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Court of Appeals
Division II
State of Washington
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No. 54178-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

MARIALYCE ESSER

Appellant,

v

GERALD JEROME ESSER

Respondent.

BRIEF OF APPELLANT

Melissa Denton, WSBA #18503
2401 Bristol Ct. SW, # A-101
Olympia, Washington 98502
ascherdent@gmail.com
ph: 360-357-8669
Attorney For Petitioner

Kevin Hochhalter. Olympic Appeals PLLC
4570 Avery Ln SE Ste C-217
Lacey WA 98503
kevin@olympicappeals.com
ph: 360-717-5024
Attorney For Respondent

Leonard Lucenko, WSBA #32134
201 5th Avenue SE, Suite 301
Olympia, WA 98501
llucenko@olylaw.com
ph: 360-943-6747
Attorney for Respondent

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I. INTRODUCTION

I represented Marialyce Esser (Mari) in 2019 during a complex case that ended in divorce between her and her husband, Gerald Esser. This appeal relates only to CR 11 sanctions that were ordered against me in post-trial proceedings and this appeal does not involve the issues in Mari's appeal of interim and final orders in that case.

The trial court imposed CR 11 sanctions on me because I filed a Motion for Reconsideration on the 11th day after written orders had been entered instead of filing it on the 10th day. The court did not impose the sanctions because I had signed any pleading in violation of CR 11.

In ordering sanctions, the trial court said: "As to the CR 11 sanctions, that's always a difficult thing. I think that you were on notice Ms. Denton, that the case law is pretty strict. And I think that you will have to pay his attorney fees for being here today." A written judgment was then entered against me for \$2,634.50.

II. ASSIGNMENT OF ERROR

The trial court erred in awarding CR 11 sanctions with the rationale that "the case law is pretty strict". This was an error and was abuse of the

trial court's discretion because the court used CR 11 to punish me for filing a pleading late. The trial court did not state or imply that I had signed a pleading that was frivolous or without merit.

CR 11 requires signed pleadings to be "warranted by existing law or a good faith argument for the extension of existing law or the establishment of new law". CR 11 sanctions are to be imposed only when it is patently clear that a claim has absolutely no chance of success, and the fact that an argument does not prevail on its merits does not justify the chilling effect of ordering CR 11 sanctions.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Should the court award CR 11 sanctions with the result of chilling a litigant's right to counsel's vigorous advocacy?
2. Should the trial court award attorney fees under CR 11 based upon the judicial officer's understanding that published case law is "strict" and does not agree with the legal argument of counsel?
3. Should attorneys be subject to damage to their reputation and forced to personally pay the other side's legal fees because the

signed document is filed a day late and the trial court does not agree with the attorney's legal arguments about why late filing should be allowed?

IV. STATEMENT OF THE CASE

The facts relevant to the issue of CR 11 sanctions are few and are not in dispute. It is undisputed that proposed orders were served on me only one day before the presentation of orders hearing. (9/23 RP 9, CP 26-28, 59-60) The fact that technical problems in my office, and in the office of the person who tried to file for me, resulted in the Motion for Reconsideration being rejected by the court clerk's office just after 4:30 p.m. on the 10th day (CP 62-63, 83-84) was also undisputed, as was the fact that I filed the Motion for Reconsideration at opening of the court clerk's office the next day. (CP 26)

Procedural events in the case occurred in 2019 as follows:

- June 19 Four day divorce trial. (CP 7-13)
- Aug 15 The trial court made her oral ruling. (8/22 RP 3)
- Aug. 21 Opposing Counsel emailed proposed orders. (8/22 RP 9)
- Aug. 22 The Court entered final documents, orally denying my motion

for the CR 54 (f)(2) required 5 court days notice of proposed orders, stating “because parties obviously have a right to reconsider if something’s not appropriate.” (8/22 RP 15) and “And I realize that, Ms. Denton, the court is going forward with this against your, in opposition to your motion to have more time. And as I indicated, obviously you have a right to a reconsideration.” (8/22 RP 21)

Sept. 3 Mason County Court Clerk refused to allow filing of the Motion for Reconsideration after 4:30 p.m./ before 5:00 p.m. (CP 62-63, 83-84) (10th day after orders entered.)

Sept. 4 When the court clerk’s office opened, I filed Mari’s Motion for Reconsideration in person at court (CP 26) (11th day after orders entered.)

Sept. 11 Motion for Reconsideration Filed re: CR 54 (f)(2) (Regarding court denial of request to have five court days notice of proposed orders requesting reconsideration of oral ruling. No written orders ever entered.)

and

Motion for Reconsideration re: CR 59 (4), (5), (7), (8), and (9)

Filed. (Amending the prior filed Motion for Reconsideration, separately written to preserve client's right to a legitimate Motion for Reconsideration, based upon new circumstances arising after final order was entered). (CP 57 and 59)

Sept. 13 Filing of Mari's Amended Motion for Reconsideration & Motion to Allow 11th Day Filing (Including the written rationale for the rest of proposed changes to final orders as entered at presentation of orders hearing.)(CP 61)

Sept. 16 Filing of Motion for CR 11 Sanctions (CP 143-151)

Sept. 23 The Court heard argument on motions and ruled, stating: "As to the CR 11 sanctions, that's always a difficult thing. I think that you were on notice Ms. Denton, that the case law is pretty strict. And I think that you will have to pay his attorney fees for being here today. (9/23 RP 18)

and

The Order on Motion for Reconsideration Judgment and Order on Respondent's Motion for CR 11 Sanctions was entered. (CP 155)

V. ARGUMENT

A. Applicable Law and Standard of Review

The relevant part of CR 11 for this case reads:

CR 11 SIGNING AND DRAFTING OF PLEADINGS, MOTIONS,
AND LEGAL MEMORANDA: SANCTIONS

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, ...The signature of a party or of 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:...

