kahrs has represented WMPS at various times in this case, including on appeal. He filed the Complaint March 3, 2008, as well as the Amended Complaint on September 10, 2008. CP at 1-5. He withdrew as counsel at Mr. Scott's request on September 4, 2008. CP at 39; CP at 57. Mr. Kahrs re-appeared in the case on October 18, 2008, and has remained counsel of record since that time.

operates under close judicial scrutiny in the Federal District Court (Western Washington) as a “vexatious litigant” after having filed 45 lawsuits in that court within four years. All but three were dismissed or not permitted to proceed. CP at 62. The Ninth Circuit Court of Appeals has also imposed a strict pre-filing review order, having found Mr. Scott to be a vexatious litigant after filing 23 appeals in that court between January 2004 and August 2006. CP at 74-77. Nearly all of these appeals were dismissed for failure to prosecute after Mr. Scott failed to comply with the court’s orders to submit briefing or pay filing fees. *Id.*

The department also provided evidence proving that Mr. Scott uses WMPS as a vehicle to avoid paying court sanctions. RP (Oct. 10, 2008) at 6-7. In addition to seeking CR 11 money sanctions against Mr. Scott personally, the department asked the trial court to stay the case until Mr. Scott paid the sanctions. The department argued that without a stay, the sanctions would be ineffective in dissuading Mr. Scott from continuing to file baseless motions:

[COUNSEL FOR THE DEPARTMENT]: [A] sanction against Mr. Scott personally will have zero effect if the Court does not also order the case stayed until he pays it. That’s what will happen. . . . Because Mr. Scott, in his motion, says that he is the sole owner of the corporation It’s just him. And so if he’s allowed to proceed without having to pay the sanction, he won’t, and the Court will have to deal with a litigation record

comparable to what the Ninth Circuit and what the Western District have.

RP (Oct. 10, 2008) at 12-13.

The trial court found that Mr. Scott had filed his motion to proceed *pro se* in bad faith, and imposed \$500.00 in CR 11 sanctions against Scott personally. CP at 6-7 (“the October order”); RP (Oct. 10, 2008) at 12 (“So I’m going to grant the motion for sanctions for \$500 against Mr. Scott personally. That’s him personally.”) Over WMPS’s objection, the court also stayed the case until Mr. Scott paid the sanctions. WMPS moved for reconsideration without success.⁴ The trial court additionally stated that if Mr. Scott did not pay the sanction, it would dismiss the case. CP at 91.

Within days of the court’s denial of reconsideration, Mr. Scott began filing a flurry of new lawsuits against the SCC, claiming more Public Records Act violations. CP at 15-16, 19-25. He increased the pace at which he was making public records requests to SCC. This escalation of litigious activity prompted the department to move for CR 11 dismissal. As explained above, the department was already aware that WMPS’s counsel had suggested that Mr. Scott substitute himself for the plaintiff in this case so he could proceed *pro se*. CP at 81. Based on claims of

⁴ The court also imposed an additional \$175.00 CR 11 sanction to compensate the department for responding to the motion for reconsideration. WMPS does not challenge this part of the order denying the motion for reconsideration. Appellant’s opening brief, note 3.

indigency, and accompanying requests to waive the filing fee in each of the cases he was filing, the department also anticipated that Mr. Scott would not—or could not—comply with the order on CR 11 sanctions.⁵ The basis of the department’s motion for dismissal was the court’s ruling that if Mr. Scott failed to pay, the court would dismiss the case. CP at 91.

The day before the hearing on the department’s motion to dismiss, Attorney Kahrs deposited \$675.00 in the court registry. CP at 37. It appeared that the funds could not have been paid by Scott as ordered in view of Scott’s recent sworn affidavits claiming that he was penniless. It was not until the hearing, and in response to the trial court’s direct questioning, that Attorney Kahrs admitted that his law firm had paid the funds into the court’s registry.⁶ Notably, Mr. Kahrs did not argue that his firm had paid the sanction on behalf of Mr. Scott.

⁵ Mr. Scott had filed affidavits claiming indigence in two lawsuits in Pierce County in the months preceding the department’s motion to dismiss. Mr. Scott asserted that he had no funds and that WMPS had no funds. In each case, Mr. Scott lacked standing to assert claims *pro se* on behalf of WMPS. On May 29, 2009, Judge McCarthy dismissed cause 08-2-15691-1 with prejudice and imposed \$500 in terms against Mr. Scott as a CR 11 sanction for his attempt to bring claims in his own name, knowing the claims were made by WMPS. For the identical reason, on June 26, 2009, Judge Lee dismissed cause 09-2-05081-9 with prejudice and imposed \$1,000 in terms against Mr. Scott.

