

FILED
COUNTY CLERK
28 JAN 19 AM 11:18
STATE OF WASHINGTON
BY [Signature] DEPUTY

No. 45810-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

**TAMARA LEE,
and
EVA CARLETON,**

Appellants

vs

DANIEL BUNCH,

Respondent

APPEAL FROM THE SUPERIOR COURT OF KITSAP COUNTY
Docket Number 04-3-03164-2

THE HONORABLE ANNA LAURIE, Judge

BRIEF OF APPELLANTS

Eva Carleton
Attorney for Appellant Tamara Lee and as pro se for Appellant Eva Carleton
WSBA #28387
13115 Muir Dr. NW; Gig Harbor, WA 98332
Phone: 253-376-2479
E-mail: evacarleton@yahoo.com

US Priority Mail (Spokane) 5-17-14

TABLE OF CONTENTS

TABLE OF AUTHORITIES --- 01

ASSIGNMENTS OF ERROR --- 1

ERROR #1 – pages 1 to 2

ERROR #2 – pages 2 to 4

ERROR #3 – pages 4 to 5

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR --- 5

ISSUE ONE: In considering CR 11 sanctions, is the court to consider the pre-filing investigation and the sufficiency of facts found prior to the filing of the motion - or is the court to consider only the facts in and a part of the motion filed? Did the court make an error in interpreting the applicable law?

ISSUE TWO: Can the lower court impose CR 11 sanctions on the basis of a motion not being supported by any facts when the court itself just threw out on a procedural technicality the exhibits attached to the motion --- exhibits that evidenced and contained the documents that showed what child support and other payments had been paid/ not paid by the father?

ISSUE THREE: Are there “magic words” that are required at the end of a declaration to make it a truthful declaration and allow attached exhibits to be considered, or is it sufficient to “swear” to the truth of what was said?

ISSUE FOUR: Should the court have given the wife the opportunity to mitigate her attestation error and have asked her to sign and correct the attestation language rather than tossing out the entire exhibit packet due to perceived error in attestation clause? Is the law rigid on the words required in an attestation clause or did the court make an error in the legal requirements?

ISSUE FIVE: If the court threw out all the exhibits containing the facts and evidence on what child support had been paid and not paid, how can there be sufficient evidence or any evidence to support a finding that no back support was owing? It is an abuse of discretion to issue a ruling not supported by substantial evidence.

ISSUE SIX: Should exhibits that are physically attached to a motion/declaration and talked about and referenced in the

motion/declaration be considered an integral part of the motion itself as per CR 10(c) ? Did the trial court apply the wrong legal standard by tossing them all out and calling the exhibit packet “inadmissible”?

ISSUE SEVEN: Can CR 11 sanctions be awarded on the basis of an attorney purportedly testifying as a “witness” in the course of a motions hearing before a judge? Did the lower court judge apply the wrong legal standard?

ISSUE EIGHT: Is there contempt once payment was late and acknowledged to have been paid late? Is it still contempt of court to start making court-ordered payments only after the wife has filed a motion re contempt trying to enforce the husband to pay?

ISSUE NINE: If there was contempt, should attorney fees have been awarded to the wife as per RCW 7.21.030 (3)?

STATEMENT OF THE CASE and BACKGROUND — 7

IN GENERAL – page 7

THE MOTION AND ORDERS – page 9

ARGUMENT — 15

SUMMARY OF ARGUMENT -- page 15

STANDARD OF REVIEW – page 17

LEGAL ARGUMENT APPLIED TO FACTS – 21

IN GENERAL – page 21

LEGAL ARGUMENT AS APPLIED TO ISSUES IDENTIFIED – page 22

Issue One and Issue Two – page 22

Issue Three – page 29

Issue Four – page 31

Issue Five – page 33

Issue Six – page 38

Issue Seven – page 40

Issue Eight – page 44

Issue Nine – page 46

ATTORNEY FEES – 47

IN CONCLUSION... WE ASK THE COURT – 47

CERTIFICATE OF SERVICE -- 50

TABLE OF AUTHORITIES

TABLE OF CASES: Relevant Case Authority

TABLE OF STATUTES : Relevant State and Federal Statutes

TABLE OF WASHINGTON COURT RULES: Relevant Court Rules

TABLE OF MISCELLANEOUS AUTHORITIES

RELEVANT CASE AUTHORITY

Ambach v. French, 141 Wash. App. 782, review granted, 164 Wash. 2d 1007, reversed,
167 Wash. 2d 167 (2007)
at page 48

Biggs v. Vail, 124 Wash.2d 193, 197 (1994).
at page 17, 18, 27,

Biomed Comm, Inc. v. State Dep't of Health Bd. Of Pharmacy, 146 Wn. App. 929 (2008)
at page 32

Brin v. Stutzman, 89 Wash. App. 809, review denied 136 Wash. 2d 1004 (1998)
at page 24

Bryant v. Joseph Tree, Inc., 57 Wn. 2d 107, aff'd 119 Wn. 2d 210 (1992)
at page 18, 27, 44

City of Kennewick v. Vandergriff, , 45 Wash. App. 900 (Div III, 1986),
at page 32

Colorado Na'tl Bank of Denver v. Merlino, 35 Wash. App. 610 (Div I, 1983)
at page 30, 33

In re Cooke, 93 Wash. App 526 (1999)
at page 24

Eugster v. City of Spokane, 110 Wash. App. 212, reconsideration denied, review denied 147
Wash. 2d 1021 (2002)
at page 25

Gander v. Yeager, 167 Wn.App. 638 (Wash.App., Div 2, 2012)
at page 20

Griffith v. City of Bellevue, 130 Wash. 2d 189 (1996)
at page 32

Harrington v. Pailthorp, 67 Wash. App. 901, review denied, 121 Wash. 2d 1018 (1992)
at page 24

Hicks v. Edwards, 75 Wash. App. 156, 163 (Wash. App. Div 2, 1994), review denied,
125 Wash.2d 1015 (1995))
at page 18

IBF, LLC v. Heuff, 141 Wash. App 624 (Div I, 2007)
at page 33

Just Dirt, Inc. v. Knight Excavating Inc., 138 Wash. App. 409 (Div II, 2007)
at page 24, 27

Kelly v. Moesslang, 287 P.3d 12 (#29210-0-III, Wash. App. Div III, 2012)
at page 24

MacDonald v. Korum Ford, 80 Wash.App. 877, 883 (Div II, 1996)
at page 17, 18, 19

Manius v. Boyd, 111 Wash. App. 764 (Div II, 2002)
at page 33

Manteufel v. Safeco Ins. Co. of America, 117 Wash.App. 168, review denied, 150 Wash. 2d 1021 (2003)
at page 24

In re Marriage of Abercrombie, 105 Wn.App. 239 (2001), review denied, 144 Wn.2d 1019 (2001).
at page 35

In re Marriage of Curtis, 106 Wn.App 191, review denied, 145 Wn.2d 1008 (2001)
at page 10, 45

In re Marriage of Lindsey, 54 Wn. App. 834 (1989)
at page 21, 35

In re Marriage of Mattson, 95 Wn. App. 592 (1999)
at page 21, 35

In re Marriage of Shoemaker, 128 Wn. 116 (1995)
at page 2, 351

N. Coast Elec. Co. v. Selig, 136 Wash. App. 636, 649 (2007)
at page 19

Northern Indiana Gun & Outdoor Show v. City of S. Bend, 163 F.3d 449 (7th Cir. 1998)
at page 39

P.E.Systems, LLC v. CPR Corp., 289 P.3d 638, 642 (Wash., Dec 6, 2012)
at page 39

Rasmussen v. Bendotti, 107 Wash.App. 947 (2001)
at page 20

Rocher v. Dowty Aerospace Yakima, 116 Wash. App. 127, review denied, 150 Wash. 2d 1016 (2003)
at page 24

Skimming v. Boxer, 119 Wn. App. 748, 755 (2004)
at page 44

State v. Ryncarz, 64 Wash. App. 902 (Div III 1992)
at page 31

Stiles v. Kearney, 168 Wn.App. 250 (Div. II 2012)
at page 9, 17, 18, 19,

Tiger Oil Corp. v. Dep't of Licensing, 88 Wash. App. 925, 938 (1997)
at page 17

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash.2d 299, 339 (1993)
at page 17

In re Welfare of BRSH, 141 Wn. App. 39, at 41 (Div II 2007)
at page 20

Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash.2d 169, 176 (2000)
at page 17

West v. State, Washington Ass'n of County Officials, 162 Wn.App. 120 (Div 2, 2011)
at page 26

