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Nº. 53949-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In Re the Estate of:

GARY RAY BLAKEY

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 16-4-00372-8
The Honorable Melissa A. Hemstreet, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in requiring Mr. Foris to pay Mr. Divine’s attorney fees and costs as sanctions for filing “frivolous and hostile” motions.
2. The trial court abused its discretion in requiring Mr. Foris to pay for preparation of portions of the transcript requested by Mr. Divine where those portions were not relevant to any issue Mr. Foris raised on appeal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a trial court abuse its discretion by requiring a party to pay another party’s attorney fees and costs as a sanction for filing “frivolous and hostile” motions where no CR 11 motion was brought? (Assignment of Error No. 1).
2. Does a trial court abuse its discretion in requiring the appealing party to pay for the cost of transcribing portions of the report of proceedings requested by the non-appealing party where the appealing party has repeatedly informed the court that the portions of the transcript which the appealing party did not request be transcribed were irrelevant to the issues that were to be raised on appeal? (Assignment of Error No. 2).
3. Should this court award attorney fees and costs to Mr. Foris if he is the prevailing party on this appeal?

C. STATEMENT OF THE CASE

Factual and Procedural Background

Gary Ray Blakey, resident of Kitsap County, died having executed one will on March 7, 2008 and a second will on January 29, 2016.¹ The

¹ CP 5-18, 33.

2008 will named Mr. Keith Foris as the executor of Mr. Blakey's estate.²

The 2016 will named Joe Divine as the personal representative of the estate and named Keith Foris as the alternate personal representative.³

On January 29, 2016, Mr. Blakey also executed a Transfer on Death deed that would transfer title to his property in Silverdale, Washington to Mr. Divine or, if Mr. Divine predeceased Mr. Blakey, to Mr. Foris.⁴ Although it was executed on January 29, 2016, the transfer on death deed was not recorded until April 27, 2019.⁵

At the time of Mr. Blakey's death, Mr. Foris had lived next door to him for over 16 years and Mr. Foris had supported Mr. Blakey financially as well as emotionally during that time.⁶ Mr. Divine had moved onto Mr. Blakey's property in September or October of 2015 and was living in a 29-foot travel trailer there.⁷

On May 9, 2016, the 2008 will was filed in Kitsap County Superior Court.⁸

On June 9, 2016, Mr. Foris, through attorney Kenneth Kambich, filed a petition for orders admitting the 2008 will to probate, appointing

² CP 10.

³ CP 15.

⁴ CP 23-24.

⁵ CP 5.

⁶ CP 44.

⁷ CP 44.

⁸ CP 1-4.

Mr. Foris personal representative of Mr. Blakey's estate, and to issue letters testamentary to Mr. Foris as personal representative of the estate.⁹

Mr. Foris argued that Mr. Divine, while nominated as the personal representative of the estate in the 2016 will, was disqualified under RCW 11.36.010 from being appointed as personal representative because Mr. Divine is a felon.¹⁰

Mr. Foris brought a motion for an order vacating the transfer on death deed on the basis that the deed was recorded after Mr. Blakey's death and was, therefore, ineffective and did not operate to transfer title of the property to Mr. Devine.¹¹

On June 10 2016, Mr. Foris filed a TEDRA petition in Kitsap County Superior Court cause number 16-4-00496-1.¹²

On June 15, 2016, Mr. Conrad Green filed a "Counter Petition for an Order Admitting Will to Probate and Issuing Letters of Administration with Will Annexed to C. Conrad Green."¹³ Mr. Green argued that Mr. Foris should be disqualified from serving as the personal representative of the estate since Mr. Foris had petitioned the court to admit the 2008 will

⁹ CP 5-8.

¹⁰ CP 6.

¹¹ CP 19-24.

¹² CP 488-507; RP 6, 7-1-2016. The petition was originally filed in cause number 16-4-00372-8 but was transferred to 16-4-00496-1. CP 263, note 5.

¹³ CP 33-36.

and thereby breached his fiduciary duties under the will.¹⁴

On June 16, 2016, Mr. Foris filed a response and declaration in support of the response to Mr. Green's Counter Petition.¹⁵

On June 17, 2016, a hearing was held to address admitting a will to probate and Mr. Foris' motion to vacate the transfer on death deed.¹⁶ The parties and court agreed that the 2016 will should be admitted to probate.¹⁷ Mr. Foris did not raise any objection to the 2016 will other than Mr. Divine being barred from acting as personal representative due to his felony conviction history.¹⁸

The Kitsap County Superior Court ordered that the 2016 will would be admitted to probate pending filing of proof that the witnesses attestation was notarized.¹⁹ The court held that all other issues would be addressed in the TEDRA proceeding begun by Mr. Foris.²⁰

The TEDRA and probate cases were consolidated on July 1, 2016.²¹ At the July 1, 2016 hearing, former counsel for Mr. Foris informed the court that he did not object to the "four corners" of the 2016

¹⁴ CP 34.

¹⁵ CP 41-158.

¹⁶ RP 1-23, 6-17-2016. The volumes of the Report of Proceedings (RP) are not numbered continuously between volumes. Reference will be made by giving the RP cite followed by the date of the hearing being referenced.

¹⁷ RP 7-9, 6-17-2016.

¹⁸ RP 7-9, 6-17-2016.

¹⁹ CP 160.

²⁰ CP 160.

²¹ RP 6, 7-1-2016.

will but he was concerned that the declaration of the witnesses to the will was not legally sufficient because it did not state the place where the declaration was made as required by RCW 9A.72.085.²² The court admitted the 2016 will to probate but did not preclude future argument about whether the will was sufficient on its face based on the declaration.²³

At a hearing on October 17, 2016, all parties agreed that Mr. Divine could not act as personal representative of Mr. Blakey's estate due to the fact of Mr. Divine's prior conviction.²⁴ Over Mr. Divine's objection, Mr. Foris was appointed to be the personal representative of Mr. Blakey's estate but the trial court retained intervention powers.²⁵

On November 7, 2016, the trial court entered orders appointing Mr. Foris to be the personal representative of Mr. Blakey's estate without non-intervention powers and without bond.²⁶

On February 6, 2017, Mr. Foris filed a motion for court approval to conduct an inventory of the estate, to perform inspections of the chimney, electrical, and septic systems, and to enter into a month-to-month

²² RP 8-13, 7-1-2016.