⁶ This is in direct violation of the court’s October 10, 2008, order that Richard Scott pay the sanction. This also appears to violate RPC 1.8(e)(1), prohibiting an attorney from advancing financial assistance to a client.

The trial court found that Mr. Scott did not pay the CR 11 sanction, and thus he had failed to comply with the court's October 2008 order. The court then dismissed the case with prejudice.

IV. ARGUMENT

Appellant WMPS argues the trial court erred for two reasons: (1) Because CR 41 does not permit involuntary dismissal of an action, with prejudice, once the case has been set for trial, and (2) the evidence did not support the trial court's conclusion that Richard Scott failed to comply with the order on sanctions. Neither argument is supported by the law or the facts of this case.

A. **CR 41 Does Not Preclude Dismissal For Failure Of Plaintiff's Director To Comply With A Court Order**

Appellant first contends that the only basis for dismissal is under CR 41(b)(1) (want of prosecution) and that dismissal for this reason was not warranted. However, the trial court's dismissal was not based on a failure to prosecute argument.⁷ Instead, it was based on Mr. Scott's failure to comply with an order of the court.

CR 41(b) provides:

⁷ The department acknowledges that it inartfully used the term "failure to prosecute" in its motion to dismiss. CP at 9-10. However, the motion, briefing, argument and the evidence before the court demonstrate that the trial court and the parties were well aware that the basis for the motion, as well as the trial court's dismissal, was Mr. Scott's failure to comply with the trial court's order on sanctions. *See, e.g.*, CP at 9-11, 14-16, 28-29.

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

The rule then goes on to specify, in CR 41(b)(1), the basis for moving to dismiss for failure to prosecute; in CR 41(b)(2), the basis for dismissing on motion of the clerk, for other failures; and in CR 41(b)(3), the basis for dismissing after plaintiff rests. CR 41(b)(2)(D) specifically states, “This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.”

If CR 41(b) applied, it would apply only to demonstrate that a trial court has the authority to dismiss an action based on the failure to comply with an order of the court.

WMPS misconstrues the application of this rule to this case. Its reliance on CR 41(b)(1) (dismissal for want of prosecution) is misplaced.

CR 41(b)(1) is a rule intended to permit a court to eliminate dormant cases from its docket. *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 169, 750 P.2d 1251 (1988). Thus, as WMPS asserts, under *Thorp Meats*, CR 41(b)(1) precludes dismissal for want of prosecution if the basis of the motion to dismiss is the plaintiff’s failure to note the case for trial and the plaintiff sets a trial date before the court hears the motion to dismiss. Those, however, are not the facts of this case.

The basis of the department's motion was not failure to prosecute but, rather, Mr. Scott's failure to comply with a court order.

Unlike the result under CR 41(b)(1), which permits dismissals only without prejudice, a dismissal for reasons other than want of prosecution under CR 41(b)(1) may be with prejudice. *See Thorp Meats*, 110 Wn.2d at 169 (the court's interpretation of CR 41(b)(1) "does not destroy a trial court's inherent authority to manage its calendar. Where dilatoriness of a type not described by CR 41(b)(1) is involved, a trial court's inherent discretion to dismiss an action . . . remains.")

Here, the department moved to dismiss based on Scott's failure to comply with the trial court's October 2008 CR 11 order, not for want of prosecution. The argument the department made in its motion made clear to WMPS and the court the specific basis for the department's Motion:

On October 10, 2008, this Court denied Mr. Scott's motion to proceed *pro se*, imposed terms of \$500.00, and ordered that Mr. Scott pay the terms personally due to his bad faith in bringing his motion. Further, the Court ordered this case stayed until Mr. Scott paid the terms. The Court noted that if Mr. Scott did not pay the terms, this case would be dismissed. . . . As of this writing, Mr. Scott has not paid either the original terms or those imposed for his motion for reconsideration. WMPS has been on notice since October 10, 2008, that this matter would be dismissed if the terms were not paid.

CP at 9-10. Moreover, the department moved to dismiss with prejudice based on Mr. Scott's failure to comply with the court's October CR 11

sanctions order. CP at 29. Thus, CR 41(b)(1) was not a basis for the trial court's ruling and has no bearing on this case.