Weatherford v. United States, 957 F. Supp. 830 (M.D. La 1997)
at page 39

RELEVANT STATUTORY AUTHORITY

Model Penal Code, Section 241.1, at page 29

18 U.S.C.A. Sections 1621, 162, at page 29.

Revised Code of Washington (RCW) 2.28.020, at page 46

RCW 2.28.060, at page 46

RCW 2.28.070, at page 46

RCW 4.36.240, at page 22

RCW 5.28.030, at page 30

RCW 5.28.050, at page 30

RCW 5.28.060, at page 30

RCW 7.21.010, at page 46

RCW 7.21.030 , at page 7, 30, 46

RCW 9A.72, at page 30

RCW 9A.72.085, at page 30

RCW 26.09.060, at page 35

RCW 26.18.010, at page 22

RCW 26.18.030, at page 21

RCW 26.18.040, at page 34

RCW 26.18.170, at page 34

RCW 26.18.330(3), at page 21

WAC 388-14A-3302, at page 10 & 11

WAC 388-14A-3330, at page 11

WASHINGTON COURT RULES

Rules of Civil Procedure 7(b)(3), at page 38

Rules of Civil Procedure 8(f), at page 21

Rules of Civil Procedure 10(c), at page 15, 33, 38, 39

Rules of Civil Procedure 11, at page 16, 17, 22, 23, 27, 28, 29, 30, 31, 32, 38, 40, 41, 42, 43, 48

Rules of Civil Procedure 43(e)(1), at page 39

Rules of Civil Procedure 43(g), at page 43

Rules of Evidence 402, at page 12

Rules of Evidence 603, at page 15, 30

Rules of Evidence 801, at page 12

Rules of Evidence 803, at page 12

Rules of Evidence 1101, at page 12

Rules of General Procedure 13, at page 29

Rules of Professional Conduct 3.7, at page 43

Rules of Appellate Procedure 14.1, at page 47

Rules of Appellate Procedure 14.2, at page 47, 49

Rules of Appellate Procedure 14.3, at page 47, 49

Rules of Appellate Procedure 14.4, at page 47, 49

MISCELLANEOUS

Black's Law Dictionary (9th ed. 2009)
At page 29

Department of Child Services Procedural Manual, intranet only at DCS offices
At page 11, 12, 26, 37

Meriam-Webster Dictionary, <http://www.Meriam-Webster.com//dictionary/>
At page 29

Moore's Federal Rules Pamphlet 2013, Part 1: Federal Rules of Civil Procedure
At page 25, 38, 39

Tegland, Washington Practice – Rules Practice, “Author’s Comments, section 11”
At page 31

ASSIGNMENTS OF ERROR

ERROR #1

is assigned to the following sections of "Order on Show Cause re:

Contempt/Judgment" issued by Kitsap County Superior Court Judge Anna

Laurie on Dec 20, 2013. [CP 611]:

Error 1a. -- Section II Findings

SUB-SECTION 2.1 regarding the Court's sufficiency of review where it entered findings that are not supported by substantial evidence. The "Findings" are quoted below:

"2.1 Compliance With Court Order. Daniel Bunch did comply with a lawful orders of the court entered on November 9, 2012 and May 24, 2013." [CP 611]

Error 1b. -- Section II Findings

SUB-SECTION 2.6 regarding the Court's sufficiency of review and making legal and factual findings not based or supported by facts and evidence (where it flatly states no back support is owed in any category).

"2.6 Back Child Support/Medical Support/Other Obligations/Maintenance. No back child support, medical support, child care costs, educational expenses, transportation expenses other special expenses, or maintenance is owed." [CP 612]

Error 1c. -- Section II Findings

SUB-SECTION: NONE ALLOWED: whereby the Court was unwilling to

include a date range that the Order covered; that is, where the court refused to allow a date range as to what period of time the Court found that all support had been paid and none was due (to date of filing of Motion or to date of Order ?).

RP 12/20/13 at 13, line 4+ ; CP 644 line 12+

Error 1d. -- Section III Order

SUB-SECTION 3.1 that finds no contempt of court by Daniel Bunch.

“3.1 Contempt Ruling. Daniel Bunch is not in contempt of court.” [CP 612]

Error 1e. -- Section III Order

SUB-SECTION 3.4, 3.5, 3.6, AND 3.11, in as much as it incorporates the Findings of Subsection 2.6 above and thereby defeats the entire Motion.

“3.4 Judgment for Past Child Support. Does not apply.” [CP 613]

“3.5 Judgment for Past Medical Support. Does not apply.” [CP 613]

“3.6 Judgment for Other Unpaid Obligations. Does not apply.” [CP 613]

“3.11 Other. Paragraphs 3.4 through 3.7 and 3.9 do not apply as no judgments were granted to Respondent or entered against Petitioner.” [CP 613]

SUB-SECTION 3.9 in as much as no attorney fees were granted.

“3.9 Attorney Fees and Costs. Does not apply.” [CP 613]

ERROR #2

is assigned to the following sections of the “Order Granting CR 11 Sanctions and Judgment” issued by Kitsap County Superior Court Judge Anna Laurie on

December 20, 2013, [CP 608]

Error 2a. -- Section II Findings and Order

SUB-SECTION 5 regarding the intertwinement of the attorney purportedly acting as witness as being a factual or legal basis for imposing Civil Rule 11 Sanctions.[CP 609].

“5. The intertwinement of Ms. Carlton’s [sic] role as attorney and witness is ethically problematic. This conduct is a basis to impose sanctions under Civil Rule 11.” [CP609]

Error 2b. -- Section II Findings and Order

SUB-SECTION 6 regarding whether when documents that were attached to a Motion and discussed in and made a part of the Motion, are totally disallowed by the Court on a procedural technicality (the Court not liking the “jurat” used in the attestation clause at the end of the Motion re Contempt), whether the motion can then be considered as not being presented with facts or evidence and the Motion can therefore be the subject for sanctions under Civil Rule 11.

“6. Ms. Carlton failed to provide any evidence supporting, or basis in fact for, the motion filed on behalf of her client. The submission of a motion without presenting facts or evidence in support of the motion is a basis to impose sanctions under Civil Rule 11.” [CP 609]

SUB-SECTION 6 regarding whether the evidential sufficiency required by Civil Rule 11 is met only within the Motion itself as accepted by the Court, or if it is met by the pre-filing inquiry made and the Motion and Exhibits when filed

(before the court rules on any part of the motion).

“6. Ms. Carlton failed to provide any evidence supporting, or basis in fact for, the motion filed on behalf of her client. The submission of a motion without presenting facts or evidence in support of the motion is a basis to impose sanctions under Civil Rule 11.” [CP 609]

SUB-SECTION 8 in that it repeats findings on Sub-Section 5 and 6

“8. Based on the findings of fact set forth above and because Attorney Carleton filed a motion without any evidence or supporting facts, acted simultaneously as attorney and witness, ignored warnings from opposing counsel pointing out these deficiencies, and persisted in pursuing the underlying motion which was denied in full; it is appropriate that sanctions be imposed against Ms. Carleton personally.” [CP 609]

Error 2c. -- Section II Findings and Order

SUB-SECTION “ORDER” in that monetary sanctions were imposed upon attorney Eva Carleton personally pursuant to Civil Rule 11.

“Ordered, Adjudged and Decreed that sanctions be imposed upon Attorney Eva Carlton personally in the amount of \$1040 pursuant to Civil Rule 11.” [CP610]

ERROR #3

is assigned to the “Order on Reconsideration” issued by Kitsap County Superior Court Judge Anna Laurie and entered on January 6, 2014 [CP 639]

Error 3a. -- Section II Findings and Order

Assign error—in as much as reconsideration was denied and reflects on the previous two noted orders objected to in ERROR #1 and ERROR #2 above
[CP 640]

Error 3b. -- Section II Findings and Order

Assign error to – denial by implication of request in motion for reconsideration to dismiss without prejudice when attestation clause insufficiency was found.

[CP 631]

Error 3c. -- Section II Findings and Order

Assign error to – court finding that reconsideration motion fails to provide a basis for reconsideration as required by CR 59(b)¹. [CP 639]

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE ONE: in considering CR 11 sanctions is the court to consider the pre-filing investigation and the sufficiency of facts found prior to the filing of the motion -- or is the court to consider only the facts in and a part of the motion filed? Did the court make an error in interpreting the applicable law?

Error 2, Error 3__

ISSUE TWO: Can the lower court impose CR 11 sanctions on the basis of a motion not being supported by any facts when the court itself just threw out on a procedural technicality the exhibits attached to the motion --- exhibits that evidenced and contained the documents that showed what child support and other payments had been paid/ not paid by the father?

Error 2, Error 3,

¹ CR 59(b) in relevant part: “....A motion for reconsideration shall identify the specific reasons in fact and law as to each ground on which the [reconsideration] motion is based.”

ISSUE THREE: Are there “magic words” that are required at the end of a declaration to make it a truthful declaration and allow attached exhibits to be considered, or is it sufficient to “swear” to the truth of what was said?

Error 1, Error 3.

ISSUE FOUR: Should the court have given the wife the opportunity to mitigate her attestation error and have asked her to sign and correct the attestation language rather than tossing out the entire exhibit packet due to perceived error in attestation clause? Is the law rigid on the words required in an attestation clause or did the court make an error in the legal requirements?

Error 1, Error 3

ISSUE FIVE: If the court threw out all the exhibits containing the facts and evidence on what child support had been paid and not paid, how can there be sufficient evidence or any evidence to prove that no back support was owing? It is an abuse of discretion to issue a ruling not supported by substantial evidence. .

Error 1, Error 3.

ISSUE SIX: Should exhibits that are physically attached to a motion/declaration and talked about and referenced in the motion/declaration be considered an integral part of the motion itself as per CR 10(c) ? Did the trial court apply the wrong legal

standard by tossing them all out?

Error 1. Error 3.