²³ CP 236-237; RP 12-14, 7-1-2016; RP 1-6, 10-17-2016.

²⁴ RP 24-25, 10-17-16.

²⁵ CP 264-268; RP 25-52.

²⁶ CP 388-389.

residential lease with Mr. Divine, and to eject subtenants.²⁷

Mr. Divine filed a responsive memorandum in which he acknowledged Mr. Foris' right to enter the property to conduct an inventory and Mr. Foris' right as personal representative to possession of the property during the pendency of the probate proceedings.²⁸ However, Mr. Divine objected to the terms of the lease proposed by Mr. Foris, objected to the inspections proposed by Mr. Foris, and objected to Mr. Foris ejecting Robert Sawya from the Blakely property where he had been living.²⁹

A hearing was held on February 13, 2017, to address Mr. Foris' motions.³⁰ At the hearing, Mr. Foris brought to the court's attention the fact that there was an account with \$3,000 in it that belonged to the estate and requested Mr. Divine's counsel assist Mr. Foris' counsel in finding records of that account.³¹ Mr. Foris' counsel also requested the court order the estate to pay Mr. Foris' attorney's fees.³² The trial court denied Mr. Foris' motion for ejectment, motion for inspection, and motion to enter into a lease with Mr. Divine.³³ The court did order an inventory be

²⁷ CP 395-408.

²⁸ CP 409-419.

²⁹ CP 409-419.

³⁰ RP 1-20, 2-13-2017.

³¹ RP 6, 2-13-2017.

³² RP 6, 2-13-2017.

³³ CP 422-424; RP 14, 2-13-2017.

conducted.³⁴

On March 24, 2017, Mr. Foris and his wife filed a creditor's claim against Mr. Blakey's estate.³⁵ The claim was for a Pontiac LeMans vehicle and was based on a \$4,672.06 loan the Forises made to Mr. Blakey in February of 2008, in return for which Mr. Blakey put Mr. Foris on the title of the Pontiac.³⁶

The Forises filed a second creditor's claim on March 24, 2017, this one seeking \$17,263.34 for loans made to Mr. Blakey from 2008-2010.³⁷ Finally, the Forises filed a third creditor's claim for \$21,914.03 in attorney's fees and costs related to Keith Foris' appointment as personal representative of the estate through 3-20-2017.³⁸

On July 14, 2017, counsel for Mr. Foris received a letter from the attorney for Jay and Sharon Arnot, neighbors of Mr. Blakey who believed that their septic system drainfield had encroached on Mr. Blakey's property for more than ten years.³⁹ The Arnots sought to establish title or an easement to use the drainfield through adverse possession and proposed Mr. Blakey's estate transfer the appropriate title or easement without an

³⁴ CP 422-424; RP 15, 2-13-2017.

³⁵ CP 425-426.

³⁶ CP 425-426.

³⁷ CP 427-428.

³⁸ CP 429-430.

³⁹ CP 438-439.

action being filed.⁴⁰

On October 20, 2017, counsel for Mr. Foris filed a motion seeking permission from the trial court to proceed with discussions regarding the Arnots' claims.⁴¹

On November 6, 2017, Mr. Divine filed an "Objection to Drain Field Encroachment Easement" in which he objected to any efforts by Mr. Foris to negotiate a settlement with the Arnots regarding the Arnots' drainfield.⁴² In the objection, Mr. Divine accused Mr. Foris and his trial counsel of trying to increase the costs of administering the estate unnecessarily and of being so biased towards Mr. Divine that they could not be trusted to negotiate a fair settlement.⁴³

On November 8, 2017, an agreed order was entered regarding the drain field encroachment.⁴⁴

On September 4, 2019, Mr. Divine filed a motion: (1) to remove Mr. Foris as personal representative of Mr. Blakey's estate; (2) to appoint Patricia Markwick as the personal representative; (3) to deny the Forises' creditor's claims; (4) to deny the Forises' claims for attorney's fees and costs; (5) to dismiss the Forises' TEDRA petition; (6) for entry of

⁴⁰ CP 438.

⁴¹ CP 435-439.

⁴² CP 441-442.

⁴³ CP 441-442.

⁴⁴ RP 2-3, 11-8-2017.

judgment against the Forises for the attorney fees incurred by Mr. Divine as a result of the “frivolous and hostile actions” of the Forises; (7) to require the Forises to remove personal property from the real property; (8) to require the Forises to pay rent for the storage of the personal property since the time Mr. Foris was appointed personal representative; and (9) for entry of a restraining order prohibiting the Forises from trespassing on the property and prohibiting the Forises from surveilling Mr. Divine and the property.⁴⁵

On September 12, 2019, the Forises, through new counsel, filed a response to Mr. Divine’s motion.⁴⁶ Counsel for Mr. Foris pointed out that since being appointed as personal representative of the Blakey estate Mr. Foris had completed an inventory of the assets of the estate, collected a \$12,000 life insurance policy, had obtained the death certificate to submit to agencies for proof of collecting funds owed to the estate, dealt with creditors and filed creditor’s claims with Kitsap Superior Court, had engaged a tax accountant to file tax returns for 2015 and 2016 and was awaiting the return of any funds due to the estate, had worked at resolving the drainfield issues on the estate property, had retained counsel to assist in administering the estate and dealing with Mr. Divine, and had been

⁴⁵ CP 454-507.