B. The Trial Court Properly Exercised Its Discretion In Dismissing The Case Based On Mr. Scott's Failure To Comply With The Court's Order Imposing CR 11 Sanctions

Appellant WMPS argues the trial court erred in dismissing the case as a sanction for failure to comply with its CR 11 order because the order was not specific as to (1) who was required to pay the sanction and (2) when the sanction was required to be paid. The trial court's order of dismissal is supported by the law, the underlying order and the facts.

Review of a sanction order is under the abuse of discretion standard, asking whether it was manifestly unreasonable or based on untenable grounds. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). The trial court's decision "will be affirmed unless no reasonable judge would have reached the same conclusion." *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985).

1. The October 2008 CR 11 Sanctions Order Required Payment By Richard Scott Personally

WMPS admitted that Richard Scott was its president, CP at 2, and Mr. Scott admitted that WMPS is his solely-owned corporation. CP at 86.

The court received evidence in the form of a letter from WMPS's former attorney Michael Kahrs to Mr. Scott explaining to Mr. Scott that he could not represent the corporation *pro se* because he is not an attorney. CP at 81. The court found that Mr. Scott's motion to proceed *pro se* was made in bad faith. CP at 6. The trial court then entered its October 2008 CR 11 sanctions order, stating specifically that, "Mr. Scott shall pay the sum of Five Hundred Dollars (\$500.00) in terms to reimburse defendant for attorneys' fees and costs incurred to respond to Mr. Scott's Motion to Proceed *Pro Se* as permitted pursuant to CR 11." CP at 7. The court's order further states that, "this matter shall be and hereby is stayed until such time as Mr. Scott satisfies the sanctions ordered . . . , above." *Id.*

When WMPS unsuccessfully moved for reconsideration of the October order, it acknowledged that the sanction was Scott's responsibility to pay. CP at 92. ("[T]he Court ordered a five hundred dollar fine and stayed the proceeding as regards to [sic] WMPS *pending payment of the sanction by its director, Richard Scott.*") (Emphasis added).

2. Mr. Scott Failed To Comply With The Order; Instead He Began Filing More Lawsuits And Making Additional Public Records Requests

On December 12, 2008, the trial court denied WMPS's motion for reconsideration of the October order. Mr. Scott immediately began filing additional Public Records Act (PRA) lawsuits in Pierce County Superior

Court, based on his frequent public records requests made to the Special Commitment Center. Cause no. 08-2-15691-1⁸ (filed Dec. 24, 2008), CP at 23; cause no. 09-2-05081-9⁹ (filed Jan. 26, 2009), CP at 19. In each of these cases, Mr. Scott filed affidavits in support of his requests to proceed without payment of filing fees stating that neither he nor WMPS had any funds. CP at 19-21, 23-25. In both of these cases, Mr. Scott named himself as plaintiff but had no standing to do so because the requests at issue were made by WMPS. Based on this increase in litigation, the department moved for dismissal of this case with prejudice. It was apparent that Scott would not pay the CR 11 sanctions in this case, but instead would simply file more lawsuits. Mr. Scott confirmed this in a letter to the department's counsel written days before the hearing on respondent's motion to dismiss. CP at 18 ("I have no problem with talking to you directly, including regarding WMPS v DSHS. I'm considering re-filing that under R.Scott anyway, withdrawing the original claim,")

⁸ Mr. Scott, a non-lawyer, filed suit for money damages for several PRA requests made by WMPS. On May 29, 2009, Judge McCarthy dismissed with prejudice because Mr. Scott knew he could not represent the corporation. The order dismissing the complaint also ordered Mr. Scott to pay \$500.00 as CR 11 sanctions.

⁹ Mr. Scott, again attempting to represent WMPS *pro se*, filed suit for money damages for a PRA request made by WMPS. On June 26, 2009, Judge Lee dismissed with prejudice and imposed \$1,000 in terms against Mr. Scott for the same reason as Judge McCarthy.

3. Motion To Dismiss With Prejudice

As explained above, the department moved for dismissal with prejudice based on Mr. Scott's failure to comply with the court's October CR 11 sanction orders. In response, WMPS counsel deposited \$675.00 into the court's registry. CP at 37. The department questioned whether Mr. Scott had paid the sanctions personally, as required in the October 2008 order. CP at 15-16. If so, the department acknowledged that its motion was moot. CP at 16. If not, then Mr. Scott still had not complied with the court's CR 11 sanctions order.