ISSUE SEVEN: Can CR 11 sanctions be awarded on the basis of an attorney purportedly testifying as a “witness” in the course of a motions hearing before a judge? Did the trial court apply the wrong legal standard?

Error 2, Error 3.

ISSUE EIGHT: Is there contempt once payment was late and acknowledged to have been paid late? Is it still contempt of court to start making court-ordered payments only after the wife has filed a motion re contempt trying to enforce the husband to pay?

Error 1, Error 3.

ISSUE NINE: If there was contempt, should attorney fees have been awarded to the wife as per RCW 7.21.030 (3)?

Error 1. Error 3.

STATEMENT OF THE CASE and BACKGROUND

In General---

Tami Lee and Dan Bunch were divorced after a multi-day trial in April 2013. Various orders were issued and Dan was ordered to pay child support

[CP 44], maintenance [CP 76, line 19] , and a Navy retirement fund monthly payment [CP 75, line 5] to Tami. In August 2013, Tami filed a Motion for Show Cause re Contempt, claiming that Dan was thousands of dollars behind in payments to her for child care, child support, monthly retirement fund share [CP 78]. There were various delays and the Motion was refiled with up-to-date figures in October 2013 [CP 409] and was heard by Judge Laurie in November, 2013, with oral decision rendered. Written orders were signed December 20, 2013 [CP 608 for CR 11 Orders] [CP 611 for Order on Show Cause re Contempt]. Motion for Reconsideration was denied without hearing on January 6, 2014.[CP 639]

This case presents as the primary issue whether the lower court abused its discretion and didn't correctly apply the law when it threw out the entire Exhibits packet attached to the Motion to Show Cause re Contempt because of a perceived procedural problem with the wording in the attestation clause, and then proceeded to impose CR11 sanctions on the basis that no evidence or facts were submitted with the Motion re Contempt.

The oral decision found that Dan didn't owe child support, maintenance, retirement, but there was a question possibly if he owed for childcare, education, transportation, but since there were no facts , nothing could be determined.

[see, RP Nov. 14, 2013, at pg 61, lines 1 – 11]

In the final written order, however, the judge wrote that Dan didn't owe

anything at all². [CP 612, line 12], and that Dan was in full compliance of previous orders [CP 611]. Tami's attorney was sanctioned under CR11 for propounding a motion with no facts or evidence to support it. [CP 608].

The Motion And Order

Respondent's original Motion to Show Cause re Contempt was primarily to try to collect back child support, mostly back childcare and educational support in lieu of childcare, as well as medical care, that had not been paid in full by Petitioner for several months. There had been a Temporary Order of Child Support dated November 2012 [CP 1] that directed Dan to pay a basic child support sum and to reimburse Tami his 78% share of the costs of day care and educational expenses [CP 6] separately "within 5 days of receipt." [CP 11]. He paid for the special child support expenses just one month between November 2012 and the end of May 2013. The May 2013 final Child Support Orders directed that the special expenses were to be run through the Department of Child Services ("DCS"). [CP 47].

Tami's Motion re Contempt alleged that Dan was several thousand dollars behind in his special child support obligations. At the time of original

² At the hearing on entry of written orders, each side presented different orders. Tami's attorney had gotten a transcript of the Nov 14 oral decision and had written her version using that transcript. A copy had been provided to the Judge. In Dan's version, his attorney went a step further and in his orders wrote that all obligations had been paid and nothing was due in any category. That version was accepted and became the final written order [CP 612, line 12]. There was extensive oral argument on the subject by Tami's attorney [RP December 20, 2013, at pg 7 and 8, lines 10+]. It is understood that the written Order is what counts, but the oral decision can be instructive. See, *Stiles v. Kearney*. 168 Wn.App. 250 (Div II, 2012)

filing, the Motion also alleged that Dan was months behind on making the wife's share of the retirement payment³ [CP 78]. Right after the original filing of the Motion in mid-August, Dan finally made a first payment of the retirement pay (which was supposed to have begun May 1 [CP 47 at line 13]), and then in late September played catch-up and paid the rest of the retirement money he was behind. Tami's Exhibits as filed in October 2013 acknowledged all those late payments and showed only what was still due. [CP 437]

Dan's payments became nice and regular after August, but he wouldn't pay the childcare, the ½ day kindergarten-in-lieu of childcare, the medical care that he still owed from November 2012 to the time of Motion. Tami claimed he still owed \$3410.66 at the beginning of September. [CP 410]. Instead of paying, and despite the receipts he was provided, Dan insisted that all receipts and all payments from November, 2012 on were to be run through DCS. The Nov 2012 orders did not say that, and instead specifically said that special expenses were to be reimbursed" within 5 days. "[CP 11]. The May 2013 final orders did say all was to go through DCS, but the problem was that the laws and procedures that DCS had to follow had changed in the interim so that DCS no longer was able to run reimbursements for kindergarten through DCS [CP 375 at Section 3c; WAC 388-14A-3302(5)], and other reimbursement could only be run through

³ The father's support obligation was reduced, in part, based on the mother receiving this pension money each and every month so that she could meet her basic obligations of supporting the child. Contempt is appropriate in such a case even for a property settlement. See, *In re Marriage of Curtis*, 106 Wn.App. 191, 197, review denied, 145 Wn.2d 1008 (2001), and cases cited therein.)

once a year⁴. [CP 390; WAC 388-14A-3330(3) & 5(c) found at CP 398] So Dan wouldn't pay his share of childcare and education costs unless it was run through DCS, yet DCS wouldn't do that because its procedures had changed. Catch-22. DCS procedural guidelines will only enforce education expenses once reduced to judgment [see, DCS Procedural Manual at CP 549; WAC 388-14A-3302 (6)(a) at CP 394]

Therefore, Tami filed her Motion re Contempt wanting to get Dan to pay her his share for childcare, kindergarten-in-lieu of childcare, medical care expenses that she had incurred and paid on behalf of their child .She asked for judgment on amounts past due. **She is authorized by RCW 26.19.080 and 26.23.110 and WAC 388-14A-3302 (6) [copy at CP 394] to seek reimbursement for back child support through the courts and not wait on DCS for collection** (if even available through DCS). Once back support was reduced to judgment DCS would enforce it. [DCS Procedural Manual at CP 375, Section 4(b)]. Tami's Motion also asked that Dan start making the retirement payment that he had been ordered in April at oral decision [CP47] and then in a Reconsideration [CP 41]to make (Dan had tried to delay the start date for the retirement payments to January 2014 [CP 17, line 17], but the original trial court denied his request and ordered him to start paying as of May 1, as directed previously [CP41]). Since Tami works at a low-paying job at the naval base in

⁴ The DCS Procedural Manual highlighted by the DCS attorney was provided and a part of the Exhibits [CP 546+]. A certified copy was also presented to the court [CP 650].

Bremerton (she makes about \$1200 a month, CP 55] she was desperate to get the monies that Dan owed her and that he had been directed to pay .

Tami submitted extensive documentation at the end of her Motion re Contempt and entitled them “Exhibits” [CP 420 to CP 579]. The Exhibits contained irrefutable facts written in the form of monthly child support and payment reports from the Washington State Department of Child Services, from the navy base child care providers, from the before and after school childcare program at the child’s school, from medical billing records showing treatments of the child, etc.. The records were all arranged on a month-to-month basis so it would be easy to read and understand. [CP 439 – CP 494]. At the beginning of Exhibit 2 was a summary chart which listed all of the receipted costs and payments that followed in Exhibit 2. [CP 437].

The Exhibits also contained copies of prior orders [CP 497 to CP 519] and copies of relevant DCS Procedural Manual [CP 546-577]. A certified and notarized copy was tendered in court [cert copy at CP 650]. The Exhibits also contained copies of RCWs and WACs that Tami cited to in her Motion [CP 421 to CP 435]. Correspondence on office letterhead and e-mail between the attorneys showing the months of effort trying to collect are also in the Exhibits [CP 521 to CP 537]. Most of these materials would be admissible documents under the Rules of Evidence. ER 803 Hearsay Exceptions, ER 801(d)(2) Admission by party opponent, ER 1101(c)(3), ER 402.

The Exhibits and the summary chart of Exhibit #2 [CP 437-495], were referred to and discussed in Tami's Motion many times, and incorporated into the Motion [CP 409,410, 411 412, 413, 414,415, 416, 417, 418, 419]. The entire Exhibit packet, however, was thrown out by the Court as having "absolutely no evidentiary value" ; The reason given by the Court for not considering the documents in the Exhibits is because the Court found the attestation clause faulty at the end of the Motion/Declaration and therefore did not consider the document to be a declaration and if not a declaration, then the documents in the Exhibits were merely hearsay and not to be accepted:

"The materials that follow have absolutely no evidentiary value. That is not a declaration. There is a specific statutory jurat that is required to eliminate the need for a sworn affidavit, and that form is not followed in these materials, and, consequently, the exhibits that were submitted, other than copies of court orders, which I take judicial notice of, are inadmissible hearsay. That means, there's no evidence upon which to base a finding..." [see, RP, Nov 14, at pg 61, lines 1 – 11]

With that, the entire Motion re Contempt failed. Without the Exhibits which support the statements in the Motion, there can be no facts and evidence showing how and by how much Mr. Bunch is behind in child support obligations.