⁴⁶ CP 510-519.

paying all costs associated with these efforts out of his own pocket.⁴⁷ It was also pointed out that Mr. Divine had been continuously hostile towards Mr. Foris and had prevented Mr. Foris from taking possession of the real and personal property of the estate contrary to RCW 11.48.020.⁴⁸

On September 16, 2019, a hearing was held to address the status of the Blakey estate and to address the pending motions.⁴⁹ The trial court held that the statute of limitations had run on the Forises' creditor's claims,⁵⁰ including the claim regarding the automobile.⁵¹ The court found that there was hostility between Mr. Foris and Mr. Divine and that the probate had "made no progress" in over three years and ordered Mr. Foris removed as the personal representative of the estate.⁵² The court found that Mr. Foris had not acted in accordance with his fiduciary duties, had been an obstacle to the case moving forward, had wasted the estate assets, and had a conflict of interest as the personal representative because he was also the main creditor of the estate.⁵³ The court appointed Patricia Markwick the new personal representative of the estate and ordered the Clerk of the Court to issue letters testamentary to Ms. Markwick.⁵⁴

⁴⁷ CP 510-511.

⁴⁸ CP 511.

⁴⁹ RP 1-33, 9-16-2019.

⁵⁰ RP 20, 9-16-2019.

⁵¹ RP 21-22, 9-16-2019.

⁵² RP 25-26, 9-16-2019.

⁵³ RP 26, 9-16-2019.

⁵⁴ RP 27, 9-16-2019.

With regards to the creditor's claims regarding attorney's fees, the court recognized that it could award a portion of the requested fees if it found the request was reasonable, but found that the court had no basis on which to make such a finding and denied the claims.⁵⁵

The court "[d]idn't see anything that's relevant to move forward" on the TEDRA petition and dismissed it.⁵⁶

The trial court also ordered Mr. Foris to remove his personal property stored on the Blakey estate or face forfeiture of the property.⁵⁷

At the close of the September 16, 2019 hearing, the court ordered counsel for Mr. Divine to prepare a written order memorializing the court's oral rulings.⁵⁸

On September 25, 2019, Mr. Foris filed an objection to Mr. Divine's proposed order regarding the September 16, 2019 hearing.⁵⁹

On September 27, 2019, a hearing was held to enter the written order memorializing the trial court's oral rulings from the September 16, 2019 hearing.⁶⁰

On October 16, 2019, Mr. Foris filed notice that he was appealing the order entered on September 27, 2019.

⁵⁵ RP 29, 9-16-2019.

⁵⁶ RP 29, 9-16-2019.

⁵⁷ RP 30-31, 9-16-2019.

⁵⁸ RP 32, 9-16-2019.

⁵⁹ CP 524-571.

⁶⁰ CP 574-583; RP 1-25, 9-27-2019.

On November 1, 2019, Mr. Divine filed a Motion for Award of Attorney's Fees and Outdoor Storage Rent Against Keith Foris In Favor of Joseph Divine and the Estate of Gary R. Blakey and supported this motion with the Declaration of Ronald C. Templeton (Mr. Divine's attorney) and the Declaration of Pete Simpson.⁶¹ Mr. Divine sought an award of the attorney's fees and costs he had spent responding to "the frivolous and hostile actions of Mr. and Mrs. Floris and their prior attorney, Ken Kambich, and as the prevailing party in the Court Order entered on September 27, 2019 in the amount of \$32,695.00."⁶² Mr. Divine also sought \$667.51 in costs for obtaining medical records and \$27,637.50 in storage rental fees.⁶³

Mr. Foris filed an objection to the motion for fees and costs on December 4, 2019.⁶⁴

On January 9, 2020, Mr. Divine filed a motion for an order requiring the Forises to pay the costs of transcription of all the hearings in this matter pursuant to RAP 9.2(C).⁶⁵

On January 15, 2020, Mr. Foris filed an objection to the motion to

⁶¹ CP 595-677

⁶² CP 595.

⁶³ CP 596.

⁶⁴ CP 678-693.

⁶⁵ CP 722-724.

require him to pay the costs of the transcripts.⁶⁶

On January 17, 2020, a hearing was held on the motions for attorney's fees and for Mr. Foris to pay the costs of preparing transcripts of all hearings for the appeal.⁶⁷ The parties agreed that the basis for the court's authority to award attorney's fees came from the September 27, 2019, order dismissing the TEDRA petition which authorized the entry of judgment against the Forises for attorney fees arising from the "frivolous and hostile actions" of Keith Foris.⁶⁸ The court held that the claim brought by Mr. Divine seeking rental payments from Mr. Foris for storage of his property was a claim that should have been brought by the Blakey Estate, not by Mr. Divine, and denied the claim.⁶⁹

Ultimately, the court ordered Mr. Foris to pay \$31,453.50 in attorney fees and \$667.51 in costs to Mr. Divine based on Mr. Foris' "failure to carry out his responsibilities as the Personal Representative...his frivolous and hostile actions against Joseph Divine and needless Motions resulting in needless attorney's fees incurred by the Estate and Joseph Divine."⁷⁰ The court also ordered Mr. Foris to pay the costs for transcribing the extra hearings designated by Mr. Divine that Mr. Foris

⁶⁶ CP 740-746.

⁶⁷ RP 1-61, 1-17-2020.

⁶⁸ RP 9, 1-17-2020.

⁶⁹ CP 756; RP 44, 1-17-2020.

⁷⁰ CP 756.

had not ordered transcribed initially.⁷¹

On February 13, 2020, Mr. Foris filed an Amended Notice of Appeal appealing the rulings from the January 17, 2020 hearing.

D. ARGUMENT

1. The trial court abused its discretion in ordering Mr. Foris to pay Mr. Divine's attorney's fees where Mr. Divine failed to bring a CR 11 motion for sanctions.

a. Standard of Review.

“Under the American rule compensation for attorney fees and costs may be awarded only if authorized by contract, statute, or a recognized ground in equity.”⁷² The Court of Appeals applies a two-part standard of review to a trial court's award or denial of attorney fees: “(1) [it] review[s] de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) [it] review[s] a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion.”⁷³

Generally, a decision to impose sanctions is reviewed for abuse of discretion.⁷⁴ A trial court abuses its discretion when its decision is

⁷¹ CP 753-754.