At the hearing on the department's motion to dismiss, the court considered WMPS's argument that the court failed properly to interpret the plain language of its own order – that the order did not require Mr. Scott, personally, to pay the sanction:

THE COURT: I'm looking at the order I signed. This matter shall be and hereby is stayed until such time as Mr. Scott satisfies the sanctions ordered above. Mr. Scott shall pay the sum of \$500 in terms, that sounds like Mr. Scott to me.

MR. KAHR: But does it say that only Mr. Scott or can, for example, Wives and Mothers or another entity pay the funds?

THE COURT: It says Mr. Scott right there. Mr. Scott should pay it. There's no evidence he's paid it. He says he doesn't have any money. He filed two more lawsuits saying he has no funds and that Wives and Mothers has no funds, so he's trying to have it both ways. I understand he's unhappy at the SCC. Most of the people committed at the

SCC as sexually violent predators are unhappy being there. That's not grounds for him to ignore the order, which he has.

RP (Feb. 13, 2009) at 6-7.

Only after the court announced its ruling did WMPS's counsel admit that his law firm actually paid Mr. Scott's sanction, rather than Scott himself:

MR. KAHRIS: Let me be real clear here, Your Honor.

THE COURT: And let me be real clear. The order says Scott pays it. I've see [sic] nothing to indicate who paid this money.

MR. KAHRIS: My office deposited the money into the account.

THE COURT: Did you get it from Mr. Scott?

MR. KAHRIS: I did not.

THE COURT: Well, I think that settles it.

RP (Feb. 13, 2009) at 8.

Notably, WMPS did not argue that the court should impose a date certain for Mr. Scott to pay the sanction, rather than dismiss with prejudice. Instead, it took the position that anyone could pay the sanction and doing so would amount to Mr. Scott having complied with the court's CR 11 sanction. This position was inconsistent with WMPS's earlier acknowledgment that it understood the CR 11 sanction to have been imposed against Scott personally. CP at 92.

In dismissing this case, the court also took into consideration Mr. Scott's letter stating his intent simply to refile the claim in this case naming himself as the plaintiff. CP at 18. The department had predicted that he might employ such a tactic, when at the October hearing, it pointed out that a financial sanction against Mr. Scott would have zero effect¹⁰ if the court did not also stay the case until Mr. Scott paid it. The court agreed, stating to WMPS's counsel:

There are a lot of small corporations, that's true. A lot of them don't abuse the legal system. Mr. Scott is, from what I understand. If you show me something different, I'll lift the stay, perhaps, on Wives and Mothers of Prisoners of the State. He's doing this simply to avoid the sanctions imposed on him. Why should I let him continue to do that? I can't see a good reason for that, so I'm going to stay this until the sanctions are paid, and at some point if they are paid, I'll lift the stay.

RP (Oct. 10, 2008) at 14.

The trial court additionally told the parties that if the sanction were not paid, it would dismiss the case. CP at 91.

4. Mr. Scott's Willful And Deliberate Refusal To Comply With The Court's CR 11 Sanctions Order Warranted Dismissal With Prejudice

Dismissal is an appropriate sanction where the record indicates that "(1) the party's refusal to obey [a court] order was willful or deliberate,

¹⁰ Numerous courts had imposed sanctions and costs against Scott which remain unpaid. RP (Oct. 10, 2008) at 8 (listing cases), *Scott v. SCC*, PCSC No. 08-2-15691-1; *Scott v. SCC*, PCSC No. 09-2-05081-9; *Scott v. Seling et al.*, No. 06-35514 (9th Cir); *Scott v. Seling, et al.*, No. 05-35036 (9th Cir).

(2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed." *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 129, 89 P.3d 242 (2004). Disregard of a court order without reasonable excuse or justification is deemed willful. *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 130, 136, 896 P.2d 66 (1995) (dismissal for willful and deliberate failure to comply with a court order affirmed where trial court relied on *combination* of plaintiff's counsel purposefully misleading the court with false claims, ignoring specific court orders, and failing to follow the case schedule); *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 691-92, 41 P.3d 1175 (2002) (dismissal for willful and deliberate noncompliance with court orders affirmed where trial court first warned counsel that it would dismiss the case if counsel missed another deadline and counsel again failed to comply with court order regarding discovery).

a. Mr. Scott's Failure To Comply With The Sanctions Order Was Willful And Deliberate

The record below demonstrates that Mr. Scott's failure to comply with the October 2008 sanctions order was willful and deliberate. In

addition to the record described above, the trial court also considered Mr. Scott's extensive pattern of disobeying court orders.