However, in the final written Order the Court went even further and was talked into accepting opposing attorney's version of written Orders, stating that Tami "bore the burden of providing evidence [and] failed to do so. And consequently, a finding is appropriate that there was none proven, and thus none

is owed.” [see, RP, December 20, at pg 12,, lines 5 - 17] And with that the court broadly wrote:

“2.6 Back Child Support/Medical Support/Other Obligations/Maintenance. No back child support, medical support, child care costs, educational expenses, transportation expenses other special expenses, or maintenance is owed.” [CP 612]

It is certainly our contention that there is a big difference between saying that no debt was proven and quite another thing to say therefore none is owed!

The Court even refused to include in the final Order a limitation on what dates the finding of ”no debts” owed covered, so that as a result DCS may limit recovery for any receipts all the way through the date of the order (end of December) even though all discussion of debts ended with the month of August! [see, RP, December 20, at pg 13,, lines 4 - 12]

The Court then awarded CR11 sanctions against Tami’s attorney, Eva Carleton, on the basis that there were no facts to support Tami’s Motion seeking back child support [CP 609]. Of course there were no facts because the Court had just tossed them all out!

When the Motion was fully denied and the Court wrote in its Order that no child support of any sort was owed [CP 612, at line 12] and that Mr. Bunch had complied with all orders [CP 611, at line 19] , a great injustice was wrought to the child involved in this matter. Tami Lee has fronted all of these child daycare expenses on her own very limited income (approximately \$1200 a month as testified to at trial and in accepted worksheets at CP 55) with the

expectation that the father will pay his share back to her. At this stage it has been a year and a half and she has gotten almost no money from him for that obligation. And the Court seems to support that notion as okay by its unwillingness to consider the Motion and indeed by its finding that no back support of any sort is owed.

ARGUMENT

SUMMARY OF ARGUMENT—

(references to record and law and case references in extended discussion only)

It is Tami's position that the Exhibit packet attached to her Motion re Contempt should not have been thrown out en masse because the Exhibits should have been allowed to be considered a part of her Motion document under CR 10(c). They should then have been evaluated and accepted/not accepted based on evidentiary rules.

Alternatively, the attestation clause at the end of the Motion stating "The above statements are Sworn to and Subscribed as being true and accurate to the best of my knowledge and information this 19th day of September, 2013" should be found equivalent to the jurat often seen at the end of declarations that state the declarant signs "subject to perjury." ER 603 asks for "substantially" similar wording, not exactly the same wording. Because the magic words "subject to perjury" were not written, the Judge tossed the entire Exhibit packet.

It is also argued that expediency and efficiency of the courts, should have had the Court allow Tami to re-sign or swear before the judge in open court right then at the hearing, to the truth and validity of the Exhibits, and then proceed and get to the merits of the Motion for back support due. There was no prejudice to opposing due to the faulty attestation, but there was great prejudice and wrong done to the child by tossing all of the Exhibits that provided the facts and proof that the father hadn't made thousands of dollars of childcare/child support payments which would have ultimately benefited the child.

It was an abuse of discretion and error of law to then impose CR11 sanctions against Tami's attorney on the basis that no facts had been presented to support the Motion. It is Tami's and the attorney's position that what is required by CR 11 is a pre-filing inquiry and substantial facts and not whether there are sufficient facts/basis to support the motion at hearing. The voluminous exhibits and statements made in the Motion regarding DCS inquiries and flow-through matters and then at hearing defending against the CR11 sanctions demanding money owed, clearly show substantial pre-filing inquiry having been done by both Tami and independently by the attorney also.

Dan was in contempt of several court orders by not paying and reimbursing childcare expenses as directed in the Nov 2012 orders and then not starting to make the retirement payments until several months after he was supposed to have started paying and only when this Motion was threatened and

filed. Contempt was complete when he was so late in paying. Attorney fees should have been awarded to Tami for the necessity of having to bring the Motion to Show Cause re Contempt.

STANDARD OF REVIEW

The appellate court will review a trial court's imposition of CR 11 sanctions.....for an abuse of discretion. *Stiles v. Kearney*, 168 Wn.App. 250 (Wash.App. Div. 2 2012) citing to *Biggs v. Vail*, 124 Wash.2d 193, 197 (1994). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. It abuses its discretion by committing an error of law. *Stiles*, 168 Wn.App. 250 (Wash.App. Div. 2 2012); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 339 (1993). The appellate court reviews findings of fact under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational person the premise is true. *Stiles*, 168 Wn.App. 250 (Wash.App. Div. 2 2012); citing to *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176 (2000). "A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts." *Stiles*, 168 Wn.App. 250 (quoting *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wash.App. 925, 938 (1997)).

CR 11 deals with two types of filings: baseless filings and filings made for improper purposes. *MacDonald v. Korum Ford*, 80 Wash.App. 877, 883

(1996). The instant case was called “baseless” by the lower court because there were no facts to support the motion (after the court threw out all the exhibits attached to the motion because of a perceived faulty attestation clause). A filing is “baseless” when it is “(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.” *Stiles v. Kearney*, 168 Wn.App. 250, 261 (Wash.App. Div. 2, 2012), quoting *MacDonald*, 80 Wash.App. at 883-84 (quoting *Hicks v. Edwards*, 75 Wash. App. 156, 163 (Wash. App. Div 2, 1994), review denied, 125 Wash.2d 1015 (1995)) The instant case was called “baseless” as not being grounded in fact. [CP 609, Section 6 and Section 8] But the trial court itself created the absence of facts by tossing the entire Exhibit attachment.

A trial court may not impose CR 11 sanctions for a baseless filing “unless it also finds that the attorney who signed and filed the [pleading, motion or legal memorandum] failed to conduct a reasonable inquiry into the factual and legal basis of the claim.” *Stiles v. Kearney*, 168 Wn.App. 250, 261 (Wash.App. Div. 2 2012)(emphasis added), citing to *Bryant v. Joseph Tree Inc.*, 119 Wash.2d 210, 220 (1992). “Courts employ an objective standard in evaluating an attorney’s conduct and test the appropriate level of pre-filing investigation by inquiring what was reasonable to believe at the time the pleading was filed.” *Stiles v. Kearney*, 168 Wn.App. 250, at 262 (Wash.App. Div. 2 2012)(emphasis added), citing to *Biggs*, 124 Wash.2d at 197 and *MacDonald*, 80 Wn.App. 877 at 890,

both of which specifically called for a pre-filing investigation to meet the test if a motion could be considered “baseless” for CR 11 purposes. “Blind reliance” on a client for information is inadequate; the attorney must also investigate. *MacDonald*, 80 Wn.App. 877 at 890.

“Finally, to impose sanctions for filing a baseless complaint, the trial court must make findings specifying the actionable conduct.” *Stiles v. Kearney*, 168 Wn.App. 250, at 262 (Wash.App. Div. 2 2012), citing to *N. Coast Elec. Co. v. Selig*, 136 Wash. App. 636, 649 (2007). In the instant case, an explanation of and findings specifying the actionable conduct were not allowed by the court. Attorney Carleton argued for that, but the court wouldn’t allow in the written “findings.” [RP, Dec 20, pg 9, line 14+]. This is contrary to the legal standard.

To recap the law and standard of review to the instant case: In the instant case the lower court found that the factual allegations that the father was months behind in his support obligations was not factually supported –after the court had disallowed and tossed out the entire Exhibit packet attached to and referred to in the Motion. It concluded that the claim (that the father was months behind on his support obligations) was baseless because it was not well-grounded in factual support.

Additionally, the trial court in the instant case, failed to conduct a reasonable inquiry into the factual or legal basis for the claim. It wouldn’t look at the Exhibits and simply considered them “inadmissible”. Ultimately the trial

court found the case “baseless” and “unsupported by facts” and therefore CR11 sanctions were warranted. There was no inquiry or discussion of the investigation that went into collecting all of those Exhibits. There was no consideration of the pre-filing inquiry that had been made by both Tami and attorney Carleton. Actually, the court also cited the attorney for CR 11 sanctions for “testifying” because she tried to tell the court of her pre-filing inquiries.

The lower court did not utilize the correct legal standard to analyze if the Motion met the legal definition of a “baseless” filing. The trial court’s decision that the motion was baseless is manifestly unreasonable and is based on untenable grounds and is contrary to legal standards for what is a “baseless” motion subject to CR 11 sanctions. A trial court abuses its discretion by applying an incorrect legal standard. *In re Welfare of BRSH*, 141 Wn. App. 39, at 41; 169 P.3d 40 (Div II 2007).

To determine whether the trial court had the legal right, based on the facts, to grant an award of attorney fees pursuant to a statute or rule is de novo. *Gander v. Yeager*, 167 Wn.App. 638 (Div. 2, 2012). In other words, the question of whether CR 11 sanctions can be granted, based on the facts, is a question of law. Issues of law are reviewed de novo. *See, Rasmussen v. Bendotti*, 107 Wn.App. 947 (Wash.App., 2001).

LEGAL ARGUMENT APPLIED TO FACTS

In General

Civil Rule 8(f) on Construction of Pleadings states: “All pleadings shall be so construed as to do substantial justice.” In the domestic relations statutes of Title 26, RCW 26.18.030 states that there should be “liberal construction” of the chapter “to assure that all dependent children are adequately supported. “ RCW 26.18.220(3) states: “A party’s failure to use the mandatory forms or follow the format rules shall not be a reason to dismiss a case, refuse a filing, or strike a pleading....”

