

NO. 41066-4-II  
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STATE OF WASHINGTON  
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NO. 41066-4-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION TWO

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MALCOLM J. GANDER & MELANIE M. KEENAN  
Appellants/ Cross-Respondents

v.

ELINA YEAGER and KAREN KEEFE,  
Respondents/ Cross-Appellants

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Russell W. Hartman, Judge

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APPELLANTS' REPLY AND CROSS-RESPONSE

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**ORIGINAL**

## TABLE OF CONTENTS

	Page
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. ISSUE PERTAINING TO RESPONDENTS' ASSIGNMENT OF ERROR .....</b>	<b>3</b>
<b>III. REPLY: ATTORNEY'S FEES ARE PROPER BECAUSE GANDER-KEENAN WAS FORCED TO APPEAL AN ANTI-HARASSMENT ORDER ISSUED BY A COURT WITH NO JURISDICTION IN REFERENCE TO CONDUCT CLEARLY COVERED UNDER THE TERMS OF THE PARTIES' SETTLEMENT AGREEMENT.....</b>	<b>3</b>
<b>A. Standard of Review.....</b>	<b>4</b>
<b>B. Multiple Bases for an Award of Attorneys' Fees Apply (Issue No. 1).....</b>	<b>5</b>
1. <u>Settlement Agreement, Statutes, and Rule</u> .....	5
2. <u>Equitable Principles</u> .....	7
a. Disputed Facts.....	7
b. Analysis.....	10
<b>C. The Superior Improperly Relied Upon its Prior Findings in Denying Attorneys' Fees (Issue No. 2).....</b>	<b>10</b>
<b>D. RALJ 11.2 Permits Attorney's Fees (Issue No. 3).....</b>	<b>11</b>
<b>IV. CROSS-RESPONSE: KEEFE-YEAGER IS ENTITLED TO NOTHING; REQUEST FOR RAP 18.9 COMPENSATORY DAMAGES.....</b>	<b>13</b>
<b>A. As Keefe-Yeager Never Moved for CR 11 Sanctions in the Superior Court, it Cannot Raise this Issue on Appeal.....</b>	<b>13</b>

**B. Request for Attorneys’ Fees Pursuant to RAP 18.9 for Keefe-Yeager’s Frivolous Cross-Appeal.....15**

**C. Keefe-Yeager Failed to Properly Support its Request for Attorney’s Fees on Appeal.....16**

**V. CONCLUSION.....18**

## TABLE OF AUTHORITIES

	Page
 <b>WASHINGTON CASES</b>	
<u>Cowiche Canyon Conservancy v. Bosley</u> , 118 Wn.2d 801, 809, 828 P.2d 549 (1992).....	17
<u>Emerson v. Weilep</u> , 126 Wn.App. 930, 110 P.3d 214 (2005).....	9-10
<u>Estep v. Hamilton</u> , 148 Wn.App. 246, 259, 201 P.3d 331 (2008).....	5
<u>Ethridge v. Hwang</u> , 105 Wn.App. 447, 460, 20 P.3d 958 (2001).....	4
<u>Go2net, Inc. v. Freeyellow.Com, Inc.</u> , 158 Wn.2d 247, 253, 143 P.3d 590 (2006).....	4
<u>Housing Authority of the City of Everett v. Kirby</u> , 154 Wn.App. 842, 849, 226 P.3d 222 (2010).....	5
<u>Ino Ino, Inc. v. City of Bellevue</u> , 132 Wn.2d 103, 143, 937 P.2d 154 (1997).....	9
<u>In re Marriage of Meredith</u> , 148 Wn.App. 887, 906, 201 P.3d 1056 (2009).....	15
<u>In re Riddell</u> , 138 Wn.App. 485, 491, 157 P.3d 888 (2007).....	4
<u>Ives v. Ramsden</u> , 142 Wn.App. 369, 396, 174 P.3d 1231 (2008).....	16-17
<u>Lowery v. Nelson</u> , 43 Wn.App. 747, 719 P.2d 594 (1986).....	12-13
<u>Mantuefel v. Safeco Ins. Co.</u> , 117 Wn.App. 168, 176, 68 P.3d 1093 (2003).....	15
<u>Mehlenbacher v. DeMont</u> , 103 Wn.App. 240, 244, 11 P.3d 871 (2000)....	5
<u>NEPA Pallet &amp; Container Co., Inc. v. CHEP USA</u> , 2003 WL 21143351 (Div. 1, 2003).....	12, 13