Mr. Scott operates under close judicial scrutiny in the federal District Court for Western Washington after having been found to be a vexatious litigant in that forum. When the Western District entered its case management order in March 2007, Scott had filed 45 lawsuits in the previous four years. All but three had been dismissed or not permitted to proceed. CP at 62-66. The Ninth Circuit Court of Appeals also found him to be a vexatious litigant. Mr. Scott filed 23 appeals in the Ninth Circuit between January 2004 and August 2006, the vast majority of which were dismissed for failure to prosecute after Mr. Scott failed to comply with the court's orders to submit briefing or pay filing fees. CP at 74-77.

Further, the trial court found that Mr. Scott's litigation was vexatious in this case. At the hearing on dismissal, WMPS objected to the court's statement regarding Mr. Scott's vexatious pattern of litigation,

MR. KAHRS: And I'm just going to object, for the record, Your Honor, on the statements regarding whether or not his particular lawsuits within this court within the last period of time including this lawsuit is vexatious. This one has a valid basis, in fact. The Court may, of course, grant the motion to dismiss, but to make an assertion like that regarding litigation that is ongoing before Pierce County Superior Court, I think, is premature.

THE COURT: I'm only making a statement about this case. He's got two others apparently pending since this was filed to add to his 30 or so in federal district court.

RP (Feb. 13, 2009) at 7-8.

b. Mr. Scott's Actions Prejudiced The Department

The record also demonstrates that Mr. Scott's vexatious litigation in this case prejudiced the department. The court heard evidence that Mr. Scott began filing additional lawsuits immediately after the court entered its December 2008 order denying reconsideration. Further, Mr. Scott filed the new lawsuits asserting that both he and WMPS had no funds. The department would be required to litigate those cases at taxpayer expense, while Mr. Scott was able to proceed at no cost to him. The court further considered Mr. Scott's own letter to the department's counsel stating that if the case were dismissed, he would simply refile the claim at issue in this case naming himself as plaintiff. CP at 18. Mr. Scott's activities would prejudice the department's ability to prepare for trial, knowing that attorney time invested would be for naught if Mr. Scott was allowed to keep this case pending while he engaged in litigation on other fronts, undermining the court's sanction order in this case.

c. No Lesser Sanction Than Dismissal Would Have Been Effective

The court considered that Mr. Scott had filed new lawsuits (without payment of the filing fees) so that he could proceed against SCC (a department program) without complying with the court's October 2008 sanctions order. The court also was aware that WMPS's counsel advanced the funds to pay the sanction imposed against Mr. Scott personally, thus nullifying any effect the sanction might have on Mr. Scott. It is also notable that the two new lawsuits Scott filed in which he named himself as plaintiff were based on public records requests made by WMPS. These activities demonstrate that no sanction less than dismissal would have been effective to deter Mr. Scott's baseless filings, frivolous pleadings, and to curb his abuses of the judicial system. *See Biggs*, 124 Wn.2d at 197.

This record makes plain that the court found Mr. Scott's failure to comply with the court's October CR 11 sanctions order was willful and deliberate when considering his long history of failing to comply with court orders, as well as his failure to comply with the October 2008 order in this case, and also where WMPS's counsel attempted to avoid dismissal by paying Mr. Scott's sanctions himself. *See Woodhead*, 78 Wn. App. 125 at 136. The record below demonstrates the dismissal

with prejudice was not manifestly unreasonable or based on untenable grounds. *See Biggs*, 124 Wn.2d at 197. Moreover, it cannot be said that no reasonable judge would have reached the same conclusion. *See Marriage of Landry*, 103 Wn.2d at 809-10.

C. An Award Of Attorney Fees And Costs In Favor Of WMPS Is Not Appropriate Based On The Record In This Case

RAP 18.1 permits attorneys fees and costs on appeal if applicable law grants such a right. WMPS seeks attorney fees and costs on appeal based on the Public Records Act, citing RCW 42.56.550(4), on equitable grounds, or as a sanction under CR 11. None is appropriate in this case.