When the Court tossed out all of the Exhibits attached to Tami’s Motion re Contempt because of a deemed technical error in the attestation clause, it basically nullified the entirety of her Motion making it impossible to argue or prove the allegations of back child support due. By then ruling that all child support, childcare, etc., have been paid, the Court literally wipes out a full year of child daycare and medical care that the mother has paid for, but to which the father has not contributed his share. That is not doing substantial justice for the child who must live with the mother on several hundreds of dollars less each month! The RCWs and case law make it mandatory that both parents pay their proportional share of childcare, educational, and medical costs.⁵ The Court

⁵ See, *In re Marriage of Mattson*, 95 Wn.App. 592 (1999) (reimbursement for underpaid expenses is mandatory); *In re Marriage of Lindsey*, 54 Wn.App. 834 (1989) (final orders cannot subsume temporary orders. Temporary support arrearages may not be forgiven by the trial court.); *In re Marriage of Shoemaker*, 128 Wn.2d 116, 121 (1995) (delinquent

should not be able to simply wipe that out on a procedural technicality (lack of affirmation verbage it deems required) whereby all evidence is tossed out and the issue literally cannot be determined.

RCW 4.36.240 regarding general rules of pleading and harmless error states that:

“The court shall, in every state of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.”

The Washington State Legislature in enacting Title 26 made clear Legislative Findings in RCW 26.18.010 that:

“the legislature finds that there is an urgent need for vigorous enforcement of child support and maintenance obligations, and that stronger and more efficient statutory remedies need to be established to supplement and complement the remedies provided in chapters 26.09, 26.21A, 74.20, and 74.20A.”

Substance should prevail over technicalities that do not affect the rights or opportunity to defend of the opposing party.

Legal Argument As Applied To Issues Identified

ISSUE ONE: *Can the lower court impose CR 11 sanctions on the basis of a motion not being supported by any facts when the court itself just threw out on a procedural technicality the exhibits attached to the motion --- exhibits that*

support payments become vested judgments as they fall due, bear interest from their due date, and may not be retroactively modified.)

evidenced and contained the facts/documents that showed what child support and other payments had been paid/ not paid by the father and what was owing?

ISSUE TWO: *in considering CR 11 sanctions is the court to consider the pre-filing investigation and the sufficiency of facts found prior to the filing of the motion -- or is the court to consider only the facts in and a part of the motion filed? Did the court make an error in interpreting the applicable law?*

Rule 11 sanctions should NOT be imposed for failure to provide facts and evidence to support the allegations in the motion where all sorts of facts and evidence in the form of official business records were provided in the Exhibits attached to the motion but were thrown out *en masse* by the Court because of the Court's issue with the attestation clause at the end of the motion.

The Court made it impossible to address and prove the allegations in the motion. There was extensive research and collection of supporting documents showing the costs incurred for childcare, medical expenses, kindergarten-in-lieu-of childcare, and showing the money flow in and out through DCS.[CP 439 – 494 at Exhibit 2 collate childcare receipts and DCS monthly reports showing payments made] There was research regarding the applicable law [CP 421-435 has relevant WACs and RCWs] and procedures of DCS.[CP 546-577, certified copy at CP 650]. Correspondence between the attorneys show the extensive

effort made to try to collect without going to court [CP 521-537] All of that was in the exhibits, but on a procedural matter the entire Exhibit packet was held not to be admissible. [RP Dec 20, pg 12, line 10+; RP Nov 14, pg 61, line 1; nothing in written orders]

In deciding whether to impose CR 11 sanctions, the trial court should evaluate a party's pre-filing investigation by inquiring what was reasonable for the attorney to have believed at the time he filed the complaint. *Manteufel v. Safeco Ins. Co. of America*, 117 Wn.App. 168, review denied, 150 Wash. 2d 1021 (2003). The Court must make finding that either the claim is not grounded in fact or law AND the attorney...failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose. *Just Dirt, Inc. v. Knight Excavating Inc.*, 138 Wn. App. 409 (Wash. App. Div II, 2007). Sanctions are authorized when a complaint lacks a factual or legal basis AND the attorney failed to conduct a reasonable inquiry into the factual and legal basis of the claims. *Rocber v. Dowty Aerospace Yakima*, 116 Wash. App. 127, review denied 150 Wash. 2d 1016 (2003). The emphasis is the same, requiring both, and using the conjunctive "and" in *Harrington v. Pailthorp*, 67 Wash. App. 901, review denied 121 Wash. 2d 1018 (1992). Ditto for *Brin v. Stutzman*, 89 Wash App. 809, review denied 136 Wash. 2d 1004 (1998). It is a pre-filing inquiry that is needed and is determinative. *In re Cooke*, 93 Wash. App 526 (1999). *Kelly v. Moesslang*, 287 P.3d 12 (Wash. App. Div III, 2012) (the filing must show that

the attorney failed to do reasonable pre-filing research.)_ There must be a showing that the motion was BOTH baseless AND signed without reasonable inquiry.

Eugster v. City of Spokane, 110 Wn. App. 212, reconsideration denied, review denied 147 Wash. 2d 1021 (2002).

In the pre-eminent treatise, Moore's Federal Rules Pamphlet 2013, Part 1: Federal Rules of Civil Procedure, at page 155 discussing Rule 11(b)(3), (4), the title to the section conjoins “reasonable basis in fact” with “pre-filing investigation” :

“... Because counsel must ensure that the claims have a factual basis, an attorney must conduct a reasonable pre-filing investigation in the factual basis for those claims.... Moreover, Rule 11(b)(4) provides that denials of factual contentions must have evidentiary support or are reasonably based on belief or a lack of information. (referring to 2 Moore's Federal Practice, Section 11.11+). At the pleading stage a party need not possess factual information sufficient to avoid dismissal or summary judgment...”

In this case, both Tami Lee and her attorney Eva Carleton did extensive research, collected and collated months' worth of receipts and billings and statements from various providers including DCS. [CP 437-494]. Both Tami Lee and this attorney talked to Tami Lee's DCS caseworker -- this attorney to verify what she was being told by Tami Lee and making sure of the procedures and limitations in DCS. [CP 368,375,389,390,398] This attorney sought out higher level authority in the form of regional attorneys at DCS in Tacoma and in Olympia state offices. [CP 370] Again, the research and review of the procedures

and laws applicable was extensive, reported to the court via declarations and paperwork submissions. [CP 421--435 for WACs & RCWs] Certified copies of DCS Procedures Manual were obtained (the certified copy was offered at hearing but returned when the Exhibits were thrown out *en masse*).[CP 650] There can be no question that attorney Eva Carleton conducted reasonable and competent inquiry of all payment matters regarding DCS and sought DCS inside legal counsel on proper procedures, etc., on how to collect back daycare and other child support due and unpaid and discussed the statutory limitations that are imposed on DCS with Tami's DCS caseworker [CP 415+] and regional DCS attorney [CP 370 & 415+]. . Tami Lee went to her bank [e.g. CP 444,449], went to the two child care providers [e.g CP 447], both military authorized and licensed providers, to obtain receipts. [e.g. CP 441, 479] She went to the kindergarten school to obtain payment records. [e.g. CP539+, 442, 446.] She tracked down and obtained copies of payment checks. [e.g. CP 472] There was lots of effort and it was competent and thorough effort to gather and put together clear evidence to support Tami's Motion re Contempt, et al. ". [all above noted and DCS monthly statements are at"Exhibits" found at CP 439-494, 544]

To impose sanctions for a baseless filing, the trial court must find not only that the claim was without factual or legal basis, BUT ALSO that the attorney who signed the filing did not conduct a reasonable inquiry into the factual and legal basis of the claim. *West v. State, Washington Ass'n of County*

Officials, 162 Wn.App. 120 (Div 2, 2011). (This case also dealt with Plaintiff's failure to comply with court rules!). The trial court must make a finding that the claim was not grounded in fact or law AND attorney/party failed to make a reasonable inquiry before filing. *Biggs*, 124 Wn. 2d at 201; *Just Dirt, Inc.*, 138 Wn.App. 409(2007).

As stated above, in the instant case, extensive inquiry was made into both the factual evidence proving that back child support was owed as well as regarding applicable procedures and laws. **The evidence presented was invalidated on a procedural matter, not because facts really did not exist or that the attorney and Respondent did not collect and try to provide facts and real evidence proving their position seeking back child supports.** The judge tossed the entire exhibit packet for a perceived procedural failure, but the exhibits themselves were extensive and sufficient to prove inquiry had been made and the action was not filed on "baseless" premises. *Bryant v. Joseph Tree, Inc.*, 57 Wn. 2d 107, aff'd 119 Wn. 2d 210 (1992) clearly holds that statements which indicated client discussed and "passed on" to attorney documents and information about transactions....and that attorney consulted with client, reviewed documents and conducted independent search for documents, establish the reasonable pre-filing inquiry required by rule CR11.