**TABLE OF AUTHORITIES**—cont'd

	Page
<u>Olympic Steamship Co. v. Centennial Insurance Co.</u> , 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991).....	9
<u>Sanders v. State</u> , 169 Wn.2d 827, 866, 240 P.3d 120 (2010).....	4
<u>Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n</u> , 116 Wn.2d 398, 413, 804 P.2d 1263 (1991).....	6
<u>Skimming v. Boxer</u> , 119 Wn.App. 748, 754, 82 P.3d 707 (2004).....	15
 <b><u>STATUTES, RULES, AND OTHERS</u></b>	
CR 11.....	13, 14, 15-16
GR 14(a).....	12
Kitsap County Local MAR 3.2.....	6
RALJ 1.2(a).....	12
RALJ 1.2(b).....	12
RALJ 11.2.....	11, 12, 13
RALJ 11.2(a).....	11
RALJ 11.2(b).....	11
RAP 10.14(h).....	12
RAP 2.2.....	14
RAP 2.5.....	14
RAP 10(c).....	17
RAP 18.9.....	3, 13, 15, 16, 18

RCW 4.84.330.....	6
RCW 7.04A.....	3
RCW 7.04A.090 .....	1
RCW 7.04A.210(2).....	6
RCW 7.04A.210(3).....	6

## I. INTRODUCTION

Based upon nothing more than a single letter, which Keefe-Yeager misconstrues, misrepresents, and even quotes entirely out of context, Respondent's Brief and Reply Brief<sup>1</sup> at 1, 4, 6-7, 8-9, and the *vacated* lower court proceedings, Keefe-Yeager contend that Gander-Keenan resisted arbitration and forced it to resort to the courts- even though such action was in unequivocal violation of the explicit terms of the parties' March 16, 2006 Settlement Agreement.

But, the record clearly demonstrates otherwise:

1. The Settlement Agreement contains: (a) an anti-harassment clause; (b) a binding arbitration clause with full enforcement power- including injunctive relief- granted to the arbitrator; and (c) an arbitrator's fees provision, CP 80-87;
2. By letter dated April 10, 2008, Arbitrator Andy Maron accepted the letter dated April 8, 2008 from Keefe-Yeager's counsel at the time, Rob Crichton, as the initiation of arbitration pursuant to RCW 7.04A.090, CP 90;
3. By email dated May 28, 2008, Maron, as the arbitrator appointed to "resolve any and all disputes arising out of or otherwise relating to the enforcement of th[e] agreement," identified the two pending issues: "(1) to order Gander/Keenan to close the gap in the fence; and (2) to order Gander/Keenan to cease activities south of the fence." But, he requested from each party a short letter "explaining whether my authority has been by the raising of these issues, and what authority I have to decide this arbitrability question," CP 96;
4. **In response**, by letter dated June 6, 2008, counsel for Gander-Keenan at the time, Dennis Reynolds, asserted specifically as to

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<sup>1</sup> For ease of reference, we refer to Respondent's Brief and Reply Brief as "RBRB."

activities south of the fence that because the issued involved interpretation of a real property conveyance: “Once again, this dispute is a matter beyond your purview, one reserved for the courts to resolve through a declaratory judgment or quiet title action if Mr. Crichton’s clients truly desire to pursue it. We wonder if that would be the case.” CP 46-47; 99-200.