(2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; ...

The standard of review and jurisprudence underlying CR 11

sanctions is set out succinctly in Bldg. Indus. Ass'n of Wash. V.

McCarthy, 152 Wn. App. 720, 218 P.3d 196, 208 (2009):

We review a trial court's decision to impose or deny CR 11 sanctions under the abuse of discretion standard. *Brin v. Stutzman*, 89 Wn. App. 809, 827, 951 P.2d 291 (1998). An abuse of discretion occurs only when no reasonable person would take the view that the trial court adopted. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004) (citing *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994)). 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. *Skimming*, 119 Wn. App. at 754. "The burden is on the movant to justify

the request for sanctions." Biggs, 124 Wn.2d at 202. 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." Skimming, 119 Wn. App. at 755 (citing In re Cooke, 93 Wn. App. 526, 529, 969 P.2d 127 (1999)). The fact that a complaint does not prevail on its merits is not enough. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

CR 11 does not permit sanctions for filing a document late and thus, CR 11 sanctions should not have been considered or awarded in this case at all. If the appellate court interprets "the case law is pretty strict" to mean that the act of filing a motion a day late is a violation of the rule to sign only legitimate pleadings, then CR 11 (a) (2) is the only part of CR 11 relevant to the issues in this appeal. CR 11 (a) (2) requires that the content of a signed pleading be "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law".

The trial court's award of CR 11 sanctions against me was an abuse of discretion because no reasonable person could conclude that my arguments were not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." The trial court certainly had the authority to deny my motion, but not the authority to deny my client's right to have me make this motion or to shift attorney's fees onto me because the court did

not agree with my motion.

My arguments in favor of Mari's motion were on significantly different bases than Schaefco, Inc. v. Columbia River Gorge Comm'n, 849 P. 2d 1225 (1993), which was the only case law cited by opposing counsel. This case had nothing to do with CR 11 sanctions. Shaefco related to the timeliness of filing of an appeal after a timely Motion for Reconsideration which was served late (but the late service was not objected to at trial court). Schaefco was the only case law before the trial court when sanctions were ordered. It is irrelevant to the issues and facts in this case.

My arguments in favor of the court considering the 11th day filed Motion for Reconsideration are also different from those made in any other appellate case law about late filed Motions for Reconsideration that I found in researching for this appeal. Metz v. Sarandos, 957 P. 2d 795 (1998) overturned the trial court's apparent use of the "mailbox rule" in granting an extension of three days to the ten day limitation because the Motion for Reconsideration related to an Order that had been mailed to the parties. This circumstance is very different from the arguments in this case and Metz did not have anything to do with CR 11 sanctions.

B. Good Faith Legal Arguments for Motions

CR 11 required me to sign the pleadings I filed with the court, certifying that I had legitimate reason to think the pleading was "well

grounded in fact” and was “warranted by existing law or good faith argument for the extension, modification, or reversal of existing law or the establishment of new law”. I complied with this requirement. I argued that Mari should be allowed to have her Motion for Reconsideration heard, even though it was filed when the court clerk’s office opened on the 11th day after the written order had been entered for two reasons :

1. Mari was denied due process because she was not allowed to file her Motion for Revision on the 10th day because the court closed at 4:30 p.m., before the 5 p.m. end of the business day and the proper deadline for timely filing documents at a court. The facts were established and not disputed that Mari’s Motion for Revision was served on the 10th day and would have been filed between 4:30 p.m. and 5:00 p.m. had the court clerk permitted it. (CP 62-63) Since Mari was denied the right to file on the 10th day due to the court clerk closing early and refusing to accept a filing just after 4:30 p.m. and because that court provides no means for filing between 4:30 p.m. and 5:00 p.m. (such as e-filing), I argued that Mari’s motion should have been considered timely when filed at opening of business the next day. I argued that denying Mari the opportunity to file after 4:30 p.m. was a failure of a session of the court and thus should not have been prevented or held against her. This argument was based upon CR 6 (c) :

Proceeding Not To Fail for Want of Judge or Session of Court. No proceeding in a court of justice in any action, suit, or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges or by the failure of a session of the court.

2. I argued that the court should consider the late filed Motion for Reconsideration because the requirement to file that motion was unjust. Mari had been denied due process when she was denied the right to meaningful participation in the presentation of orders after trial and the court should not have imposed the restrictions inherent in a Motion for Reconsideration upon her in lieu of proper notice and normal participation in a hearing on presentation of orders. As a remedy for this error on the court's part, the court should have heard a proper presentation of orders, including the information filed in Mari's Motions and proposed orders. The time limitation for filing a Motion for Reconsideration should not have been applied in this case because Mari had not been served proposed orders before presentation of orders required as required by CR 54 (f) (2):

No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment..." (inapplicable exceptions not listed)

The trial court denied Mari due process both by refusing her filing of her Motion for Reconsideration on the 10th day and by requiring her to file an extremely burdensome Motion for Reconsideration rather than

having the legally required notice of the proposed orders and an opportunity to participate meaningfully in presentation of orders. These arguments were clearly “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law” and thus the pleadings were not signed in violation of CR 11.

C. EXCERPT: Bryant v. Joseph Tree, Inc. 829 P. 2d 1099, 119 Wash. 2d 210 (1992)

The Bryant case is also attached in Appendix II, but the below excerpt (from pages 219-222) encapsulates Washington law on CR 11 and clearly describes why sanctions were an abuse of discretion in this case:

.....

