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

In Re the Estate of:

GARY RAY BLAKEY

REPLY 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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I. REPLY

1. Respondent has conceded that there was no basis for the trial court to impose attorney's fees other than RCW 11.96A.150.

In his Opening Brief, Mr. Foris discussed all potential sources of the trial court's authority to impose attorney's fees in this case.¹ Mr. Foris discussed, CR 11, RCW 2.28.010, RCW 4.84.185, RCW 7.21.050, and RCW 11.96A.150. In its Response Brief, Respondent discusses only attorney's fees awarded under RCW 11.96A.150.²

Where a party fails to respond to an argument on appeal, that party is deemed to have conceded the issue.³

By not discussing any authority to impose attorney's fees other than other than RCW 11.96A.150, Respondent has conceded that the trial court did not impose the attorney's fees under any other statute.

2. Respondent mischaracterizes attorneys fees awarded as a sanction as "relief" a party is entitled to.

Citing *Hos Bros. Bulldozing v. Hugh S. Ferguson Co.*,⁴

Respondent argues,

[A] trial court has discretion to award any relief to which a party may be entitled. "Except in the case of a default judgment, every final judgment may grant the relief to which the prevailing party is entitled, *even if that party has*

¹ Appellant's Opening Brief, p. 15-29.

² Respondent's Brief, p. 8-12.

³ See, e.g. *State v. Ward*, 125 Wn.App. 138, 144, 104 P.3d 61 (2005).

⁴ 8 Wn.App. 769, 773, 508 P.2d 1377, 1380 (1973), citing CR 54(c).

not demanded such relief in his pleadings.”⁵

Respondent improperly confuses attorney’s fees awarded as sanctions with relief sought via a civil complaint. A “sanction” is “a penalty or coercive measure that results from a failure to comply with a law, rule, or order.”⁶ “The purposes of sanctions orders are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctions should include a compensation award. However, we caution that the **sanctions rules are not ‘fee shifting’ rules.**”⁷

In *Hos Bros Bulldozing*, the court was discussing whether the trial court had erred in awarding the appellant a higher dollar amount of attorney’s fees than had been prayed for in the complaint.⁸ *Hos Bros. Bulldozing* was an action to foreclose on a materialman’s lien.⁹ *Hos. Bros. Bulldozing* prevailed and the trial court awarded *Hos. Bros. Bulldozing* \$4,000 in attorney’s fees even though the original complaint had only asked for \$1,500 in attorney’s fees.¹⁰ In analyzing the propriety of the trial court’s award of damages, the Court of Appeals reasoned,

⁵ Respondent’s Brief, p. 8, emphasis in original.

⁶ Black’s Law Dictionary, Seventh Edition, 1999, p. 1341.

⁷ *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054, 1085 (1993) (internal citations omitted)(emphasis added).

⁸ *Hos Bros. Bulldozing*, 8 Wn.App. at 773, 508 P.2d 1377.

⁹ *Hos Bros. Bulldozing*, 8 Wn.App. at 770, 508 P.2d 1377.

¹⁰ *Hos Bros. Bulldozing*, 8 Wn.App. at 771, 773, 508 P.2d 1377.

RCW 60.04.130, applicable to the foreclosure of materialman's liens, provides in part:

The court may allow to the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for filing or recording the claim, and a reasonable attorney's fee in the superior court . . .

It is clear that, under this statute, the trial court had the power to award attorney's fees to the respondent. *Swenson v. Lowe*, 5 Wn.App. 186, 486 P.2d 1120 (1971). Appellant's primary contention is that the award of an attorney's fee of \$4,000 on the judgment of \$14,904 is excessive and constitutes an abuse of the trial court's discretion. He argues that respondent should be limited to a fee of \$1,500, the amount prayed for in his complaint. We disagree. Except in the case of a default judgment, every final judgment may grant the relief to which the prevailing party is entitled, even if that party has not demanded such relief in his pleadings. CR 54(c). But see *Ware v. Phillips*, 77 Wn.2d 879, 468 P.2d 444 (1970). Moreover, respondent's complaint did ask for 'such other and further relief as to the court may seem just and proper.'¹¹

The *Hos Bros. Bulldozing* court found that a specific statute (RCW 60.04.130) applied in that case to authorize the court to award attorney's fees and that Hos. Bros. Bulldozing *had actually requested* "such other and further relief as to the court may seem just and proper" in their complaint.

Hos. Bros. Bulldozing is factually distinguishable from this case. Unlike the prevailing party in *Hos Bros. Bulldozing*, Respondent in this

case did not request attorney's fees in any complaint, nor did Respondent ever make a detailed showing to the court of exactly what conduct Appellant engaged in that Respondent believed was frivolous or hostile or why Respondent was entitled to have its attorney's fees paid by Appellant.