Respondents, however, ignore the obvious **fact** that Reynolds’ June 6, 2008 letter was a mere statement of position- and certainly not a freestanding ground upon which to assert that Gander-Keenan resisted arbitration- especially in light of the following **facts**, all of which are absent from Keefe-Yeager’s pleading:

1. Maron’s subsequent letter dated June 12, 2008, stating that Keefe-Yeager properly invoked arbitration, CP 115-16;
2. Maron’s letter dated July 8, 2008 denying withdrawal and noting that as arbitrator, he “is governed by RCW 7.04A,” CP 118-21;
3. The parties’ July, 2008 communications regarding the scheduling and procedures for the forthcoming arbitration, CP 123-24;
4. Maron’s bill for arbitration through July 31, 2008, CP 127;
5. Reynolds’ August 29, 2008 email to Gander-Keenan summarizing his conversation with Crichton, in which the two discussed the parties’ available dates for the forthcoming hearing. Reynolds concludes with a request to get back to him with a date to complete the arbitration, CP 129-30; and
6. Crichton’s testimony that neither he nor his clients had taken any additional steps to schedule the arbitration before filing the petition for an antiharassment order on October 16, 2008, CP 132.

Based upon these facts, as summarized in his Second Declaration in Support of Attorney Fees, Reynolds avers:

Contrary to Ms. Bertram's position in the present disposition, therefore, Mr. Gander and Ms. Keenan were fully prepared to proceed through arbitration, but were prevented from doing so because Ms. Keefe and Ms. Yeager in the opinion of my clients violated the terms of the March 2006 Settlement Agreement by resorting to the courts and requesting an antiharassment order." CP 71-75.

There is, therefore, only one inescapable conclusion: Keefe-Yeager violated the terms of the Settlement Agreement by refusing to arbitrate and instead resorting to the courts. In vacating the lower court's decision for lack of jurisdiction- and thus declining to reach Gander-Keenan's additional assignments of error- the Superior Court necessarily agreed.

**II. ISSUE PERTAINING TO RESPONDENTS' ASSIGNMENT OF ERROR**

Whether this Court should grant compensatory damages to Gander-Keenan, pursuant to RAP 18.9, for having to respond to Keefe-Yeager's baseless and frivolous renewal of its motion for sanctions, which is based upon misrepresented, misconstrued, and misquoted "facts" and the vacated decision of the Bainbridge Island Municipal Court?

**III. REPLY: ATTORNEY'S FEES ARE PROPER BECAUSE GANDER-KEENAN WAS FORCED TO APPEAL AN ANTI-HARASSMENT ORDER ISSUED BY A COURT WITH NO JURISDICTION IN REFERENCE TO CONDUCT CLEARLY COVERED UNDER THE TERMS OF THE PARTIES' SETTLEMENT AGREEMENT**

As the facts amply demonstrate, Keefe-Yeager violated the clear terms of the parties' Settlement Agreement by resorting to the courts. To

dissolve the wrongfully issued antiharassment order, Gander-Keenan was forced to incur the costs of an appeal, in which it prevailed. On an equitable basis, an award of attorney's fees is thus proper.

**A. Standard of Review**

Under any formulation, the standard of review is *de novo*.

First, Sanders, a very recent Supreme Court decision, is unambiguous: "Whether to award costs and attorney fees is a legal issue reviewed de novo." Sanders v State, 169 Wn.2d 827, 866, 240 P.3d 120 (2010); accord Ethridge v. Hwang, 105 Wn.App. 447, 460, 20 P.3d 958 (2001) ("Whether a party is entitled to attorney fees is an issue of law which is reviewed de novo").

Keefe-Yeager, moreover, is correct that Gander-Keenan's request is *primarily* a claim for equitable relief, yet somehow argues- without citation- that the abuse of discretion standard applies. RBRP at 8. The reason for this lack of citation is clear: as a question of law, whether equitable relief is appropriate is reviewed *de novo*. See, e.g., Go2net, Inc. v. Freeyellow.Com, Inc., 158 Wn.2d 247, 253, 143 P.3d 590 (2006); In re Riddell, 138 Wn.App. 485, 491, 157 P.3d 888 (2007) ("Whether equitable relief is appropriate ... is a question of law, which we review de novo").

Finally, even the case upon which Keefe-Yeager relies for application of the abuse of discretion standard actually supports *de novo*

review. In Housing Authority of the City of Everett v. Kirby, 154 Wn.App. 842, 849, 226 P.3d 222 (2010), the Court noted that where statutory interpretation is required, the decision to award or deny attorneys fees is reviewed *de novo* as a question of law. Contrary to Keefe-Yeager's assertion that Gander-Keenan conceded that no statute applies, RBRB at 7, Gander-Keefe cited to RCW 7.04A.210 by analogy to both the Superior Court, CP 3:1-6, and in its Opening Brief.