The text of CR 11 does not explicitly require a finding that a pleading lack a factual or legal basis before the court may impose CR 11 sanctions. We must therefore look to the purpose behind CR 11 to determine if such a finding is required.

The present CR 11 was modeled after and is substantially similar to the present Federal Rule of Civil Procedure 11 (Rule 11). See *Miller v. Badgley*, 51 Wn. App. 285, 299, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988). We may thus look to federal decisions interpreting Rule 11 for guidance in construing CR 11. In *re Lasky*, 54 Wn. App. 841, 851, 776 P.2d 695 (1989); see also *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 37, 499 P.2d 869 (1972) (construing CR 24 in light of Fed. R. Civ. P. 24).

The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. See *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, U.S. , 112 L.Ed.2d

1140, 1160, 111 S.Ct. 922 (1991). Both the federal rule and CR 11 were designed to reduce "delaying tactics, procedural harassment, and mounting legal costs." 3A L. Orland, Wash. Prac., Rules Practice § 5141 (3d ed. Supp. 1991). CR 11 requires attorneys to "stop, think and investigate more carefully before serving and filing papers." See Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. 165, 192 (1983). "[R]ule 11 has raised the consciousness of lawyers to the need for a careful pre-filing investigation of the facts and inquiry into the law." Commentary, Rule 11 Revisited, 101 Harv. L. Rev. 1013, 1014 (1988).

However, the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 199. The Ninth Circuit has observed that:

Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.

Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1363-64 (9th Cir.1990). Our interpretation of CR 11 thus requires consideration of both CR 11's purpose of deterring baseless claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims.

Complaints which are "grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" are not "baseless" claims, and are therefore not the proper subject of CR 11 sanctions. The purpose behind the rule is to deter baseless filings, not filings which may have merit. The Court of Appeals therefore correctly determined

that a complaint must lack a factual or legal basis before it can become the proper subject of CR 11 sanctions.

If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. See Townsend, at 1362 (a filing may be subject to Rule 11 sanctions where it is both baseless and made without a reasonable and competent inquiry). **The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorneys fees to a prevailing party where such fees would otherwise be unavailable.** John Doe v. Spokane & Inland Empire Blood Bank, 55 Wn. App. 106, 111, 780 P.2d 853 (1989).

The reasonableness of an attorney's inquiry is evaluated by an objective standard. Miller, 51 Wn. App. at 299-300. CR 11 imposes a standard of "reasonableness under the circumstances". Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 198; see also Miller, at 301. **The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted.** See Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 199. **The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.** Spokane & Inland Empire Blood Bank, at 111 (quoting Cabell v. Petty, 810 F.2d 463, 466 (4th Cir.1987)). In making this determination, the court may consider such factors as: the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim. **(Emphasis added)**

D. Trial Court's Improper Basis for Ruling

The trial court did not make a determination that the motion/motions in this case were filed without a basis in law and/or fact. The order awarding CR 11 sanctions was an abuse of discretion because it was in violation of the clear language of CR 11 and in contravention to all established judicial interpretation of that rule. This court does not have an obligation to look beyond the trial court's articulated reasoning for her ruling to attempt to determine whether the filings I signed are or are not grounded in law or fact, because the trial court's articulated reasoning for her ruling makes it clear that she based the ruling on grounds other than those listed in CR 11. This ruling, if upheld, chills the rights of any attorney's client to make legitimate arguments to protect the client's rights.

E. The Fact That a Complaint Does Not Prevail on its Merits Is by No Means Dispositive of the Question of CR 11 Sanctions.

The trial court's rationale for ordering CR 11 sanctions was that case law is "strict" (9/23 RP 18) and does not agree with (and I would argue is distinguishable from) the result that I was advocating for on behalf of my client. The only case law that the trial court could have been referring to is the law regarding no extensions of the 10 day rule for filing a Motion for Reconsideration.

As Bryant and other case law before and after make clear, it is an

abuse of discretion to order CR 11 sanctions simply because the court is ruling against the motion or because the trial court disagrees or prior case law disagrees with the position advocated by the lawyer. CR 11 is “intended to curb abuses of the judicial system”, not for the purpose of punishing a lawyer for advocating an arguable legal position that the trial court does not agree with.

F. CR 11 Is Not a Mechanism for Providing Attorneys Fees to a Prevailing Party Where Such Fees Would Otherwise Be Unavailable.

The trial court’s statement “you will have to pay his attorney fees for being here today” (9/23 RP 18) evidences the use of CR 11 as a fee shifting mechanism. Biggs v. Vail, 876 P. 2d 448 (1994) made it clear that this is not appropriate, stating:

In deciding whether the trial court abused its discretion, we must keep in mind that "[t]he purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system". Bryant, at 219. CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings.

It was an abuse of discretion to use CR 11 sanctions to make me pay the opposing side’s fees when my good faith arguments did not persuade the court to hear a filing that was deemed filed late.

G Rule 11 Is Not Intended to Chill an Attorney's Enthusiasm or Creativity in Pursuing Factual or Legal Theories

The Motion for Reconsideration CR 59 re: CR 54 (f) (2) (CP 59) that I filed regarding the trial court's August 22nd oral denial of my request for five days advance notice of opposing counsel's proposed final documents was never ruled upon at the September 23 hearing. The CR 11 sanctions certainly effectively chilled my efforts to advocate for my client and pursue a ruling on that timely motion for reconsideration of an order that had not yet been reduced to writing and thus properly before the court when I filed it. That motion should have been ruled upon at the September 23 hearing (9/23 RP 4), but the personal punishment of sanctions awarded against me discouraged me from asking the court to rule on this timely motion. The unwarranted CR 11 sanctions were an abuse of discretion and caused a result antithetical to the purpose of CR 11 as Federal Courts, Washington's Supreme Court, and other Washington Appellate cases make very clear as noted in the Bryant case excerpt above.