⁷² *In re Impoundment of Chevrolet Truck, Wash. License No. A00125A*, 148 Wash.2d 145, 160, 60 P.3d 53 (2002).

⁷³ *Gander v. Yeager*, 167 Wash.App. 638, 647, 282 P.3d 1100 (2012).

⁷⁴ *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

manifestly unreasonable or based on untenable grounds.⁷⁵

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.⁷⁶

b. *Authority of trial court to require Mr. Foris to pay Mr. Divine's attorney fees as a sanction.*

“The general rule in Washington, commonly referred to as the American rule, is that each party in a civil action will pay its own attorney fees and costs. This general rule can be modified by contract, statute, or a recognized ground in equity.”⁷⁷

Various court rules allow the imposition of sanctions. E.g., CR 11, 26(g); CrR 4.7(h)(7). Sanctions, including attorney fees, may also be imposed under the court's inherent equitable powers to manage its own proceedings. *In re Recall of Pearsall–Stipek*, 136 Wash.2d 255, 266–67, 961 P.2d 343 (1998).⁷⁸

Here, the motion for the imposition of sanctions cited no specific

⁷⁵ *Fisons*, 122 Wn.2d at 339.

⁷⁶ *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002).

⁷⁷ *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296–97, 149 P.3d 666, 669 (2006)

⁷⁸ *State v. Gassman*, 175 Wn.2d 208, 210–11, 283 P.3d 1113, 1114 (2012).

court rule or statute as the basis for the imposition of sanctions.⁷⁹ Instead, the motion requested the court enter “judgment against the Forises for the attorney’s fees incurred by Joseph Divine as a result of the frivolous and hostile actions of Keith and Jody Foris in an amount to be awarded in a subsequent hearing.”⁸⁰ The Order granting the motion for attorney fees also states the fees are awarded are those “arising from the frivolous and hostile actions of Keith Foris” but does not identify which actions or motions are “frivolous and hostile” or under what authority the court was sanctioning Mr. Foris.

This leaves several possible bases for the court to award Divine’s attorney’s fees: CR 11 (baseless filings); RCW 2.28.010 (court’s inherent authority to control disruption of court proceedings); RCW 4.84.185 (court’s inherent authority to award attorney fees to prevailing party on frivolous actions); RCW 7.21.050 (court’s inherent authority to impose sanctions for contempt); and RCW 11.96A.150 (authority of trial and appellate court in TEDRA action to award reasonable attorney’s fees and costs in an amount the court deems equitable). As will be discussed below, in this case it was improper for the trial court to award attorney fees under any of these bases.

c. There was no legal basis to award attorneys fees

⁷⁹ CP 455, paragraph 9.

⁸⁰ CP 455, paragraph 9.

and costs under CR 11 where the procedure to award sanctions under CR 11 was not followed.

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system.⁸¹

Prompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses.

[Deterrence] is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions.⁸²

A filing is baseless if it is not well grounded in fact, or not warranted by existing law or a good faith argument for altering existing law.⁸³ The burden is on the movant to justify the request for sanctions.⁸⁴ Because CR 11 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.⁸⁵ The fact that a complaint does not prevail on its merits is not enough.⁸⁶

⁸¹ *Biggs v. Vail*, 124 Wash.2d 193, 197, 876 P.2d 448 (1994); *Skimming v. Boxer*, 119 Wash.App. 748, 754, 82 P.3d 707 (2004).

⁸² *Biggs*, 124 Wn.2d at 198, 876 P.2d 448, citing *In re Yagman*, 796 F.2d 1165, 1183 (9th Cir.), *amended*, 803 F.2d. 1085 (1986).

⁸³ *Skimming*, 119 Wash.App. at 754, 82 P.3d 707.

⁸⁴ *Biggs*, 124 Wash.2d at 202, 876 P.2d 448.

⁸⁵ *Skimming*, 119 Wash.App. at 755, 82 P.3d 707.

⁸⁶ *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wash.App. 720, 745, 218 P.3d 196 (2009).

CR 11 procedures must comport with due process requirements.⁸⁷

“Due process requires notice and an opportunity to be heard before a governmental deprivation of a property interest.”⁸⁸ As a result, a party seeking CR 11 sanctions should “give notice to the court and the offending party promptly upon discovering a basis for doing so.”⁸⁹ Failure to give timely notice that a CR 11 motion might be filed and failure to bring a CR11 motion preclude the imposition of sanctions under CR 11:

Normally...late entry of a CR 11 motion would be impermissible, since without prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper. See *Bryant*, 119 Wash.2d at 228, 829 P.2d 1099 (Andersen, J., concurring in part, dissenting in part).

. . . Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. Without such notice, CR 11 sanctions are unwarranted. [Citation omitted.]

We adopt as our own the advice of the Advisory Committee that, in most cases, “counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation **before** proceeding to prepare and serve a [CR 11] motion.”⁹⁰

⁸⁷ *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 224, 829 P.2d 1099 (1992).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Biggs*, 124 Wn.2d at 198, FN 2, 876 P.2d 448.

Should a court decide that the appropriate sanction under CR 11 is an award of attorney fees, it must limit those fees to the amounts reasonably expended in responding to the sanctionable filings. Generally, this award of reasonable fees should not exceed those fees which would have been incurred had notice of the violation been brought promptly. [Citation omitted.] ... Bryant makes clear that CR 11 sanctions should be limited to the minimum necessary, and should not be used as a fee-shifting mechanism. [Citation omitted.]

Finally, in imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order. The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose. [Citations omitted.]⁹¹

Here, whatever the merits of Mr. Foris' motions were, Mr. Divine never filed a motion for sanctions citing CR 11, never provided the requisite notice to counsel for Mr. Foris that a pleading or motion filed by Mr. Foris might result in CR 11 sanctions, and never provided the trial court notice that any pleading or filing of Mr. Foris was a potential basis for sanctions. Further, the trial court never made a finding that sanctions were appropriate under CR 11. Therefore, the award of attorney fees in this case was not authorized by CR 11.

d. There was no legal basis to award attorneys fees and costs under RCW 2.28.010 because neither Mr. Foris nor either of his attorneys were found to have disrupted the proceedings or to have committed

⁹¹ *Biggs*, 124 Wn.2d at 201, 876 P.2d 448.

conduct tantamount to bad faith.