Washington follows the American Rule for the payment of attorneys fees. Under this rule, any imposition of attorney fees must be based on a contract, a statute or some recognized ground in equity. *Hamm v. State Farm Mutual Automobile Ins. Co.*, 151 Wn.2d 303, 325, 88 P.3d 395 (2004).

1. Attorney Fees And Costs Are Not Available In This Case Under The Public Records Act

The PRA provides for attorney fees and costs where a plaintiff prevails in an action seeking, *inter alia*, to receive a public record. RCW 42.56.550(4). WMPS has not prevailed on the underlying claim. Here, if WMPS were to prevail on appeal, it would have prevailed, at best, in having the case remanded to the superior court for the opportunity to

seek relief on the merits. Thus, applicable law does not grant WMPS a right to attorney fees and costs. RCW 42.56.550(4).

2. Equity Does Not Support A Fee Award To WMPS Under The Facts Of This Case

There is no recognized “equitable” basis for awarding attorney fees to WMPS in this case. In support of its argument that an equitable basis exists for awarding fees in this case, WMPS cites to cases dissolving injunctions that permitted fees to the prevailing party. There was no injunction here and the cases cited provide no support for an imposition of attorney’s fees on a vague equitable ground.

While attorney’s fees are recoverable as a cost of dissolving a wrongfully issued temporary injunction or restraining order, as noted in the cases WMPS cited, Brief of Appellant (Br. Appellant) at 14-15, *Alderwood Associates v. Washington Environmental Council*, 96 Wn.2d 230, 247, 635 P.2d 108 (1981), they are simply not available in every case in which an appellant alleges—or even proves—that the respondent took unfair advantage.

Notably, here, the trial court’s dismissal was based on CR 11, not on an action for temporary restraining order. Thus no equitable basis exists for awarding attorney fees to WMPS.

3. There Is No Basis For Awarding Attorney Fees To WMPS Based On CR 11

WMPS also requests fees based on an argument that the department's motion to dismiss the underlying case was frivolous or did not sufficiently identify supporting case law or statute. Essentially, the corporation asks this Court to impose a CR 11 sanction on the department because its briefing in the trial court relied on CR 11 and on the trial court's previous rulings. WMPS raised this argument below, which the trial court rejected. CP at 12-13. WMPS fails to demonstrate, however that the department's motion to dismiss lacked a factual basis or a legal basis. The factual basis of the department's motion is detailed extensively above. The legal basis was the trial court's own ruling and CR 11. Thus, the record does not support WMPS's argument that the trial court erred in declining to impose CR 11 sanctions against the department.

D. This Court Should Award The Department Its Attorneys' Fees And Costs Incurred To This Appeal

The basis of the trial court's dismissal of this case was failure to comply with a CR 11 sanctions order. In successfully defending this appeal, this Court may similarly impose CR 11 sanctions against Appellant equal to the cost to the public for the department having to defend. *Bryant*, 119 Wn.2d at 223. Here, the department has demonstrated that its motion to dismiss with prejudice was based on

Mr. Scott's failure to comply with the trial court's CR 11 sanction. In view of this fact, WMPS's appeal lacks a factual and legal basis. This Court should award to the department its attorneys' fees and costs incurred responding to this appeal. CR 11.

V. CONCLUSION

The trial court properly exercised its discretion in dismissing this matter with prejudice, after finding that Richard Scott failed to comply with the October 10, 2008, CR 11 sanctions order. The October order stated in plain terms that the sanction was imposed against Mr. Scott. Mr. Scott did not pay the sanction, and thus the court dismissed the case on that basis. This court should affirm the trial court, and further order appellant / WMPS to pay respondent / the department's attorneys' fees and costs incurred to defend this appeal in accordance with CR 11.

RESPECTFULLY SUBMITTED this 9th day of July, 2009.

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CERTIFICATE OF SERVICE

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Christine Howell, states and declares as follows:

STATE OF WASHINGTON
BY *ka*
DEPUTY

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On July 9, 2009, I served a true and correct copy of this **CORRECTED BRIEF OF RESPONDENT** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

Counsel For Appellant

Michael C. Kahrs
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- By United States Mail**
- By Legal Messenger**
- By Facsimile**
- By E-Mail PDF – mkahrs@kahrslawfirm.com**
- By Federal Express**
- By Hand Delivery by: _____**

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of July, 2009, at Tumwater, Washington.

Christine Howell
CHRISTINE HOWELL
Legal Assistant