VI. CONCLUSION

The Esser case was and continues to be extremely complex. The CR 11 sanctions are not complex. There was no legitimate basis for the court to order CR 11 sanctions against me for filing motions and advocating for

my client.

It is important in this case to overturn the trial court's error in improperly awarding CR 11 sanctions and the to damage to the reputation of an attorney who is properly advocating for her client. The chilling effect and the damage imposed upon me and upon my client by these this CR 11 sanction greatly outweighs the number of dollars awarded and even outweighs the high cost in time and resources for pursuing this appeal.

I ask the Washington Court of Appeals, Division II to overturn the CR 11 sanctions order against me and to clear my name as it has been wrongly besmirched.

Date: February 24, 2020

Respectfully submitted,

Melissa Denton, Appellant, WSBA # 18503

VII. APPENDIX

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Superior Court Civil Rules

RULE CR 11

SIGNING AND DRAFTING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of 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) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the 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 or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

[Originally effective March 1, 1974; amended effective January 1, 1974; September 1, 1985; September 1, 1990; September 17, 1993; October 29, 2002; September 1, 2005.]

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- 한국어서류/Korean
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- Tiếng Việt/Vietnamese



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Bryant v. Joseph Tree, Inc.

119 Wn.2d 210 (1992)

829 P.2d 1099

ELAINE J. BRYANT, ET AL, Plaintiffs, v. JOSEPH TREE, INC., ET AL, Petitioners,
MORRIS H. ROSENBERG, ET AL, Respondents.

No. 57401-4.

The Supreme Court of Washington, En Banc.

May 28, 1992.

Eugene N. Bolin, Jr., for petitioners.

Malcolm L. Edwards, Howard M. Goodfriend, Catherine W. Smith, and Edwards, Sieh,
Wiggins & Hathaway, P.S., for respondents Rosenberg and Koch.

Stephen J. Sirianni and Sirianni & Youtz, for respondent Sellers.

Gary N. Bloom, Bryan P. Harnetiaux, and Daniel E. Huntington on behalf of Washington
State Trial Lawyers Association, amicus curiae for respondents.

*213 JOHNSON, J.

This case requires review of two instances of Civil Rule 11 (CR 11) attorney sanctions. The trial court imposed CR 11 sanctions against the three respondent attorneys: Marilyn Sellers, Morris Rosenberg and Stuart Koch. The Court of Appeals reversed these sanctions and imposed CR 11 sanctions on the petitioners' attorney, Eugene Bolin, Jr. The petitioners, Joseph Tree, Inc., et al. (Joseph Tree), seek review of both of these determinations. We

affirm the Court of Appeals reversal of the sanctions imposed against the three respondents. We also affirm the Court of Appeals imposition of sanctions on Bolin.

In July 1985, Elaine Bryant filed a dissolution petition against her husband of 30 years, Fred Bryant. Mrs. Bryant obtained a restraining order preventing her husband from transferring community assets.

The Bryants later reconciled, but then separated again. Elaine Bryant commenced a new legal separation action. Marilyn Sellers acted as Mrs. Bryant's attorney. Sellers served Fred Bryant with interrogatories in order to discover the extent of the Bryants' marital community holdings. Fred Bryant refused to answer these interrogatories, citing religious reasons for his refusal.

Mrs. Bryant and Sellers then began reviewing financial statements and researching public records in an effort to determine the extent of the Bryants' assets. They discovered evidence that Fred Bryant had made numerous transfers of community real property to the various petitioners for little or no consideration. Some of these transfers were made while the restraining order was in effect. The petitioners include various corporations in which Fred Bryant has an interest; Gerald Bopp, who was Fred Bryant's attorney; corporations in which Bopp had a substantial interest or involvement; the Bryants' daughter Wendy; an irrevocable trust of which Wendy Bryant is trustee; and various business associates and church members.

Sellers and Mrs. Bryant presented this information to the family law court commissioner. They obtained an order from the commissioner authorizing Mrs. Bryant to commence an *214 action against the parties to whom Fred Bryant allegedly transferred the marital community assets.

Sellers obtained the aid of Morris Rosenberg, another lawyer in her firm, and associated Stuart Koch. The three attorneys signed and filed a complaint on behalf of both Mrs. Bryant and the Bryants' marital community. In this complaint, they sought to invalidate the transfers of property made to the petitioners by Fred Bryant. Mrs. Bryant also signed the complaint.

The petitioners presented a motion for a more definite statement in response to this complaint. A superior court judge granted their motion, ordering that Mrs. Bryant and her attorneys identify the transferred assets, designate the county in which the property was located, and provide the approximate date of each transfer.

Mrs. Bryant's attorneys then filed an amended complaint. The petitioners moved to dismiss the amended complaint, asserting that Mrs. Bryant and her attorneys had not complied with the order for a more definite statement. A second superior court judge, Judge Huggins, heard this motion and dismissed the amended complaint without prejudice.

The petitioners then moved for sanctions against Mrs. Bryant and her three attorneys, alleging they had all violated CR 11 in signing and filing the original and amended complaints. This motion came before a third superior court judge, Judge Pechman (hereinafter the trial court). The parties argued this motion in three separate hearings at which no testimony was taken. The respondents submitted a memorandum and Elaine Bryant's affidavit in opposition to the motion for sanctions. In addition, the three attorneys each submitted declarations. The trial court found that Sellers, Koch and Rosenberg had violated CR 11, but that Mrs. Bryant had not.