RCW 2.28.010 states, in pertinent part:

Every court of justice has power--(1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it...(3) To provide for the orderly conduct of proceedings before it or its officers. (4) To compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein. (5) To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto...

“[W]hile an express finding of bad faith by the trial court is not required, a sanction of attorney fees imposed under the court's inherent authority must be based on a finding of conduct that was at least “ ‘tantamount to bad faith.’ ”⁹²

When contemplating sanctions, the court should apply the court rule that most specifically addresses the misconduct alleged in the specific case.⁹³

“[T]he inherent power of the court should not be resorted to where [court] rules adequately address the problem.”⁹⁴

⁹² *Gassman*, 175 Wn.2d at 211, 283 P.3d 1113, citing *State v. S.H.*, 102 Wash.App. 468, 474, 8 P.3d 1058 (2000) (internal citations omitted).

⁹³ See *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339–40, 858 P.2d 1054, 1076 (1993).

⁹⁴ *Fisons Corp.*, 122 Wn.2d at 340, 858 P.2d 1054, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, —, 111 S.Ct. 2123, 2136, 115 L.Ed.2d 27 (1991) (Where conduct occurring during the course of litigation can be adequately sanctioned under court rules, a court should ordinarily rely on the rules rather than the inherent power of the court.).

The court did not find Mr. Foris or his counsel to be in contempt of court, nor did the trial court find that Mr. Foris or either of his counsel engaged in bad faith conduct or in conduct tantamount to bad faith. Further, CR 11 expressly addresses the problem of a party filing a frivolous motion. Because CR 11, the frivolous motion rule, was adopted to specifically address the type of conduct involved here, it, rather than the inherent power of the court, was applicable in the present case. An award of attorney's fees and costs was not authorized under RCW 2.28.010.

e. There was no legal basis to award attorney fees and costs under RCW 4.84.185 where Mr. Foris' efforts were not entirely without reasonable cause.

RCW 4.84.185 states,

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order. The provisions of this section apply unless otherwise specifically provided by statute.

Courts may award attorney fees under RCW 4.84.185 in any civil action where a claim “was frivolous and advanced without reasonable cause.” “The statute is designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite.”⁹⁵ If a party persists with repeated and wholly meritless efforts, courts can infer they are motivated by spite rather than by a sincere belief in the sufficiency of their claims.⁹⁶

A lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law.” *Dave Johnson Ins. v. Wright*, 167 Wn. App. 758, 785, 275 P.3d 339, 275 P.3d 339 (2012). An award is warranted under RCW 4.84.185 when a “reasonable inquiry” would have revealed that the plaintiff’s position was untenable. *Kearney v. Kearney*, 95 Wn. App. 405, 416-17, 974 P.2d 872 (1999). The purpose of such an award is to “ ‘discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases.’ ” *Kearney*, 95 Wn. App. at 416 (quoting *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992)).⁹⁷

But attorney fees and costs may not be awarded under RCW 4.84.185 if only some of the claims raised by a party are “frivolous”:

⁹⁵ *Skimming*, 119 Wn. App. at 756, 82 P.3d 707 (internal citation omitted).

⁹⁶ See *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 267, 961 P.2d 343 (1998) (“Given the repeated and wholly meritless efforts to recall [the respondent], [the appellant’s] persistence suggests that he may be motivated by spite rather than by a sincere belief in the sufficiency of the recall charges.”).

⁹⁷ *Eugster v. Washington State Bar Ass’n*, 53325-1-II, 2020 WL 71351, at *5 (Wash. Ct. App. Jan. 7, 2020).

“RCW 4.84.185 authorizes a trial court to award reasonable attorney fees incurred in opposing an action deemed “frivolous and advanced without reasonable cause.” However, a court may not award fees in accordance with this statute unless the entire lawsuit meets this standard. *Biggs v. Vail*, 119 Wash.2d 129, 133, 830 P.2d 350 (1992) (holding the trial court erred in awarding fees because only three of the four claims for relief were found to be frivolous).⁹⁸

"[T]he language and the history of the frivolous lawsuit statute (RCW 4.84.185) are clear. The lawsuit, as a whole, that is in its entirety, must be determined to be frivolous and to have been advanced without reasonable cause before an award of attorneys' fees may be made under the statute. *Id.* at 137, 830 P.2d 350. In *Biggs I*, we reversed the trial court's award of fees under RCW 4.84.185 because the trial court found only three of four claims asserted by Biggs to be frivolous. Because the fourth claim advanced to trial, the suit could not be considered frivolous in its entirety. Thus, fees under RCW 4.84.185 were not appropriate. *Id.* at 132, 137, 830 P.2d 350. Under *Biggs I*, if any claims advance to trial, a trial court's award of fees under RCW 4.84.185 cannot be sustained."⁹⁹

When considered in their entirety, Mr. Foris’ efforts and actions in this case were not frivolous or advanced without reasonable cause. At a minimum, Mr. Foris’ motion to remove Mr. Divine as personal representative of the estate because Mr. Divine is a felon was granted by stipulation.¹⁰⁰ Because at least one of the motions he brought in his efforts was meritorious and was granted, an award of attorney fees and costs was

⁹⁸ *Kilduff v. San Juan Cty.*, 194 Wn.2d 859, 876, 453 P.3d 719, 728 (2019)

⁹⁹ *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903–04, 969 P.2d 64, 72 (1998).

¹⁰⁰ CP 6; RP 24-25, 10-17-16.

not authorized under RCW 4.84.185.