Here, then, given that the issues are whether equitable relief in the form of attorneys' fees is warranted and whether RCW 7.04A.210 applies by analogy, the questions are legal in nature and thus reviewed *de novo*. See, e.g., Estep v. Hamilton, 148 Wn.App. 246, 259, 201 P.3d 331 (2008) ("whether a statute, contract, or equitable theory authorizes the award is a matter of law subject to *de novo* review"); Mehlenbacher v. DeMont, 103 Wn.App. 240, 244, 11 P.3d 871 (2000) ("A trial court's decision to award fees and costs is a question of law and reviewed to determine if the relevant statute or contract provides for an award of fees").

**B. Multiple Bases for an Award of Attorneys' Fees Apply (Issue No. 1)**

1. Settlement Agreement, Statutes, and Rule

First, the parties' very Settlement Agreement confers upon the arbitrator the power to award attorneys' fees in a dispute arising out of

such Agreement. CP 83. Next, RCW 7.04A.210(2) provides that an arbitrator may award attorney's fees and other reasonable expenses of arbitration if authorized by law; RCW 7.04A.210(3), in turn, provides that an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances- even if such remedy could not or would not be granted by the court." Kitsap County LMAR 3.2 similarly provides that in addition to the powers generally given to arbitrators, "an arbitrator has the authority to award fees, as authorized by these rules, by a contract, or by law ..."

In addition, attorney's fees based on a contractual provision are appropriate "when the action arose out of the contract and the contract is central to the dispute." Mehlenbacher, 103 Wn.App. at 244 (citing Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991)). In an action, such as here, to defend or enforce a contract with an attorney fee provision, "the prevailing party may recover attorney fees and costs under RCW 4.84.330." Id. Gander-Keenan had to appeal to the Superior Court to enforce the parties' contractual obligations under the Settlement Agreement.

Here, then, given that Keefe-Yeager improperly hearkened to the courts in lieu of mandatory arbitration, during which the arbitrator could

award attorneys' fees to the prevailing party, it logically follows that attorneys' fees are warranted.

2. Equitable Principles

As a basic matter of equity, an award of attorneys' fees is warranted because rather than proceeding through arbitration for relief, Keefe-Yeager improperly hearkened to the courts, thus forcing Gander-Keenan to institute appeal to protect its property rights. As the prevailing party, attorneys' fees are appropriate.

a. Disputed Facts

In addition to the June 6, 2008 letter by Gander-Keenan's counsel stating the position of his clients that arbitration was inapplicable- written specifically in response to Maron's request- Keefe-Yeager rely on the *vacated* lower court proceedings and the fact that the court issued a permanent anti-harassment order.

But, the fact is that because the Superior Court vacated the lower court's decision for lack of jurisdiction, it properly refused to comment on the merits of the additional issues Gander-Keenan raised, including insufficiency of the evidence, that the order was permanent, that Gander-Keenan's lawful and legitimate conduct on its own property could be subject to a permanent injunction, and that the haphazard application of the rules of evidence violated Gander-Keenan's due process rights. See

CP 212-258. And, Crichton's testimony during the lower court proceeding that he had no idea that the arbitrator had the power the issue injunctive relief is disingenuous- at best- given his prior representations and his threat of actually seeking injunctive relief. CP 241. The remainder of his testimony is likewise dubious.

The *vacated* lower court decision thus has no bearing on the present disposition.

## 2. Analysis

While Keefe-Yeager contends that none of the cases cited by Gander-Keenan *directly* apply, they all apply by analogy to the specific circumstances of the case.

First, construing the Settlement Agreement as a contract, Keefe-Yeager breached contract by filing suit rather than pursuing arbitration. The cost of the breach for Mr. Gander, Ms. Keenan, and their family cannot be adequately compensated for merely by an award of attorneys' fees given their public embarrassment; their time, efforts, and energies expended embroiled in litigation; and the temporary injunction on their conduct on their own property.

Here, then, to obtain the benefit of the binding arbitration clause in the Settlement Agreement, Gander-Keenan was forced to file suit.