The court also found that:

The drafting of the complaints, as well as the supporting data supplied by [Elaine Bryant's] Attorneys, was insufficient for the Court to make any determination as to the underlying merits of the cause of action.

*215 Clerk's Papers, at 677. The petitioners submitted a fee request for almost \$90,000 in connection with the two motions and the sanctions request. The trial court awarded the petitioners \$40,000 in sanctions against Mrs. Bryant's lawyers: \$15,000 each against Rosenberg and Koch, and \$10,000 against Sellers.

One month after the trial court entered its order imposing CR 11 sanctions, Elaine and Fred Bryant obtained a decree of legal separation. Elaine Bryant was awarded all of the marital community's remaining assets and Fred Bryant was awarded all of the community's liabilities. Eugene Bolin, Jr., represented Fred Bryant in this action.

Rosenberg and Koch retained attorney Malcolm Edwards and appealed the CR 11 sanctions to the Court of Appeals. The petitioners cross-appealed the trial court's determination that Elaine Bryant did not violate CR 11. As a result, Edwards also agreed to represent Elaine Bryant in the appeal. Each of the three clients consented in writing to this joint representation. Sellers retained separate counsel and joined in the appeal.

On the day Joseph Tree's respondents' brief was due in the Court of Appeals, Bolin filed on Joseph Tree's behalf a 2-volume motion for the "immediate disqualification of Malcolm Edwards and Edwards & Barbieri from further participation in the instant appeal". Bolin also requested that independent counsel be appointed for the marital community because

the appeal would create "additional liability" for the marital community. Bolin alleged in his motion that a conflict of interest precluded Edwards' joint representation of Rosenberg, Koch, Mrs. Bryant and the marital community. According to Bolin, Rosenberg's and Koch's strategy on appeal was to blame Elaine Bryant for any deficiencies in their pleadings. Bolin asserted that "Rosenberg and Koch are now deliberately aiding [Joseph Tree]" in its argument that the trial court erred in not sanctioning Elaine Bryant.

The Court of Appeals commissioner found that Edwards had complied with RPC 1.7, the rule which addresses when *216 an attorney may or may not represent multiple clients in the same action. The commissioner also stated in his order:

It does not appear that a cross appeal has been filed by [Joseph Tree] relating to the marital community of Elaine J. Bryant and her husband....

The commissioner denied without prejudice Bolin's motion to disqualify Edwards and his law firm, thus allowing Bolin to renew his motion upon filing Joseph Tree's cross appellants' brief. The commissioner denied the respondents' request for sanctions against Bolin for filing the motion. Bolin requested and was granted permission to remove any materials he deemed appropriate from the record relating to his motion to disqualify. Bolin removed several hundred pages of documents from the record. These documents made reference to an unrelated confidential settlement agreement between the Bryants and four attorneys who are unrelated to this action.

Bolin later filed a brief on Joseph Tree's behalf which contained a cross appeal against Mrs. Bryant, but not against the Bryants' marital community. In response, Rosenberg and Koch requested in their reply brief that the Court of Appeals award them all of their fees on appeal under CR 11. They specifically cited the motion to disqualify as meriting sanctions under CR 11. Reply Brief of Appellant, at 12.

The Court of Appeals reversed the CR 11 sanctions imposed against Sellers, Rosenberg and Koch. The court determined that the trial court erred in imposing CR 11 sanctions without a finding that the complaints lacked a factual and legal basis. After reviewing the record, the court determined the complaints did have both a factual and legal basis, and were thus not the proper subject of CR 11 sanctions. The court also affirmed the trial court's decision not to impose sanctions against Elaine Bryant.

In addition, the Court of Appeals imposed CR 11 sanctions against Bolin for filing the motion to disqualify Edwards and *217 his law firm. The court determined that the motion lacked a factual and legal basis, especially due to the fact that Bolin never filed a cross

appeal against the marital community. The court awarded Rosenberg and Koch \$2,980.70 in attorneys fees in connection with the motion to disqualify. The Court of Appeals denied Bolin's motion for reconsideration.

The petitioners seek review of the Court of Appeals reversal of sanctions against the respondents and the court's imposition of sanctions against Bolin.

CR 11 provides, in part, that:

Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address.... The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11 addresses two types of problems relating to pleadings, motions and legal memoranda: filings which are not "well grounded in fact and ... warranted by ... law" and filings interposed for "any improper purpose". At issue in this case is CR 11's not "well grounded in fact and ... warranted by ... law" provision.

*218 We first analyze whether the Court of Appeals erred in reversing the trial court's imposition of sanctions against the respondents. The Court of Appeals applied the abuse of discretion standard in its review of this case. See *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 115, 786 P.2d 829, 791 P.2d 537 (1990). The parties do not place the standard of review at issue.[1] We therefore assume, without deciding, that the proper standard of review is abuse of discretion.

The respondents signed and filed on their client's behalf a complaint and an amended complaint. CR 11 imposes requirements on attorneys who sign and file any "pleading, motion, or legal memorandum". A complaint is a "pleading". An attorney who signs and files a complaint must therefore comply with CR 11's requirements.

The petitioners first argue that the Court of Appeals erred in determining that a complaint may not be the subject of CR 11 sanctions without a finding that the complaint lacked a factual or legal basis. The petitioners maintain that CR 11 sanctions may be imposed against an attorney^[2] regardless of whether or not the attorney's complaint has a factual and legal basis. The text of CR 11 does not explicitly require a finding that a pleading lack a factual or legal basis before the court may impose CR 11 sanctions. We must therefore look to the purpose behind CR 11 to determine if such a finding is required.