Further, as discussed above in section 1(d), CR 11 more specifically deals with the filing of an allegedly frivolous motion and should have been resorted to rather than RCW 4.84.185.

f. There was no legal basis to award attorney fees and costs under RCW 7.21.050 where Mr. Foris was never found to be in contempt of court and was not given the opportunity to defend against an allegation of contempt.

Under RCW 7.21.050(1), a judge may summarily impose either a remedial or punitive sanction upon a person who commits a contempt of court within the courtroom if the judge certifies that she or he saw or heard the contempt.

RCW 7.21.050(1) provides in pertinent part: “The person committing the contempt of court *shall* be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise.” (Emphasis added.) The legislature's use of the term “shall” is mandatory and a court acting without having complied with the statutory mandate does so without authority. *State v. Martin*, 137 Wash.2d 149, 154–55, 969 P.2d 450 (1999).¹⁰¹

Neither Mr. Foris nor either of his counsel was ever found to be in contempt of court. An award of attorney fees and costs was not authorized under RCW 7.21.050.

Again, as discussed above in section 1(d), CR 11 more specifically

¹⁰¹ *State v. Jordan*, 146 Wn. App. 395, 403, 190 P.3d 516, 520 (2008).

deals with the filing of an allegedly frivolous motion and should have been resorted to rather than RCW 7.21.050.

- g. There was no legal basis to award attorney fees and costs under RCW 11.96A.150 where RCW 11.96A.150 does not authorize the award of attorneys fees as a sanction and Respondent failed to file the requisite motion for attorney fees and cost to be awarded.*

RCW 11.96A.150(1) provides, in pertinent part,

Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings...The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

Respondent's request in paragraph 9 of his September 4, 2019 motion¹⁰² that the court order Appellant to pay Respondent's attorney fees and costs did not refer to RCW 11.96A.150. Accordingly, RCW 11.96A.150 could not properly be a basis for the court to award attorney fees and costs in this case. However, even if Respondent had asserted RCW 11.96A.150 as a basis for attorney fees and costs to be awarded, it

¹⁰² CP 455.

would have been error for the trial court to award fees under that statute.

RCW 11.96A.150...leaves the award of attorney fees to the discretion of the court and [appellate courts] will not interfere with a trial court's fee determination unless “there are facts and circumstances clearly showing an abuse of the trial court's discretion.” *In re Estate of Larson*, 103 Wash.2d 517, 521, 694 P.2d 1051 (1985); RCW 11.96A.150; see also RCW 11.24.050 (attorney fee statute under the will contest chapter stating that where a will is revoked assessment of costs shall be in the court's discretion).¹⁰³

As discussed above, a trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.¹⁰⁴ A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.¹⁰⁵

Here, there was no basis for the court to award attorney fees and costs as a sanction because Respondent never filed a motion for sanctions under CR 11. Instead of following the applicable court rule and filing a formal motion for sanctions under CR 11, Respondent simply made

¹⁰³ *In re Estate of Black*, 153 Wn.2d 152, 173, 102 P.3d 796, 807 (2004).

¹⁰⁴ *George E. Failing Co. v. Cascade Drilling, Inc.*, 197 Wn. App. 1019 (2016).

¹⁰⁵ *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002).

conclusory assertions that Mr. Foris had made “frivolous and hostile motions” without even identifying which motions were being referred to. As stated above, the burden is on the movant to justify the request for sanctions,¹⁰⁶ and the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success.¹⁰⁷ The record shows that neither the Respondent nor the trial court even attempted to abide by these standards. Additionally, the failure of Respondent to bring a proper CR 11 motion deprived Mr. Foris of his due process rights to notice of the purported improper motion and the opportunity to cure any alleged defect.

Without an underlying CR 11 motion identifying which specific motion was “frivolous and hostile” and making a legal argument explaining why the identified motion was “frivolous and hostile,” the trial court lacked a basis in the record upon which to award Respondent attorney fees and costs. The trial court committed a manifest abuse of discretion in awarding attorney fees and costs under RCW 11.96A.150 because Respondent had utterly failed to make kind of showing or record as to why such sanctions were appropriate.

h. The sanction for a personal representative’s violation of his fiduciary duties to an estate and a beneficiary by failing to administer the estate and

¹⁰⁶ *Biggs*, 124 Wash.2d at 202, 876 P.2d 448.

¹⁰⁷ *Skimming*, 119 Wash.App. at 755, 82 P.3d 707.

causing waste is limited to revocation of the letters testamentary.

In the Order on the September 16, 2019 Hearing,¹⁰⁸ the trial court found that Mr. Foris had “violated the fiduciary duties he owed to Mr. Divine and ha[d] made little if any effort to administer the Estate and ha[d] caused needless waste.”¹⁰⁹ The trial court also made the above discussed finding that Respondent was entitled to an award of attorney’s fees and costs against Mr. Foris for fees arising from the “frivolous and hostile” actions of Mr. Foris.¹¹⁰

RCW 11.28.250 governs the sanctions a trial court may impose when it finds the personal representative of an estate has wasted, mismanaged, or neglected to perform any acts as personal representative. RCW 11.28.250 provides, in pertinent part,

Whenever the court has reason to believe that any personal representative has wasted...or mismanaged...the property of the estate committed to his...charge...or has neglected to perform any acts as such personal representative, or for any other cause or reason which to the court appears necessary, it shall have power and authority, after notice and hearing to revoke such letters. The manner of the notice and of the service of the same and of the time of hearing shall be wholly in the discretion of the court, and if the court for any such reasons revokes such letters the powers of such personal representative shall at once cease, and it shall be the duty of the court to immediately appoint some other personal representative, as in this title provided.

¹⁰⁸ CP 574-583.

¹⁰⁹ CP 578.

¹¹⁰ CP 581.

RCW 11.28.250 specifically limits the court's punitive power in such situations to revoking the letters testamentary and appointing a new personal representative. RCW 11.28.250 *does not* authorize the imposition of sanctions against the removed personal representative in the form of an award of attorney fees and costs to beneficiaries for having to respond to motions brought by the removed personal representative. By removing Mr. Foris as personal representative of the estate, the trial court imposed the harshest sanction it could under RCW 11.28.250.