Olympic Steamship Co. v. Centennial Insurance Co., 117 Wn.2d 37, 811 P.2d 673 (1991) and its progeny thus apply.

In like manner, Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 937 P.2d 154 (1997), applies because Gander-Keenan was forced to appeal a wrongfully issued anti-harassment order. While the order was permanent, Gander-Keenan's assignment of error to this finding was unresolved given the Superior Court's holding that the lower court lacked jurisdiction. And, the mere fact that Keefe-Yeager is in such blatant violation of the mandatory arbitration provision- thus necessitating reversal on purely jurisdictional grounds- seems to render the permanent anti-harassment "wrongful."

Finally, Emerson v. Weilep, 126 Wn.App. 930, 110 P.3d 214 (2005) is easily distinguishable- and not quite as Keefe-Yeager represent. See RBRB at 12-13. In Emerson, the trial court entered a temporary order of protection; appellant then successfully contested entry of a permanent order. Id. at 934-35. Among other issues, appellant claimed that the court erred in failing to award attorneys' fees because he successfully dissolved a wrongfully issued temporary restraining order. Id. at 940. Because the trial court acted within its discretion in granting the temporary order, it was not wrongfully issued and attorneys' fees were improper. Id. at 941. This is the context within which the court stated that "allowing an award if

attorney fees to those who successfully defend against a permanent order of protection would prevent private parties from seeking temporary and immediate relief from harassment.” Id. Note, however, that the parties in Emerson were not subject to a mandatory arbitration clause specifically covering the allegedly harassing conduct and the courts were the sole option for relief.

In equity, therefore, an award of attorneys’ fees is warranted.

**C. The Superior Improperly Relied Upon its Prior Findings in Denying Attorneys’ Fees (Issue No. 2)**

Because the Superior Court properly declined to address the merits of the anti-harassment dispute, see RP 2:20 (“I did not address the merits of the antiharassment dispute, even though invited to do so on appeal, ruling instead that the parties were in the wrong forum to begin with”), and relied upon its May 14, 2010 findings entered prior to receipt of Mr. Reynolds’ Second Declaration, filed on June 10, 2010, CP 71-137, its prior findings have no relevance.

While true that Gander-Keenan asserted its position in the June 6, 2008 letter that arbitration was inapplicable- and thus acquiesced in the Superior Court’s May 14, 2010 finding to the same, CP 33-34, and also that it would not contest Ms. Keefe’s standing, CP 35, the evidence clearly demonstrates that in the midst of communications regarding the

scheduling and format of the pending arbitration, Keefe-Yeager improperly hearkened to the courts. Such evidence, however, was summarized for the court only after its decision vacating the lower court's decision and based solely on the out-of-context June 6, 2008 letter.

The court thus erred in relying in incomplete information.

**D. RALJ 11.2 Permits Attorney's Fees (Issue No. 3)**

Given the permissive nature of RALJ 11.2, which Keefe-Yeager disregards, RBRB at 15, counsel's failure to move for attorneys' fees in its opening brief is not jurisdictional.

At the time of the pleading, counsel was primarily concerned with the criminal case arising out of Mr. Gander's alleged violation of the anti-harassment order- which was subsequently dismissed- and Gander-Keenan's property rights. There were also several procedural difficulties in obtaining and transmitting the voluminous record and delineating the pertinent legal issues, which resulted in an over-length brief.

As to legal authority, RALJ 11.2(a) states: "If applicable law grants to a party the right to recover reasonable lawyer's fees or expenses, the party *should* request the fees or expenses as provided in this rule" (italics added). RALJ 11.2(b) additionally provides: "If a statute gives a party the right to recover lawyer's fees or expenses under certain circumstances for services in a court of limited jurisdiction, a party is

entitled to fees and expenses under similar circumstances for services on an appeal to the superior court.” The statute then delineates what a party requesting attorneys’ fees “should” do.

RALJ 1.2(a) not only supports the proposition that the RALJ 11.2 procedures are permissive, it actually mandates such result: “These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RALJ 1.2(b) similarly declares: “Cases and issues will not be determined on the basis of compliance or noncompliance with these rules ...”