The trial court ordered Appellant to pay Respondent's attorney's fees as punishment for Appellant's "frivolous and hostile" actions. The attorney fees were *not* ordered to be paid as part of the relief pleaded and proved to the court by Respondents.

3. Respondent mischaracterizes the issue raised by Appellant in this appeal.

- a. Appellant does not argue that ordering Mr. Foris to pay Mr. Divine's attorney's fees was an abuse of the trial court's discretion because the facts of the case do not support it.*

Respondent tries mightily to characterize the issue in this appeal as whether Appellant's conduct warranted sanctions under RCW 11.96A.150(1). Respondent discusses the factual history of the case and asserts that this was a basis for sanctions imposed under RCW 11.96A.150(1) but fails to address the law that a court may not impose sanctions under its inherent powers where court a court rule adequately addresses the problem.¹²

¹¹ *Hos Bros. Bulldozing, Inc. v. Hugh S. Ferguson Co.*, 8 Wn. App. 769, 773, 508 P.2d 1377, 1380 (1973)

¹² *Fisons Corp.*, 122 Wn.2d at 340, 858 P.2d 1054, citing *Chambers v. NASCO, Inc.*, 501

Again, Respondent’s argument relies on *Hos Bros. Bulldozing* and the holding in that case that under CR 54(c) a trial court may “grant the relief to which the prevailing party is entitled, even if that party has not demanded such relief in his pleadings.”¹³

Not only is *Hos Bros. Bulldozing* factually distinguishable as discussed above, but the legal issues in this case are completely different than those raised in *Hos. Bros. Bulldozing*. It is true that under CR 54(c) final judgments must grant the relief a party is entitled to, even if that party has not requested that particular relief in its pleading.¹⁴ But CR 54(c) is inapplicable to the issues raised in this appeal.

Appellant is not objecting to the award of attorney’s fees on the basis that the Respondent did not ask for the attorney’s fees in its pleadings. Appellant’s argument is that *there was not a valid legal basis to sustain the trial court's award of attorney's fees* to the Respondent, not that the trial court erred by awarding relief the Respondent did not seek. Respondent mischaracterizes and fails to respond to the true issue raised by Appellant, that the trial court could not properly impose payment of attorney fees as a sanction for filing frivolous motions in the absence of a

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.).

¹³ Respondent’s Brief, p. 8, citing *Hos Bros. Bulldozing v. Hugh S. Ferguson Cp.*, 8 Wn.App. 769, 773, 508 P.2d 1377, 1380 (1973).

CR 11 motion for sanctions.

b. Appellant does not argue that imposing the sanction of Mr. Foris having to pay Mr. Divine's attorney's fees was improper because Mr. Divine motion and the trial court's order did not cite RCW 11.96A.150 as the basis for the attorney fee sanction.

At page 8 of its Response Brief, Respondent mischaracterizes Appellant's argument on appeal as, "because Mr. Devine's brief before the trial court, and the trial court's order did not reference RCW 11.96A.150, the statute 'cannot properly be a basis for the court to award attorney fees...in this case.'"¹⁵ This is not Appellant's argument at all.

Appellant's argument, as clearly set forth in Appellant's Opening Brief, is that the trial court abused its discretion in awarding attorney's fees as a sanction under RCW 11.96A.150 for frivolous conduct without a motion for sanctions under CR 11 being brought first.¹⁶ While RCW 11.96A.150 gives a trial court authority to award attorney's fees as sanctions in a TEDRA action, "the inherent power of the court should not be resorted to where [court] rules adequately address the problem,"¹⁷ and, when contemplating sanctions, the court should apply the court rule that

¹⁴ CR 54(c).

¹⁵ Respondent's Brief, p. 8, citing Opening Brief of Appellant, p. 25.9

¹⁶ Appellant's Opening Brief, p. 19-21, 25-27

¹⁷ *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.).

most specifically addresses the misconduct alleged in the specific case.¹⁸

As discussed further below, it was improper for the court to impose attorney's fees as sanctions for "frivolous" litigation in the absence of a CR 11 motion.

4. The law prohibits a trial ordering payment of attorney's fees as a sanction under RCW 11.96A.150 for "frivolous and hostile" actions and pleadings without a CR 11 motion for sanctions first being filed.

The trial court imposed sanctions on Appellant as *punishment* for what Respondent characterized were Appellant's "frivolous and hostile actions."¹⁹ In other words, the attorney fees were not ordered to be paid as any part of the relief sought in a complaint, the attorney's fees were ordered to be paid specifically as a *sanction*. Respondent purposefully ignores CR 11 and the law that when contemplating sanctions, the court is required to apply the court rule that most specifically addresses the misconduct alleged in the specific case²⁰ and should not resort to the inherent power of the court to sanction where court rules adequately address the problem.²¹

¹⁸ See *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339–40, 858 P.2d 1054, 1076 (1993).