[1] The present CR 11 was modeled after and is substantially similar to the present Federal Rule of Civil Procedure 11 (Rule 11). See *Miller v. Badgley*, 51 Wn. App. 285, 299, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988). We may thus look to federal decisions interpreting Rule 11 for *219 guidance in construing CR 11. In *re Lasky*, 54 Wn. App. 841, 851, 776 P.2d 695 (1989); see also *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 37, 499 P.2d 869 (1972) (construing CR 24 in light of Fed. R. Civ. P. 24).

[2] The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. See *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, ___ U.S. ___, 112 L. Ed. 2d 1140, 1160, 111 S. Ct. 922 (1991). Both the federal rule and CR 11 were designed to reduce "delaying tactics, procedural harassment, and mounting legal costs." 3A L. Orland, *Wash. Prac., Rules Practice* § 5141 (3d ed. Supp. 1991). CR 11 requires attorneys to "stop, think and investigate more carefully before serving and filing papers." See Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. 165, 192 (1983). "[R]ule 11 has raised the consciousness of lawyers to the need for a careful prefiling investigation of the facts and inquiry into the law." *Commentary, Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1014 (1988).

However, the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 199. The Ninth Circuit has observed that:

Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to

produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.

Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1363-64 (9th Cir.1990). Our interpretation of CR 11 thus requires consideration of both CR 11's purpose of deterring baseless claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims.

[3, 4] Complaints which are "grounded in fact" and "warranted by existing law or a good faith argument for the *220 extension, modification, or reversal of existing law" are not "baseless" claims, and are therefore not the proper subject of CR 11 sanctions. The purpose behind the rule is to deter baseless filings, not filings which may have merit. The Court of Appeals therefore correctly determined that a complaint must lack a factual or legal basis before it can become the proper subject of CR 11 sanctions.

If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. See Townsend, at 1362 (a filing may be subject to Rule 11 sanctions where it is both baseless and made without a reasonable and competent inquiry). The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorneys fees to a prevailing party where such fees would otherwise be unavailable. John Doe v. Spokane & Inland Empire Blood Bank, 55 Wn. App. 106, 111, 780 P.2d 853 (1989).

[5, 6] The reasonableness of an attorney's inquiry is evaluated by an objective standard. Miller, 51 Wn. App. at 299-300. CR 11 imposes a standard of "reasonableness under the circumstances". Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 198; see also Miller, at 301. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted. See Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 199. The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified. Spokane & Inland Empire Blood Bank, at 111 (quoting Cabell v. Petty, 810 F.2d 463, 466 (4th Cir.1987)). In making this determination, the court may consider such factors as:

the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether *221 a signing attorney accepted a case from another member

of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.

Miller, at 301-02 (citing *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 875-76 (5th Cir.1988)); see also Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 199. However, an attorney who accepts a case from another member of the bar must acquire knowledge of facts sufficient to enable him or her to certify that the complaint is well grounded in fact. *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 558 (9th Cir.1986).

The Court of Appeals in this case determined that the complaints did not lack a factual or legal basis, and thus were not the proper subject of CR 11 sanctions. The court noted that Elaine Bryant's affidavit, in particular, provided the factual basis for the allegations that the petitioners received property from Fred Bryant which belonged to the marital community. The court determined that the complaints had legal merit since they asserted an equitable claim for restitution of the properties and a claim that Joseph Tree held these properties in a constructive trust for the benefit of the marital community.

[7] The petitioners have not assigned error to the Court of Appeals determination that the complaints had both a factual and a legal basis. The petitioners instead maintain that Elaine Bryant's affidavit and the declarations of her three attorneys should not have been considered by the court for providing the factual basis behind the complaints. They argue that the court should not allow an attorney to supplement the factual record at a CR 11 hearing. Instead, they argue that a court should determine from the complaint alone whether an adequate factual basis existed for the filing. The petitioners rely on *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194 (7th Cir.1985) for this proposition. In *Rodgers*, the Seventh Circuit held that a court need not allow an attorney to supplement the factual record in a Rule 11 proceeding where the attorney's complaint lacked a *222 legal basis under any set of facts. This case is distinguishable from *Rodgers*. Unlike the plaintiff in *Rodgers*, Elaine Bryant and her attorneys did have a legal basis for their complaints.

Moreover, Washington's notice pleading rule does not require parties to state all of the facts supporting their claims in their initial complaint. CR 8(a) provides that: "A pleading which sets forth a claim for relief ... shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief ...". (Italics ours.) The notice pleading rule contemplates that discovery will provide parties with the opportunity to learn more detailed information about the nature of a complaint. A court should thus be reluctant to impose sanctions for factual errors or deficiencies in a complaint before there has been an opportunity for discovery. *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir.1987) (citing *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir.1987)).

[8] The petitioners next assert that the Court of Appeals erred when it reviewed the record to determine whether the complaints had a factual and legal basis rather than remanding the matter for the trial court's determination. The trial court in this case failed to enter any finding regarding whether or not the complaints lacked a factual or legal basis. Because of this, the appellate court could not exercise any degree of deference to a trial court's finding, as no such finding even existed. In such situations, instead of remanding a matter to the trial court for a factual finding, an appellate court may independently review evidence consisting of written documents and make the required findings. See *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 887, 658 P.2d 1267, review denied, 99 Wn.2d 1016 (1983). The trial court in this case did not hear testimony, only argument from counsel. The documents in the record therefore provide the only evidence regarding whether the complaints had a factual and legal basis. The trial court was thus in no better position to evaluate the evidence than the appellate court. We conclude the Court of Appeals did not *223 err in reviewing the documents in the record in order to determine if the complaints had a factual and legal basis.