The trial court failed to conduct a reasonable inquiry into the factual or legal basis for the claim. It wouldn't consider the Exhibits and simply considered

them “inadmissible” because it didn’t like the preceeding attestation clause in the motion. Ultimately the trial court found the case “baseless” and “unsupported by facts” and therefore CR 11 sanctions were deemed warranted. There was little inquiry or discussion allowed of the investigation that went into collecting all of thos Exhibits. There was no consideration of the pre-filing inquiry that had been made by both Tami and attorney Carleton. Actually, the court also cited the attorney for CR11 sanctions for “testifying” because she tried to tell the court of her pre-filing inquiries.

The lower court did not utilize the correct legal standard to analyze if the Motion met the legal definition of a “baseless” filing. The trial court’s decision that the motion was baseless is manifestly unreasonable and is based on untenable grounds and is contrary to legal standard for what is a “baseless” motion subject to CR 11 sanctions.

In its written Findings the Court also refused to make a finding beyond writing in the final orders that no facts were provided to support the motion and therefore CR 11 sanctions were warranted. [CP 609] Attorney Eva Carleton had requested that a more specific finding stating the reason why there were no facts—because the entire Exhibits information had been found inadmissible due an error in the jurat of the attestation clause—be a part of the Findings. Opposing counsel opposed and the Court stayed with the proposed Findings as written by opposing counsel. [RP Dec 20, at pg 12] The more expanded reasoning that

attorney Eva Carleton had requested was denied . [CP 609 at line 10+ & line 16+]. Previous case law suggests that a more detailed finding is most appropriate.

ISSUE THREE: *Are there "magic words" that are required at the end of a declaration to make it a truthful declaration and allow attached exhibits to be considered, or is it sufficient to "swear" to the truth of what was said?*

THE AFFIDAVIT / DECLARATION AND THE ATTESTATION CLAUSE

Tami does contend, that the wording in her affirmation at the end of the Motion/Declaration, "Sworn to as true and accurate..." is in substantial compliance to GR 13 and CR 11. The word "sworn" is mostly used interchangeably with "verified.", which indicates an oath. The Merriam-Webster dictionary defines it as "to assert as true or promise under oath." Merriam-Webster Dictionary, <http://www.Merriam-Webster.com/dictionary/sworn>. An oath promises the truth. If the truth is not told in legal documents, it is subject to a perjury charge and penalty. *Black's Law Dictionary* defining the word "perjury" refers to the *Model Penal Code, Section 241.1* and states that "a person is guilty of 'perjury' if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true." *Black's Law Dictionary* (9th ed. 2009) [emphasis added]

See, also 18 U.S.C.A. Sections 1621, 1623. In Tami's Motion/Declaration, Tami and her attorney swore to the truth and accuracy of what was detailed in the Motion, the attorney because her signature is required on motions as per CR 11, and Tami to acknowledge her knowledge of the contents of the motion and affirming the contents as her own also. The words used in the affirmation would subject both affiants to a perjury charge if the statements in the motion were knowingly untrue.

“Substantial compliance with formatting requirements will generally be sufficient.” *Colorado Nat'l Bank of Denver v. Merlino*, 35 Wash. App. 610 (Div I, 1983) (sufficiency of a motion determined not by its technical format *or language*, but by its contents). RCW 9A.72.085 talks of unsworn statements and that certification “may be in substantially” a certain form. But note that the term “may” and “substantial” is used and the goal of the relevant laws is to be sure that a person is telling the truth. Evidence Rule 603 on oath or affirmation does not dictate a specific form necessary but states that it should be “in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to [testify truthfully].” See also, RCW 5.28.030 which allows the form to be varied. RCW 5.28.060 regarding evidentiary matters states: “Whenever an oath is required, an affirmation, as prescribed in *RCW 5.28.050* is to be deemed equivalent thereto, and a false affirmation is to be deemed perjury, equally with a false oath.” Also, see on perjury: *RCW 9A.72 and RCW 7.21.030*. The verbage

used by Tami at the affirmation clause certainly covers the requirements, and swears to the truth and accuracy of the statements made in the Motion/Declaration. The attestation clause used by Tami does include all the necessary requirements for signing an affidavit/declaration. It does not use the “magic” words exactly, but it encompasses the entire meaning of them. Being untruthful would subject the signors to perjury charges.

ISSUE FOUR: *Should the court have given the wife the opportunity to mitigate her attestation error and have asked her to sign and correct the attestation language rather than tossing out the entire exhibit packet due to perceived error in jurat of attestation clause?*

OPPORTUNITY TO CORRECT OR MITIGATE

If the court still does not like and accept the affirmation clause used by Tami, it would have been simple to correct the affirmation format right there in court since all parties were present, and the Court could have gone on to do justice by hearing the Motion on its merits. (see, *State v. Ryncarz*, 64 Wash. App. 902 (Div III 1992) (Defendant entitled to motion, even though affidavit of prejudice had not been signed before notary, given that judge or clerk could have corrected form when defendant appeared).. In the treatise by Tegland, Washington Practice – Rules Practice, under CR 11 “*Author’s Comments, section 11*” the author states that “both attorneys and judges who perceive a

possible violation of CR 11 should give the offending party prompt notice. . . .and an opportunity to mitigate the sanction by amending or withdrawing the offending paper.” If a document subject to CR 11 is not signed, the court will strike the document unless the proponent signs it promptly upon notification of the omission. *Griffith v. City of Bellevue*, 130 Wash. 2d 189 (1996) (emphasis added). “If the pleading, motion or legal memo is not signed as set forth in Rule 11, it will be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. A party must be given a reasonable opportunity to cure the defect.” *Biomed Comm, Inc. v. State Dep’t of Health Bd. Of Pharmacy*, 146 Wn. App. 929 (2008)(emphasis added). Again, Tami Lee and her attorney, would have signed using words the Court directed had the Court given an opportunity to correct the deemed faulty affirmation clause on the Motion. Or the judge could have sworn the witness in, since all parties were present at the motions hearing. It was not necessary to gut the Motion and find the Exhibits as having “absolutely no evidentiary value” and then go on to make Findings based on. . . .what?

NO PREJUDICE TO OPPOSING PARTY

DUE TO FAILURE OF ATTESTATION CLAUSE

“Defects may be overlooked if the opposing party fails to demonstrate prejudice by the moving party’s failure to comply with the technical motion requirements.” *City of Kennewick v. Vandergriff*, 45 Wash. App. 900 (Div III,

1986), rev'd on other grounds. There is no allegation that opposing counsel and his client were harmed in any way by the perceived faulty attestation clause. They had ample opportunity to review all of Tami's documents including the exhibits and of responding to the verity of them. See, *Manius v. Boyd*, 111 Wash. App. 764 (Div II, 2002). Also, *see, IBF, LLC v. Heuft*, 141 Wash. App 624 (Div I, 2007)(regarding opposing not being prejudiced); *Colorado Nat. Bank v. Merlino*, 35 Wn. App. 610 (1983) (literal compliance with CR 10 not required if no prejudice results from failure to comply) . In our case there was no prejudice to opposing party by Tami's or her attorney's failure to use the magic words of "perjury" in the affirmation at the end of the Motion. Opposing's responses went to the entirety of our Motion.

ISSUE FIVE: *If the court threw out all the exhibits containing the facts and evidence on what child support had been paid and not paid, how can there be sufficient evidence or any evidence to prove that no back support was owing? It is an abuse of discretion to issue a ruling not supported by substantial evidence.*

**NO BASIS TO MAKE FINDING OF NO BACK SUPPORT OWED –
FATHER DOES NOT DENY OWING MONEY FOR DAYCARE**

Tami's whole case relies on the documentary evidence she submitted from the various agencies regarding child support payments made or not made. There cannot be lying done by Tami or her attorney when official documents and

business records indicate that childcare was provided, when, and for how much. All it takes is an adding machine to add up the receipts, and court orders which tell what the father's percentage of that obligation was. The entire Motion was based on written facts contained in the receipts appearing of record in the Exhibits. It is perplexing how the Court could find that no back child support, and specifically "no back child support, medical support, child care costs, educational expenses, medical support, transportation expenses, other special expenses, or maintenance is owed." (CP 612, line 11). If the exhibits are not accepted, then how can such a determination happen at all? If there are no "facts" how can such a determination be made one way or the other?

Clearly contrary to the court's finding, the father's various declarations as well as a couple of his exhibits refer to childcare that the child went to but that he hasn't paid his share for. His contention is that payments for such can only be run through DCS and that the mother hasn't had DCS do the collecting for the childcare he owes and he won't pay it any other way⁶. But the father does not deny that he owes for back child care and possibly back medical care. The Court is asked to look at "Response Declaration of Daniel Bunch re: Motion for Contempt" [CP 345] where he states he had paid all child care costs through the

⁶ Note that RCW 26.18.040 allows that the mother can bring an action to enforce a duty of support or maintenance by filing a petition or a motion in court. She is not obliged to wait and only process a complaint through the administrative process available to DCS. A parallel provision at RCW 26.18.170 also states that a parent seeking medical premium reimbursement may enforce through DCS or file directly with the superior court.

end of 2012. That is great and may or may not be accurate (we contend it is not), but that is only til the end of 2012 – a year ago! Then at CP 345, line 15, Mr. Bunch states he paid another \$1399.39 for child care costs which included the education-in-lieu-of childcare cost, but then admits in the next sentence how that money was applied to regular basic support rather than child care costs by DCS. So again, childcare went unpaid so far as Tami was concerned. Indeed, Mr. Bunch states at CP 345, line 25, that “what might be owed is unclear” and NOT that nothing is owed because he has paid all of his share! He makes no comment about why he ignored the billings that the mother sent him --- billings that he was supposed to repay “within 5 days of receipt” (as per Nov 2012 temporary orders at CP 11, line 7+ and CP 6 at line 10), but never once paid as presented.