CR 11 is the court rule that more specifically addresses situations where a party is alleged to have filed a frivolous motion. CR 11 should have been the rule the court applied in determining whether attorney fees and costs should have been awarded. The court lacked a legal basis to award attorneys fees and costs under RCW 11.28.250.

2. The trial court abused its discretion in ordering Mr. Foris to pay for the transcription of any hearings other than the September 27, 2019 hearing.

A party seeking review may file a partial verbatim report of proceedings; however, any other party may then add to the verbatim report. RAP 9.2(c).

If the party seeking review refuses to provide the additional parts of the verbatim report of proceedings, the party seeking the additional parts may provide them at the party's own expense *or apply to the trial court for an order requiring the party seeking review to pay for the additional parts*

of the verbatim report of proceedings.

(Italics ours.) RAP 9.2(c). Upon application, the trial court may correct or supplement the report of proceedings, RAP 9.9, and “may direct the party seeking review to pay for the expense of any modifications of the proposed report of proceedings”. RAP 9.5(a). Moreover, whether the record should be supplemented is discretionary with the trial court. “[T]he judge can direct such additions as he deems necessary to present fully the questions to be raised on the appeal.” *Palin v. General Constr. Co.*, 45 Wash.2d 721, 727, 277 P.2d 703 (1954).¹¹¹

Because the decision to order supplementation of the record is discretionary with the trial court, review of the court’s decision to order an appealing party to pay for portions of the transcript not originally transcribed is reviewed for abuse of discretion.

Mr. Divine’s argument as to why Mr. Foris should have to pay for transcribing the entire report of proceedings is that RAP 9.2(c) states that a party seeking review who arranges for transcription of less than all of the report of proceedings “*should* include in the statement of arrangements a statement of the issues the party intends to present on review”¹¹² and Mr. Foris did not do so and did not respond to Mr. Divine’s request for Mr. Foris to inform him of the issues Mr. Foris intended to present on review.¹¹³ Mr. Divine then relied on RAP 9.2(c) to order transcription of

¹¹¹ *Jackson v. Washington State Criminal Justice Training Comm’n*, 43 Wn. App. 827, 831–32, 720 P.2d 457, 460–61 (1986).

¹¹² RAP 9.2(c) (emphasis added).

¹¹³ CP 723.

the entire record and requested Mr. Foris pay for it because “he wanted to make sure the appellate court had the full record to review any claimed errors.”¹¹⁴

In response to Mr. Divine’s request that Mr. Foris pay for transcription of every hearing in this case, Mr. Foris informed Mr. Divine and the trial court that Mr. Foris was appealing only the September 27, 2019 order and had ordered the transcript of the entire proceeding relating to that order.¹¹⁵ Mr. Foris even went so far as to produce a table, set out below, listing every hearing ordered by Mr. Divine, the type of motion that was the subject of the hearing, and the relevance of the order and/or hearing to Mr. Foris’ appeal:

Date of Hearing / Order	Type of Motion	Relevance to Appeal filed by Foris
June 17, 2016	Divine moving into a trailer on the Decedent’s property & DV by Divine against Decedent	None
July 1, 2016	Petition for TEDRA & Contingency Issue and Consolidate matters: Petition to Appoint Conrad Green as PR (who was not named in the Will); Admit Will to Probate	None
October 17, 2016	1. Appointment of PR to Estate; and 2. Conflict of Interest of Templeton to represent Divine	None
February 13, 2017	Motion to Approve Declaration of Foris (Inventory of Estate and	None

¹¹⁴ CP 723.

¹¹⁵ CP 741.

		Inspection of the Property)	
September 2019	16,	Court's Request for hearing on status of estate	None
November 2017	8,	Drain Field Encroachment	None
September 2019	27,	Divine's Motions regarding Status of Estate; 1. Revoke Foris' Letters of Testamentary; 2. Appointment of Marwick as Successor PR; 3. Order Declaring Title to Blakey Real Property to Divine; 4. Denying Foris' Creditor Claims; 5. Denying Foris' Creditor Claim for Loans to Decedent; 6. Denying Foris' Creditor Claims for attorney's fees and costs; 7. Order to Dismiss Foris' TEDRA Petition; 8. Entry of Judgment Against Forises for attorney fees; 9. Order Requiring Forises to remove certain personal property from subject property; 10. Entry of restraining order.	Order Foris Appealed and Ordered the complete transcript of the hearing - which was filed on 1/15/2020
November 2019	25,	Approve Petition for Attorney's Fees	None ¹¹⁶

Mr. Foris informed the trial court and Mr. Divine, in no uncertain terms, that,

the additional VRPs that Divine has requested...have no bearing on the appeal that [Mr.] Foris filed. The complete VRP from the hearing on September 27, 2019 was ordered...and this VRP provides a complete picture and illustration of why Foris filed an appeal on that Order and

¹¹⁶ CP 743-744.

that Order alone.¹¹⁷

At the January 17, 2020 hearing addressing Mr. Divine's motion to have Mr. Foris pay for the entire report of proceedings, counsel for Mr. Foris again informed the trial court that the only hearing relevant to the issues Mr. Foris intended to raise on appeal was the hearing held on September 27, 2019.¹¹⁸ Counsel for Mr. Foris again informed the trial court and Mr. Divine of the subject of each of the hearings Mr. Divine had requested and stated that those hearings had nothing to do with what Mr. Foris was appealing.¹¹⁹

Mr. Foris does not dispute that his initial statement of arrangements did not comply with RAP 9.2(c)'s suggestion that the statement of arrangements for a partial transcript *should* include a statement of issues Mr. Foris intended to present on review. However, as soon as possible, Mr. Foris repeatedly and clearly informed Mr. Divine and the trial court that he was appealing only issues related to the September 27, 2019 hearing and that he had ordered the entire hearing.