Respondents complain that the Appellants “improperly cite to Nepa Pallet and Container Co. for the proposition that the RALJ 11.2 procedures are permissive” and cite to RAP 10.14(h) and GR 14.1(a) for support. 2003 WL 21143351 (Div. 1, 2003). GR 14.1(a), however, states merely: “A party may not cite *as an authority* an unpublished decision of the Court of Appeals” (italics added).

As counsel for Respondents must be aware, there is only one published case, Lowery v. Nelson, 43 Wn.App. 747, 719 P.2d 594 (1986), even tangentially mentioning RALJ 11.2- lest providing any guidance on how to construe it. And, the Lowery Court’s sole reference is narrow and axiomatic: “Attorney’s fees allowed by statute may be recovered on

appeal from judgments from courts of limited jurisdiction. RALJ 11.2.”  
Id. at 752.

Given this dearth of authority interpreting RALJ 11.2, Nepa simply provides an illustrative example of how one Washington appellate court handled an analogous issue. And, in its Opening Brief at 30, Gander-Keenan clearly noted that it was citing Nepa for its “illustrative” value and not as controlling authority.

Under any interpretation- from plain language to common sense- the RALJ 11.2 procedures are permissive.

While the Superior Court found that it would be inequitable to raise the issue of attorneys’ fees after decision on the merits, the true inequity here is the burdens and travails Mr. Gander, Ms. Keenan, and their family had to suffer on account of Keefe-Yeager’s violation of the terms of the Settlement Agreement.

#### **IV. CROSS-RESPONSE: KEEFE-YEAGER IS ENTITLED TO NOTHING; REQUEST FOR RAP 18.9 COMPENSATORY DAMAGES**

##### **A. As Keefe-Yeager Never Moved for CR 11 Sanctions in the Superior Court, it Cannot Raise this Issue on Appeal**

As an initial matter, it seems that Keefe-Yeager is attempting to conflate two separate issues. First, in its Notice of Cross Appeal, Keefe-Yeager states that the issue is whether the trial court erred in denying its

“request for an award of attorneys fees incurred in responding to Appellants’ Motion for Attorneys Fees and Motion for CR 11 Sanctions.” Keefe-Yeager properly attached the related order, but which must have referred solely to the Motion for Attorneys’ Fees given that Gander-Keenan’s Motion for CR 11 Sanctions, CP 138-42, was filed on July 6, 2010- *subsequent* to Keefe-Yeager’s Opposition to Motion for Attorneys’ Fees, CP 37-70, filed on June 10, 2010.

In its brief, moreover, Keefe-Yeager claims that the Superior Court erred in denying *its* motion for CR 11 sanctions. RBRB at 16. But, Keefe-Yeager fails to cite to any portion of the record containing its alleged motion. And, more importantly, during oral argument, Keefe-Bertram conceded it did not move for sanctions, but rather requested fees “only in ... having to respond to this motion, having to hire an attorney in order to respond to a motion.” RP 11:11-15. The simple fact is that because Keefe-Yeager never moved for CR 11 sanctions in the Superior Court, it is precluded from raising this issue for the first time on appeal. RAP 2.2, RAP 2.5. It is precisely this type of conduct and misrepresentation which led Gander-Keenan to file its initial motion for sanctions in the Superior Court, and which is further evidence of the frivolity of the cross-appeal.

**B. Request for Compensatory Damages Pursuant to RAP 18.9 for Keefe-Yeager's Frivolous Cross-Appeal**

Given Keefe-Yeager's obstinate factual misrepresentations, improper allegations, and the impossibility of success of its frivolous cross-appeal, Gander-Keenan's cross-response is a request for compensatory damages pursuant to RAP 18.9. An appeal is frivolous where, as here, "considering the record in its entirety and resolving all doubts in favor of the appellant, no debatable issues are presented upon which reasonable minds might differ; i.e., it is so devoid of merit that no reasonable possibility of reversal exists." In re Marriage of Meredith, 148 Wn.App. 887, 906, 201 P.3d 1056 (2009).