Delinquent support payments accrued under an order for temporary support remain collectible and are not extinguished when a final decree is entered. RCW 26.09.060; *In re Marriage of Mattson*, 95 Wn.App. 592 (1999) (reimbursement for underpaid expenses is mandatory); *In re Marriage of Lindsey*, 54 Wn.App. 834 (1989) (final orders cannot forgive temporary orders support arrearages); *In re Marriage of Shoemaker*, 128 Wn.2d 116, 121 (1995) (delinquent support payments become vested judgments as they fall due, bear interest from their due date, and may not be retroactively modified.); ditto *In re Marriage of Abercrombie*, 105 Wn.App. 239 (2001), review denied, 144 Wn.2d 1019 (2001). By correlation, a statement that no back support is owing cannot be

taken or used to forgive a back supporty obligation that did, in fact, exist and can be proven by a careful look at the Exhibits.

In this case it was made very clear that back support was still at issue, but since the receipts spoke for themselves and the law mandates that each parent pay his share, there wasn't anything to argue about and hence the matter wasn't discussed at trial per se, but in the final orders it was noted that back support may still be due and owing⁷..

Continuing in that same Declaration noted above, at CP 345, line 16 *et seq.*, Mr. Bunch again alludes to knowing that child day care support was owing, but because Tami Lee hadn't gone through DCS to make the claim, he had no obligation to pay. Of course this is totally contrary to the Nov 2012 orders [CP 11, line 7+ and CP 6, line 10 which told him to reimburse Tami at 78% "within 5 days" of receipt of invoice. Those orders did not require a showing that childcare was only while Tami worked, so there was no possible excuse for not paying for his share of childcare for those 6 months (November 2012 until May 2013). And yet again at CP 347, at line 9, Mr. Bunch again acknowledges that there is childcare due and claims to have a surplus at DCS to pay for childcare. (But the Statements from DCS do not show surplus in late June as Mr. Bunch indicates [CP 482-484]).

⁷ [see RP, Nov, line 7, where attorney responds to judge's question and explains how 2 attorneys argued about the wording in the final orders and how opposing only agreed to cross out cross out the "no back support due" portion when attorney Eva Carleton said she would not sign like that and would argue the matter before the trial judge.

At CP 348, line 4, Mr. Bunch states knowingly that “Tami uses child care on the navy base where she is employed.” Obviously, he should be paying for his share of that cost. Dan also provides child care records as an exhibit to his own declaration at CP 358+ so he obviously got independent proof himself of his child going to Amanda Vavra at the base center. Dan’s records show that the childcare has been paid for, but he hasn’t paid anything towards that childcare cost!

In his Declaration, Mr. Bunch goes on and on for several pages about his child going to daycare even though he questions the hours and costs, but mostly because he was under the misconception that childcare had to be only work-related and that attending school and legal depositions was not a valid use. But again, he acknowledges that his child goes to daycare, that sums are incurred and paid for that daycare, and that he hasn’t paid his share for that daycare because Tami isn’t “going through proper channels”.⁸ --

Mr. Bunch also acknowledges that medical bills for the child were presented, but makes excuses for not paying for a school physical and an annual dental check-up. The law mandates he pay his share of medical costs. [CP 350, line 8+]

In short, just based on Mr. Bunch’s own acknowledgements and discussions in his various Declarations, not to mention his own attorney’s acknowledgement of unpaid childcare in letters regarding childcare fees incurred

⁸ even though he is misinformed on what those channels were and how payments through DCS work (which can be shown by the DCS Procedural Manual sections copies of which he was given even before the motion was filed.

[CP 366] and at oral argument [RP Nov, at 34 “money that may be owed...”], there is at minimum, back childcare and medical care and education-in-lieu-of childcare owed. Even if the Court tosses Respondent’s exhibits which could help establish the exact amount owed, Mr. Bunch himself acknowledges owing for many months’ worth of childcare. **The court cannot possibly make a finding that no childcare is owed. There is no evidence for such a finding and there is clear acknowledgement by Mr. Bunch himself that back childcare IS owed.**

ISSUE SIX: *Should exhibits that are physically attached to a motion/declaration and talked about and referenced in the motion/declaration be considered an integral part of the motion itself as per CR 10(c)? Did the trial court apply the wrong legal standard by tossing them all out?*

EXHIBITS ARE INCORPORATED AND A PART OF THE MOTION

CR7(b)(3) states, “[all] motions shall be signed in accordance with Rule 11.” Tami’s Motion was signed as per CR 11. CR 10(c) says that “statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.” Washington’s CR 10 is based on the Federal Rules, and written instrument has been broadly defined by various courts. In Moore’s Federal Rules Pamphlet discussing Rule 10(c); Exhibits, a broad reading of the term “instrument” is encouraged and discussed,

e.g., see, Northern Indiana Gun & Outdoor Show v. City of S. Bend, 163 F.3d 449, 452 (7th Cir. 1998) (copies of letters attached to pleadings were properly considered. The term “instrument” in Rule 10(c) is not limited to papers with legal effect such as contracts and affidavits, but applies to other documents as well.”) According to Moore, if the allegations of the complaint contradict the terms of the exhibit, the exhibit controls over the complaint. (citing to *Weatherford v. United States*, 957 F. Supp. 830, 832 (M.D. La. 1997)).

However, the document generally must not be hearsay and meet evidentiary rules and exceptions. *P.E. Systems, LLC v. CPR Corp.* 289 P.3d 638, 642 (Wash., Dec 6, 2012). CR 43(e)(1) regarding Evidence on Motions states: “... When a motion is based on facts not appearing of record the court may hear the matter on affidavits....but the court may direct that the matter be heard wholly or partly on oral testimony.....” The exhibits presented were “of record.”

The exhibits proffered and attached to Respondent’s Motion for back child support were primarily Washington State Division of Child Support (DCS) monthly statements of accounts [e.g. CP 459, 461, 466], statements on letterhead from school daycare [e.g., CP 446, 462,476] and school facilities [e.g., CP 539+] showing various amounts owed and/or paid for childcare, various receipts from military base licensed childcare providers Amanda Vavra and Danielle Debuer [e.g., CP 441,447,491,472 ---- but also see Dan’s exhibits at CP 358+ showing even more childcare provided by Amanda Vavra], medical care statement on

doctor's letterhead [CP 487], and DCS procedural manual [CP 546] which is a government document – and a single certified copy of this document was offered at hearing [CP. 650]. There were exhibits of relevant WACs [CP 421+] and RCWs [CP 571+]and of prior court orders [CP 497+] . There were correspondence records//letters trying to collect on back supports [CP 520+] These documents are not hearsay; or they meet the requirements of various hearsay exceptions which were not even allowed to be argued. These documents are a part of the Motion itself. The Exhibits and facts contained in them were mentioned over and over on every single page of the body of the motion itself . With a few exceptions not relevant to this case, pleadings [including motions] under Rule 11 “need not be, but *may* be accompanied by affidavit...” So even if the court does not view the Motion sufficient to stand as a dual Motion/Declaration, it should stand as a valid Motion to recoup back child support, with proper signatures and supporting exhibits that are a part of the Motion.

ISSUE SEVEN: *Can CR 11 sanctions be awarded on the basis of an attorney purportedly testifying as a “witness” in the course of a motions hearing before a judge? Did the trial court apply the wrong legal standard?*

ATTORNEY “TESTIFYING”

Opposing attorney and the Court stated that they felt that Tami's attorney, Eva Carleton, was “testifying” and was not differentiating between

whether she wanted to be a witness or an attorney. Since this attorney's factual knowledge of the case before the court --- what back child support is owed -- is based solely on physical receipts provided mostly on business letterhead by the child's school, by the child's daycare providers, by DCS monthly statements, this attorney can merely comment on those records and what they show. This attorney has no further personal knowledge of what was incurred and/or paid than what the receipts show

What "testifying" there may have been in the Motion was sworn to by this attorney and what was done orally in Court was mostly to matters brought up by the judge or matters responding to CR 11 negligence/investigation issues which can only be responded to by the accused attorney. In short, attorney Eva Carleton "testified":

1/ in response to the judge's comment that the "back support" box in the final child support order was just routinely checked and didn't mean anything, attorney Carleton noted that there was a loud verbal argument in court between opposing's then-attorney Jeff Robinson and Eva Carleton because Mr. Robinson wanted to check that no back supports were owed and Eva Carleton refused to check that stating that the matter would be brought back up before the trial judge. Mr. Robinson conceded. That was testimony in direct response to the judge's question and statement and since Mr. Frank, the current attorney, had not been there, he couldn't say what actually had happened. [RP of Nov, at pg 8]

2/ In response to query and seeming disapproval regarding attorney Carleton serving Petitioner with a Motion re Contempt, attorney Carleton stated that there is no prohibition to that and that the service-in-front-of-a-child version the Petitioner advanced was not true and that Tami Lee had written a declaration stating that she was present at that serving and witnessed how the papers were served outside the sight of the child [RP of Nov, at pg 52]. As a matter of fact, that service matter isn't relevant for purposes of this current Motion as it occurred in a different version and time than the Motion before the court now.