Mr. Divine's argument as to why the Court of Appeals needed to have the transcript of every hearing to review on appeal was that

The Court of Appeals needs to view the case as a whole.
They need to hear the representations that the Forises made.

¹¹⁷ CP 744.

¹¹⁸ RP 48-52, 1-17-2020.

¹¹⁹ RP 49-50, 1-17-2020.

They need to hear the representations that Mr. Kambich made to the Court and inform the Court why the Court ruled as it did on September 27.

Also, if I was a betting man, the Forises are going to appeal the order that's about to be entered on attorneys' fees, and certainly those prior hearings are relevant to that.¹²⁰

This argument was premised on the assumption that Mr. Foris would be making fact-based challenges to the trial court's award of attorney fees and costs for "frivolous and hostile" motions.

In ordering that the full transcript was required, the trial court made similar assumptions that Mr. Foris' challenges to the order would be fact-based. The trial court stated it felt that it was necessary

to get the entire report of the proceedings before the Court of Appeals so they can understand why I made the rulings that I made—and in fact, this goes back to prior orders that were entered before, and that includes, you know, the October 2016 information, February 2017 information, I think all of that's necessary.

I don't think you can take this case piecemeal. I think it's the entirety that's required.¹²¹

As the preceding portion of this Opening Brief makes clear, Mr. Foris challenges the trial court's award of attorney fees and costs on purely *procedural* grounds, specifically that Mr. Divine failed to bring the necessary CR 11 motion seeking sanctions for a frivolous motion that

¹²⁰ RP 48, 1-17-2020.

¹²¹ RP 56, 1-17-2020.

would have given the trial court authority to award the attorney fees and costs as sanctions. Both Mr. Divine and the trial court failed to consider that Mr. Foris' appeal would be based solely on procedural, not factual arguments.

It is not necessary for this court to review the transcripts of every single hearing that occurred in this matter for this court to determine that no CR 11 motion was ever brought. A simple review of the trial court docket and the Clerk's Papers is sufficient.

As Mr. Foris repeatedly informed the trial court and Mr. Divine, the only transcript required for this court to review the issues raised in Mr. Foris' appeal is the transcript of the September 27, 2019, which Mr. Foris ordered in its entirety. The trial court should have left it to this court to determine whether the record was sufficient to review the issues raised in Mr. Foris' appeal, as this court is authorized to do under RAP 9.10:

If a party has made a good faith effort to provide those portions of the record required by rule 9.2(b), the appellate court will not ordinarily dismiss a review proceeding or affirm, reverse, or modify a trial court...because of the failure of the party to provide the appellate court with a complete record of the proceedings below. If the record is not sufficiently complete to permit a decision on the merits of the issues presented for review, the appellate court may, on its own initiative or on the motion of a party (1) direct the transmittal of additional clerk's papers and exhibits or administrative records and exhibits certified by the administrative agency, or (2) correct, or direct the supplementation or correction of, the report of proceedings.

Mr. Foris made this argument to the trial court both in his Opposition to Motion for Foris to Pay for Additional VRP¹²² and in oral argument to the trial court on January 17, 2020.¹²³ However, the trial court ignored this argument and ordered Mr. Foris to pay for the full transcript of every hearing requested by Mr. Divine.

The facts known to the trial court did not support the trial court's conclusion that it was necessary for this court to have the transcript of every hearing in order to consider the issues that would be raised by Mr. Foris on appeal. Because the facts known to the trial court did not support the trial court's conclusion, the trial court's ruling that it was necessary for Mr. Foris to pay for the transcription of every hearing was an abuse of the trial court's discretion.

3. This court should award Mr. Foris his appellate attorney fees and costs if he prevails in this appeal.

RAP 18.1 authorizes an award of attorney's fees to a party on appeal if such an award is authorized by "applicable law" and the party requests the attorney fees in its brief.

"A party is entitled to attorney fees on appeal if a contract, statute, or recognized ground of equity permits recovery of attorney fees at trial

¹²² CP 741-745.

¹²³ RP 50, 53, 1-17-2020.

and the party is the substantially prevailing party.”¹²⁴

RCW 11.96A.150(1) provides, in pertinent part,

[A]ny court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings...The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RAP 18.1 and RCW 11.96A.150(1) authorize this court to award Mr. Foris costs, including attorney fees, if Mr. Foris is the substantially prevailing party on the appeal. Should he be the prevailing party on appeal, Mr. Foris requests this court award him all of his appellate attorney fees and costs, including the cost to prepare the portions of the trial transcript requested by Mr. Divine.

E. CONCLUSION

For reasons stated above, this Court should vacate the trial court's award of attorney fees and costs to Mr. Divine and vacate the trial court's order that Mr. Foris pay for the cost of all transcripts requested by Mr. Divine. This court should remand this case for entry of a judgment and order requiring Mr. Divine to reimburse Mr. Foris for all attorney's fees

¹²⁴ *Hwang v. McMahill*, 103 Wn. App. 945, 954, 15 P.3d 172 (2000).

and costs paid pursuant to the September 27, 2019 and January 17, 2020 order and the January 20, 2020 Judgments Against Keith and Jody Foris.

Additionally, should Mr. Foris be the prevailing party on appeal, this court should award Mr. Foris the attorney fees and costs he has spent prosecuting this appeal, including the cost of preparing the transcripts ordered by Mr. Divine.

DATED this 29th day of May, 2020.

Respectfully submitted,



Daniel J. Frohlich, WSBA # 31437
Attorney for Appellant Keith Foris

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day, I provided a true and accurate copy of the document to which this declaration is affixed, entitled document to the following in the manner so indicated:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Ronald C. Templeton, WSBA No. 8684 & all counsel assigned at: Templeton Horton Weibel & Broughton, PLLC 3212 NW Byron Street, Suite 101 Silverdale, WA 98383 360-692-6415 360-692-1257	COA ECR:

Dated this 29th day of May 2020 at Yelm, Washington.



Kimberly Lampman, Law Clerk
WSBA NO: 9100472

DICKSON FROHLICH

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