A Court reviews a decision on attorneys' fees under CR 11 to determine "whether the court's conclusion was the product of an exercise of discretion that was manifestly unreasonable or based on untenable grounds or reasons." Skimming v. Boxer, 119 Wn.App. 748, 754, 82 P.3d 707 (2004). "The burden is on the movant to justify the request for sanctions." Id. at 754-55. Because sanctions "have a potential chilling effect ... the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success." Id. at 755.

To prevail on a claim for CR 11 sanctions, three criteria must be met: (1) the action was not well-grounded in fact; (2) it was not warranted

by existing law- or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; *and*, (3) the attorney signing the pleading failed to conduct a reasonable inquiry into the factual or legal basis for the action. Mantuefel v. Safeco Ins. Co., 117 Wn.App. 168, 176, 68 P.3d 1093 (2003); CR 11(a).

Here, none of the above applies: (1) The evidence clearly demonstrates that rather than pursuing arbitration, Keefe-Yeager unilaterally determined to hearken to the courts- in violation of the Settlement Agreement; (2) equitable grounds mandate that because Keefe-Yeager improperly resorted to the courts, which had no jurisdiction, it pay Gander-Keenan's attorneys fees incurred in restoring the wrongfully issued anti-harassment order; and (3) counsel thus made more than ample inquiry into both the factual and legal bases for its motion.

As it is impossible for Keefe-Yeager to prevail in its cross-appeal, fees and costs pursuant to RAP 18.9 are warranted.

**C. Keefe-Yeager Failed to Properly Support its Request for Attorney's Fees on Appeal**

Because Keefe-Yeager failed to support its claim for attorney's fees on appeal on any legal basis other than CR 11- which it failed to raise below and which necessarily does not apply on appeal as it is a Superior Court Civil Rule-, it is precluded from doing so in its reply. See, e.g., Ives

v. Ramsden, 142 Wn.App. 369, 396, 174 P.3d 1231 (2008) (“issues and argument raised for the first time in a reply brief are untimely and waived”) (citing RAP 10.3(c); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)).

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**V. CONCLUSION**

Despite all of the evidence to the contrary, Keefe-Yeager persists in asserting that Gander-Keenan resisted arbitration and forced it to resort to the courts when, in fact, the opposite is true. To correct Keefe-Yeager's violation of the terms of the Settlement Agreement and to protect their property rights, Gander-Keenan appealed to the Superior Court on numerous grounds, including lack of subject matter jurisdiction; the Superior Court agreed and vacated. On equitable grounds, then, Gander-Keenan should not be compelled to incur the costs of dissolving the order when Keefe-Yeager never should have pursued judicial action.

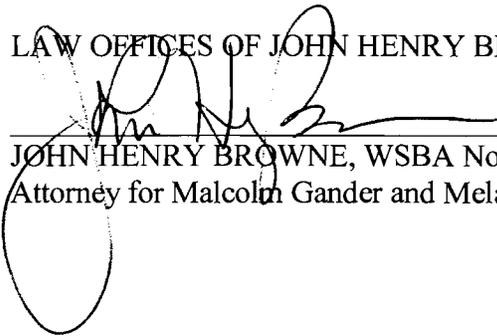
And, on a more general policy level, it seems illogical and unfair to permit Keefe-Yeager and others similarly situated to essentially abuse process in lower courts and successfully curtail a neighbor's activities on its own land, perhaps hoping that an appeal will not follow.

Reversal of the trial court's denying an award of attorney's fees- as well as compensatory damages under RAP 18.9- are thus appropriate.

DATED this 26th day of May, 2011.

Respectfully submitted,

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\_\_\_\_\_  
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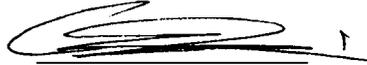
**CERTIFICATE OF SERVICE**

I, Craig Suffian, certify under penalty of perjury under the laws of the State of Washington that on May 26, 2011, I caused a true and correct copy of the foregoing document to be served on the person listed below in the manner indicated:

*Via legal messenger;*

Karen Bertram, WSBA #22051  
Kutscher, Hereford, Bertram, Burkart, PLLC  
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DATED at Seattle, WA this 26th day of May, 2011



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STATE OF WASHINGTON  
BY  J. HENRY BROWNE  
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