3/ attorney Carleton also "testified" regarding talking to DCS caseworker in Everett regarding this case and talking to DCS attorney in Tacoma regarding this case and application of DCS internal rules and procedures. There is no other way but to "testify" when a charge for CR 11 sanctions for lack of investigation into facts and evidence is charged against the attorney personally. [RP of Nov, at pg 54+] [CP 40 3, 600]

4// attorney Carleton "testified" that this was the fourth CR11 sanction request before 3 different judges that opposing attorney firm has sought. [CP 419] Again, this is relevant to the current CR11 sanction charge being brought against attorney Carleton and shows how aggressively opposing is trying to shift some of its attorney costs.

5/ attorney Carleton "testified" about the dozens of informal attempts to collect on overdue child care, etc. The communications were letters and e-mails

showing the discussions between the two sides on the subject of late childcare reimbursements. The copies were a part of the Exhibit packet. Who else can talk about the lack of response to so many attempts to collect and discuss the matter with opposing? Such communications showed pre-filing investigations also.

[CP 520+]

The attorney as witness Civil Rule 43(g) concerns an attorney testifying or being perceived as testifying before a jury. The professional ethics rules parallel the civil rules (RPC 3.7): “a lawyer shall not act as advocate at a trial”). In this case even when this attorney objected to some testimony and discussion of matters not brought up in the Motion but nonetheless addressed and brought up by opposing, the court told attorney Carleton once and then attorney Frank once, that the court is capable of sorting out what is relevant and admissible and what is not and won’t consider matters that are not appropriate in its final decision-making. [RP of Nov, at pg 19, and also, RP of Nov, at pg 5] Therefore, it is not a stretch to note that even if some attorney statements were perceived as “testifying”, the court, by its own statement, was clearly capable of only considering those statements that were relevant and permissible and no unauthorized “testimony” would be likely to taint or sway the Court’s judgment.

PROCEDURAL VIOLATIONS NOT COVERED BY CR 11

Rule 11 sanctions are not appropriate for a procedural violation such as an attorney “testifying” or acting as witness. Nor are CR11 sanctions appropriate

for a procedural violation, if any, in the attestation clause. Rule 11(a) talks of where pleadings (including motions) need to be verified and what the signature of a party or attorney means:

“...The signature of a party or an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party’s or attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: 1/ it is well grounded in fact; 2/ it is warranted by existing law;.... 3/ it is not interposed for any improper purpose, such as to harass... 4/ the denials of factual contentions are warranted on the evidence....”

There is nothing about testifying as warranting sanctions pursuant to Rule 11.

The trial court should impose sanctions only when it is “patently clear that a claim has absolutely no chance of success.” *Skimming v. Boxer*, 119 Wn.App. 748, (2004). The fact that a complaint did not survive on the merits is not enough. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220 (1992).

ISSUE EIGHT: *Is there contempt once payment was late and acknowledged to have been paid late? Is it still contempt of court to start making court-ordered payments only after the wife has filed a motion re contempt trying to enforce the husband to pay?*

DELAYED, LATE, AND NO PAYMENTS

ARE NON-COMPLIANCE WITH ORDERS AND EQUAL CONTEMPT

Mr. Bunch HAS been in contempt of court when he intentionally disobeyed the November 2012 court order to reimburse for daycare/educational care “within 5 days”. [CP 11] He was in contempt when he didn’t even make an attempt to start paying the retirement share awarded to Tami Lee until this action was actually threatened and filed. He admits that he started paying 4 months later than ordered, [CP 581 at line 16+], but makes unfounded excuses for why. He knew Tami and his child lived on very low income and that the \$389 a month meant the difference between buying food or utilities or paying for childcare – especially since Tami was paying solely for childcare with no reimbursements coming from him! Opposing argues that contempt is not appropriate for a property settlement item and that the retirement pay share was a property matter. However, there is case law that suggests that contempt is appropriate in a property settlement situation where that money is directly related to the support of the child. See, *In re Marriage of Curtis*, 106 Wn.App. 191, 197, review denied, 145 Wn.2d 1008 (2001). In Tami’s case where she earned only \$1200 a month to begin with, each and every penny above that poverty level obviously went for necessities of roof over the head and food and clothing for the child and mother. In the case where the father wasn’t even reimbursing childcare expenses, that retirement money would have gone to pay for that at least!

A sanction should be imposed for those past contempts of court if for no other purpose than to uphold the authority of the court and the orders it issued.

See, RCW 7.21.010 et seq regarding sanctions.. RCW 2.28.020, RCW 2.28.060, RCW 2.28.070 regarding contempt

ISSUE NINE: *If there was contempt, should attorney fees have been awarded to the wife as per RCW 7.21.030 (3)*

RCW 7.21.030 allows for attorney fees as a remedial sanction for the losses and/or costs suffered by a party as a result of the contempt:

“The court may,order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney’s fees.”

Tami Lee tried for weeks and months to get Dan Bunch to reimburse her his share of childcare costs, medical costs, educational fees. She tried to get him to start paying her the court ordered retirement allotment that was supposed to have been started on May 1 (and was reaffirmed by the court to start on May 1 when Dan tried to have it delayed to January via a reconsideration). He only started paying the retirement amount once the motion re contempt was started. He never did pay all of the special child support costs and still owes thousands. Tami has no money and can't afford the court actions.....but she can't afford not to get the money owed her for the benefit of the child. There is no doubt he didn't pay as per court orders and delayed and obfuscated and tried to wiggle out at every turn. Once he is found owing, once he is found having been months late in paying, he is in violation of the court's directives and is technically in

contempt of court. The Orders drafted by Dan's attorney and signed by the lower court made findings that Dan had the means at all times to comply with court orders. [CP 612] Of course there was no financial discussion or proof of his financial status at the hearings, so it may be questionable how the court came to such a finding, but for our purposes since it was Dan's attorney who drafted the Orders that were signed, Dan should be held to that statement should he be found in contempt (one of the bases of contempt requires that the person must have had the means to comply but willfully did not). Attorney fees can and should be awarded Tami for the time and effort it has taken to get Dan to comply with clear court orders

ATTORNEY FEES

Appellant requests reimbursement of costs and fees, as appropriate, pursuant to RAP 14.1 and RAP 14.2 wherein costs are awarded to the "substantially prevailing party." Cost reimbursement under RAP 14.3 is requested of "reasonably necessary" fees and costs incurred. A cost bill shall be prepared as required under RAP 14.4.

IN CONCLUSION – WE ASK THE COURT:

- Respondent asks that the Court reverse the lower court's findings and either re-note the original Motion(s) for a new hearing where all facts and evidence, including the Exhibit documents, can be considered, heard,

and ruled on, or strike or dismiss the Motion without prejudice so it can be re-filed. The current order finding absolutely no back support due and finding that Petitioner has been complying with all orders is simply wrong, unfounded, and not based on facts. The court abused its discretion in making findings and issuing orders not supported by substantial evidence.

- Appellants ask that the CR 11 sanctions against attorney Eva Carleton be reversed as being inappropriate. The pre-filing inquiry was thorough and appropriate. When a court orders attorney sanctions for a complaint on the basis of its erroneous view of the law, sanctions must be reversed. *Ambach v. French*, 141 Wash. App. 782, review granted, 164 Wash. 2d 1007, reversed 167 Wash. 2d 167 (2007).
- Appellants ask this court to direct the lower court to issue more specific findings on its rulings rather than the minimalistic wording used.
- Appellants ask this court to direct the lower court to state the dates covered in its ruling when it states no monies are due for child support.
- Appellant asks this court to direct the lower court to reconsider attorney fees for the contempt hearing for Tami Lee if she shows that Dan Bunch had not paid various child support matters in a timely fashion and the

Motion re contempt was necessary to get ball rolling in paying back support due.

- Appellant asks this court to award attorney fees and costs to appellant , if appropriate, under RAP 14.2, 14.3, 14.4.

Sworn to as true and accurate, and subject to the perjury laws of the State of Washington, this 13th day of May, 2014.



Eva Carleton, Attorney for Appellant Tamara Lee
WSB # 28387,
13115 Muir Dr., Gig Harbor, WA 98332
Phone # 253-376-2479 e-mail: evacarleton@yahoo.com



Eva Carleton, as pro se for Appellant Eva Carleton
13115 Muir Dr., Gig Harbor, WA 98332
Phone #253-376-2479 e-mail: evacarleton@yahoo.com

CERTIFICATE OF SERVICE

I certify under penalty of perjury that I did mail on May 17 or earlier, a true copy of this document and all attachments to the opposing party at his last known and designated address via U. S. Express Overnight Mail:

Daniel Bunch, as pro se
3018 ½ North Puget Sound Avenue
Tacoma, WA 98407

Signed this 15th day of May, 2014, in Spokane, WA



Eva Carleton, Attorney
WSB # 28387,
13115 Muir Dr., Gig Harbor, WA 98332
Phone # 253-376-2479