¹⁹ CP 455, 581.

²⁰ See *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339–40, 858 P.2d 1054, 1076 (1993).

²¹ *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.).

As discussed in Appellant’s Opening Brief, the purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system.²² Clearly CR 11 applies to actions and pleadings filed by an attorney that another attorney believes are “frivolous and hostile.” However, instead of bringing a CR 11 motion for sanctions, Respondent simply requested attorney’s fees be awarded and relied on the trial court’s inherent power to impose sanctions under RCW 11.96A.150(1). Imposing attorney’s fees as a sanction for filing frivolous and hostile pleadings without a CR 11 motion being filed was an abuse of the trial court’s discretion. If Respondent felt that Appellant’s pleadings and actions were frivolous and hostile, Respondent should have followed the applicable court rule and filed a motion for sanctions under CR 11. In the absence of the requisite CR 11 motion, it was an abuse of discretion for the trial court to order Appellant to pay Respondent’s attorney’s fees under RCW 11.96A.150(1) as a sanction for frivolous and hostile behavior.

Respondent’s assertions at page 10 of its Response Brief that, “no case law stands for the proposition that a court cannot award attorney fees under RCW 11.96A.150 as a result from responding to frivolous or harassing motions or that RCW 11.96A.150 is not the appropriate avenue

²² *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); *Skimming v. Boxer*, 119 Wn.App. 748, 754, 82 P.3d 707 (2004).

for seeking such relief”²³ are simply incorrect.

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.²⁴ In the absence of a CR 11 motion, imposition of attorney’s fees as sanctions for “frivolous” actions in this case was manifestly unreasonable because the requisite procedure had not been followed to impose sanctions for “frivolous” conduct. The trial court abused its discretion in imposing attorney’s fees as sanctions without a CR 11 motion being filed.

5. Appellant may challenge the order requiring Appellant to pay Respondent’s attorney fees for the first time on appeal.

Respondent claims that Appellant cannot challenge the imposition of the sanction that he pay Respondent’s attorney’s fees on appeal because he did not challenge it in the trial court.²⁵ First, as discussed above, Appellant is not objecting to the award of attorney’s fees on the basis that the Respondent did not ask for the attorney’s fees in its pleadings or

²³ Respondent’s Brief, p. 10.

²⁴ *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002).

²⁵ Respondent’s Brief, p. 12-13.

identify the specific basis for those fees. Appellant’s argument is that *there was not a valid legal basis to sustain the trial court's award of attorney’s fees* to the Respondent, not that the trial court erred by awarding relief not sought by Respondent.

Second, Appellant may raise the CR 11 challenge to the imposition of attorney’s fees because the failure to follow the required CR 11 procedure violated Appellant’s due process rights.

“An established rule of appellate review in Washington is that a party generally waives the right to appeal an error unless there is an objection at trial. RAP 2.5(a).”²⁶

However, while appellate courts normally decline to review issues raised for the first time on appeal, RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealable as a matter of right.²⁷ Under RAP 2.5(a)(3), an appellant may raise for the first time on appeal a claim of manifest error affecting a constitutional right.²⁸ RAP 2.5(a)'s use of the term “may” indicates that it is a discretionary decision to refuse review.²⁹ “This exception strikes a careful policy balance [because] a procedural rule should not prevent an appellate court from

²⁶ *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

²⁷ *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015); *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

²⁸ *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

remediating errors that result in serious injustice to an accused.”³⁰

“Whether RAP 2.5(a)(3) applies is based on a two-part test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is ‘manifest.’”³¹

“‘An error is manifest when it has practical and identifiable consequences in the trial of the case.’”³²

As discussed at pages 17-19 of Appellant’s Opening Brief, proper procedure on a CR 11 motion for sanctions requires observing the due process requirements of notice and an opportunity to be heard as well as timely notification of the pending motion and the opportunity to correct the issue. The failure of Respondent to bring a CR 11 motion deprived Appellant of his due process rights to notice, opportunity to be heard, *and the opportunity to mitigate the sanction.*³³

The error of the trial court in failing to require Respondent to bring a motion pursuant to CR 11 before the court imposed sanctions for “frivolous” litigation is both constitutional and manifest. It violated

²⁹ *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011); *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005).

³⁰ *Kalebaugh*, 183 Wn.2d at 583, 355 P.3d 253.

³¹ *State v. Ridgley*, 141 Wn.App. 771, 779, 174 P.3d 105 (2007) (internal quotation marks omitted) (*quoting State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007)).

³² *Ridgley*, 141 Wn.App. at 779, 174 P.3d 105 (*quoting State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)); *see also McFarland*, 127 Wn.2d at 333, 899 P.2d 1251 (“The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights.”).