[9] We affirm the Court of Appeals reversal of the CR 11 sanctions against the respondents. If the respondents violated a court rule, they violated CR 12(e), not CR 11. CR 12(e) requires attorneys to comply with a court's order for a more definite statement. Judge Huggins imposed the proper sanction under this rule when she dismissed the amended complaint without prejudice. See CR 12(e). CR 11 sanctions are not appropriate where other court rules more properly apply. See *Clipse v. State*, 61 Wn. App. 94, 808 P.2d 777 (1991) (misleading discovery disclosures may not be sanctioned under CR 11, but can be sanctioned under CR 26(g)'s provisions which govern discovery requests).

[10] We now turn to the Court of Appeals imposition of CR 11 sanctions against Bolin, the petitioners' attorney. The first question is whether the Court of Appeals had the authority to impose sanctions pursuant to CR 11. CR 11 is a civil rule applicable to attorneys who sign and file pleadings in the superior courts of this state. RAP 18.7 provides, however, that: "Each paper filed pursuant to [the Rules of Appellate Procedure] should be dated and signed by an attorney or party as provided in CR 11 ...". Under CR 11, an attorney's signature constitutes a "certificate" that "to the best of the ... attorney's knowledge, information, and belief, formed after reasonable inquiry [the attorney's document] is well grounded in fact and is warranted by existing law ...". Pursuant to RAP 18.7, CR 11's certification requirement therefore applies to proceedings in the appellate courts, as well as in the superior courts. See *Rhinehart v. Seattle Times, Inc.*, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990).

The petitioners assert that the Court of Appeals erred in imposing CR 11 sanctions against Bolin because the court ruled without the benefit of having the entire record before it. Bolin has resubmitted the documents he removed from the record, and obtained an order sealing them. We have reviewed these documents and find that they do not support *224 the contention that the Court of Appeals erred when it sanctioned Bolin. The documents in the sealed record have no bearing on the question of whether Edwards' joint representation of Rosenberg, Koch and Elaine Bryant created a conflict of interest. Instead, the documents in the sealed record make reference to a confidential settlement agreement unrelated to the present proceeding.

The petitioners also maintain that the Court of Appeals erred in sanctioning Bolin because Rosenberg and Koch never brought a motion to modify the commissioner's denial of sanctions. The commissioner's order, however, can be construed as leaving the question of sanctions open until after Bolin filed a brief on Joseph Tree's behalf.

[11, 12] Finally, Bolin argues that the Court of Appeals sanctioned him without affording him adequate due process rights. The federal advisory committee note to Rule 11 provides that CR 11 procedures "obviously must comport with due process requirements." Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 201. Due process requires notice and an opportunity to be heard before a governmental deprivation of a property interest. *Tom Growney Equip., Inc. v. Shelley Irrig. Dev., Inc.*, 834 F.2d 833, 835 (9th Cir.1987) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)). A party seeking CR 11 sanctions should therefore give notice to the court and the offending party promptly upon discovering a basis for doing so. Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 200. Rosenberg and Koch requested in their appellants' reply brief that CR 11 sanctions be imposed against Bolin. They specifically cited Bolin's motion to disqualify Edwards and his law firm as meriting the imposition of CR 11 sanctions. The respondents therefore provided Bolin with notice prior to oral argument that they were seeking CR 11 sanctions. At oral argument, Bolin had the opportunity to be heard on this issue. Bolin's due process rights were therefore not violated. We affirm the Court of Appeals imposition of sanctions against Bolin.

*225 [13] The Court of Appeals imposed monetary sanctions against Bolin in the amount of \$2,980.70. We note that in fashioning an appropriate sanction, "the least severe sanctions adequate to serve the purpose should be imposed." *Schwarzer, Sanctions Under the New Federal Rule 11 A Closer Look*, 104 F.R.D. 181, 201 (1985). Bolin has not assigned error to the monetary amount imposed by the Court of Appeals.

The respondents, however, seek review as to the amount of these sanctions. They contend they should have been awarded all of their attorneys fees incurred before the Court of Appeals. They argue that the petitioners violated CR 11 and RCW 4.84.185 by presenting a meritless defense of the sanctions originally imposed by the trial court. The Court of Appeals correctly denied the respondents' request, as the proceeding before that court involved unsettled questions regarding CR 11's interpretation. The respondents' request for the fees and costs incurred in this proceeding is denied for the same reason.

The respondents also request that the court sanction Bolin under RAP 18.9 for a misuse of the Rules of Appellate Procedure. They assert that Bolin misused the rules when he withdrew hundreds of pages from the record and then reinserted these pages for this court's review of the case. The respondents' request is denied because Bolin removed these documents pursuant to permission granted by the Court of Appeals commissioner.

DORE, C.J., and UTTER, DOLLIVER, SMITH, and GUY, JJ., concur. ANDERSEN, J. (concurring in part, dissenting in part)

This is the first opportunity this court has had to construe the sanctions provision of CR 11. As the case before us amply demonstrates, this court's guidance regarding the proper interpretation and application of the rule is sorely *226 needed by practitioners, trial judges and appellate courts alike. Unfortunately, to my view, the majority opinion does not adequately provide the necessary guidance, hence this separate opinion.

In his treatise on the subject, Gregory Joseph astutely describes the sanctions quandary:

Sanctions are a sensitive subject. Lawyers are both proponents and victims. Judges are both umpires and advocates. Parties are perpetrators, conspirators and innocent bystanders. Standards are uncertain, but if a violation is found, sanctions can be mandatory. All the players are in place, but their roles are not altogether familiar. The rules are uncertain, and all but the judge are at risk. On the subject of sanctions the bench and bar are decidedly ambivalent. It is a rare trial lawyer who considers himself outrageous in his litigation practices. But he sees other lawyers, especially opponents, often behaving outrageously. That they should suffer for their misbehavior is more than fair it can be turned into a litigation advantage. Uncertain standards and uneven enforcement, however, give everyone reason to pause. The lawyer aggrieved on one occasion may be the target next time. The line separating zeal from rashness is not always bright. Even under objective tests, sanctions decisions often rest on largely subjective judicial assessments, including assessments of the merits before the merits have been litigated and of tactical decisions

after tactics have misfired. Not infrequently, it is only after the fact that behavior seems so plainly misbehavior.

(Footnote omitted.) G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 1 (1989).

The majority here sought to address some of the problems so aptly described by Mr. Joseph and I agree with most of the legal principles set forth in the majority opinion. However, and again this is my own view, the majority adds to the confusion on the subject by not applying the very principles it enunciates. I would seek to clarify the law to the extent possible, and would hold as follows:

First, the majority opinion correctly declares CR 11 to be an extraordinary remedy and that its "sanctions are not appropriate where other court rules more properly apply." Majority opinion, at 223. For that reason, I would hold that the sanctions imposed against these attorneys in both the *227 Superior Court and the Court of Appeals were inappropriate. In the case of attorneys Sellers, Koch and Rosenberg, CR 12(e) (allowing for dismissal of the complaint in this case) is the more specific, more appropriate rule. In the case of attorney Bolin, RAP 18.9(a) (providing for sanctions on appeal) is the more specific, more appropriate rule. I also would hold that the sanctions section of CR 11 is not made a part of the appellate court rules by the reference to the rule contained in RAP 18.7. The factual hearing required before CR 11 sanctions may be imposed makes application of the rule cumbersome in the appellate courts. RAP 18.9(a) is better tailored to the function of appellate courts, essentially serves the same purpose as CR 11 and could have been considered for application in this case.

Second, I would establish and apply a standard of review for CR 11 cases. The majority opinion declines to enunciate a standard of review. See majority opinion, at 218. This leaves trial and appellate courts without the guidance they are entitled to have from this court. To my view, the abuse of discretion standard is the standard of review that should be applied in CR 11 cases. See, e.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990) (establishing a deferential standard in construing the federal counterpart to CR 11); *In re Lasky*, 54 Wn. App. 841, 852, 776 P.2d 695 (1989); *Cooper v. Viking Ventures*, 53 Wn. App. 739, 742, 770 P.2d 659 (1989). Contrary to the majority opinion's analysis, this would mean that even where the trial court's decision rested on documentary, rather than testimonial, evidence the abuse of discretion standard would still apply. The standard should not change to de novo review because of the nature of the evidence presented to the trial court. While professing to apply the abuse of discretion standard, the majority reviews de novo both instances of sanctions in this case. With

respect to attorney Bolin, the majority additionally considered evidence not before the sanctioning court, thus going beyond both the abuse of discretion and de novo standards.

*228 Third, I believe that the certification mandated by the language of CR 11 means that the signer has read the document and has: (1) conducted a reasonable investigation into the facts that support the pleading, motion, or other paper; (2) has conducted a reasonable investigation into the law to determine that the document is supported by existing law or a good faith argument for extension, modification or reversal of existing law; and (3) has not filed the document for any improper purpose. See *G. Joseph*, at 610. I disagree with the majority's 2-prong test, because I believe the first prong (i.e., whether the pleading, motion, or other paper is legally or factually baseless) cannot be determined without determining the second prong; that is, whether, considering all of the circumstances, the attorney's investigation was reasonable. I would thus hold that the issue to be decided by the trial court in a CR 11 case is whether the investigation of the facts and the law was, indeed, reasonable under the circumstances.

Fourth, I would make it clear that CR 11 is not a fee shifting statute. Where fees are to be sought as a sanction, I would hold that due process and case law require that such notice be provided in writing at the earliest opportunity; further, in such cases I would require mitigation on the part of the party requesting sanctions. See *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 122-23, 786 P.2d 265 (1990). In the present case, attorney Bolin was given limited opportunity to present oral argument in opposition to the request for sanctions. He was not given an opportunity to present evidence or written argument. I would hold that he was thus not provided a fair hearing. That being so, he was denied due process.

In sum, I concur in the result reached by the majority opinion with respect to attorneys Sellers, Koch and Rosenberg, because the appropriate sanction was dismissal of the complaint under CR 12(e). I dissent, however, from the approval of sanctions on appeal against attorney Bolin because: (1) I do not believe CR 11 sanctions should be available on appeal; (2) even if CR 11 sanctions were available, *229 the Court of Appeals did not apply the proper standard; and (3) the denial of an opportunity to have a factual hearing and to make written response to the request for sanctions in this case did not comport with the due process requirements of timely and adequate notice and hearing.

BRACHTENBACH and DURHAM, JJ., concur with ANDERSEN, J.

Reconsideration denied July 1, 1992.

NOTES

[1] The amicus curiae, the Washington State Trial Lawyers Association (WSTLA), argues that a court's denial of CR 11 sanctions should receive abuse of discretion review, but that the imposition of sanctions should receive de novo review. As this argument is raised only by the amicus curiae, we do not address it. See *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984).

[2] The petitioners have not sought review of the determination that Elaine Bryant did not violate CR 11. As such, they have not placed at issue the requirements CR 11 imposes on parties to an action.

ASCHER & DENTON

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