³³ *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994)

Appellant's constitutional due process rights and it was manifest because Mr. Foris was required to pay over \$30,000 in attorney's fees. Requiring Mr. Foris to pay Mr. Divine over \$30,000 in attorney's fees is a very identifiable consequence of failing to require Respondent to file a CR 11 motion and protect Appellant's constitutional due process rights.

The trial court's abuse of discretion in imposing sanctions for frivolous litigation without requiring Respondent to first bring a CR 11 motion is an error of constitutional magnitude that Appellant may raise for the first time on appeal.

6. The trial court abused its discretion in ordering Appellant to pay for the transcription of every hearing below.

a. To review the issues raised in this appeal, this court needed a transcript of the September 27, 2019 hearing only.

As Respondent points out at page 12 of its Response Brief, "Mr. Foris's [sic] challenge to fees is procedural." Respondent also correctly notes on pages 8, 10, and 14 of his Response Brief that Appellant has not challenged any of the trial court's findings of fact making those findings verities on appeal.

Respondent makes Appellant's argument for him. Appellant's challenge to the award of attorney's fees to Mr. Divine as a sanction of Mr. Foris is purely procedural, specifically, the trial court abused its

discretion and violated Mr. Foris' due process rights when it ordered him to pay Mr. Divine's attorney's fees as sanction for frivolous litigation. Appellant does not challenge any of the trial court's *factual* findings supporting the imposition of sanctions, so it is unnecessary to burden this court with transcripts for the hearings that support those findings.

As discussed in section 2 of Appellant's Opening Brief, Mr. Foris ordered transcription of the only relevant hearing to the issues he raised on appeal and told the court and Mr. Divine in no uncertain terms that all other hearings had nothing to do with the appeal.³⁴ 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, 2019.³⁵ 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.³⁶

The only record this court needs to review the issues raised by Mr. Foris on appeal are the absence of a CR 11 motion and the fact the trial court imposed sanctions for frivolous litigation without requiring a CR 11

³⁴ CP 741-744

³⁵ RP 48-52, 1-17-2020.

³⁶ RP 49-50, 1-17-2020.

motion be filed. The transcripts of all the other hearings are irrelevant to the issues raised by Appellant because it is unnecessary to search the record to determine whether the record supports the trial court's unchallenged findings of fact.³⁷

b. *Appellant does not concede that he "violated" RAP 9.2(c).*

At page 15 of his Response Brief, Respondent claims that Appellant has conceded that he violated RAP 9.2(c) by not identifying what issues he would raise on appeal. This is another misrepresentation of the argument made by Appellant on appeal.

Appellant's argument to the trial court and on appeal is that RAP 9.2(c) does not require a party requesting only one hearing out of many in a proceeding to tell the trial court and opposing counsel exactly what issues were going to be raised on appeal.³⁸

More importantly, RAP 9.2(c) does not mandate that the party arranging for less than all of the verbatim report of all proceedings state in the statement of arrangements the issues the party intends to present on appeal. RAP 9.2(c) states, "If a party seeking review arranges for less than

³⁷ Generally, findings are viewed as verities, provided there is substantial evidence to support the findings. *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Halstien*, at 129, 857 P.2d 270.

³⁸ RP 52-53, 1-17-2020;

all of the verbatim report of proceedings, the party *should* include in the statement of arrangements a statement of the issues the party intends to present on review.”³⁹

Courts have interpreted “may” to be permissive language.⁴⁰

“Should” has also been interpreted as permissive language, expressing a desire or request.⁴¹ The definition of “should” is a nonemphatic request.⁴²

“Shall” creates a mandatory or imperative construction.⁴³

RAP 9.2(c) indicated a request that the issues should be identified, but does not mandate it. Respondent has cited no authority establishing that RAP 9.2(c) creates a mandatory duty, and appellate courts treat a party's failure to cite any authority as a concession that the argument lacks merit.⁴⁴

Respondent’s argument that Appellant violated RAP 9.2(c) lacks legal and factual support. The trial court abused its discretion in ordering Mr. Foris to pay for the transcription of every hearing.

³⁹ Emphasis added.

⁴⁰ *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435, 656 P.2d 1083 (1982) (holding that “[w]here a provision contains both the words ‘shall’ and ‘may,’ it is presumed that the lawmaker intended to distinguish between them, ‘shall’ being construed as mandatory and ‘may’ as permissive”).

⁴¹ *Tennant v. Roys*, 44 Wn. App. 305, 313, 722 P.2d 848 (1986) (holding that “should” and “shall” are distinguishable).

⁴² See Webster's Third New International Dictionary 2104 (2002).

⁴³ *Scannell*, 97 Wn.2d at 705.

⁴⁴ *State v. McNeair*, 88 Wn.App. 331, 340, 944 P.2d 1099(1997).

II. CONCLUSION

For the reasons stated above and in Mr. Foris' Opening Brief, 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 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 24th day of August, 2020.

Respectfully submitted,



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DICKSON FROHLICH

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