

FILED

OCT 08 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY .....

No. 287343

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

BRET MICHAEL WHEELER, Respondent,

v.

SARA M. CALLOWAY, ERICK CALLOWAY and  
WWW.SARAMCALLOWAY.COM, Appellants.

---

RESPONDENT'S BRIEF

---

MICHAEL H. CHURCH  
WSBA # 24957  
MELODY D. FARANCE  
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Bret M. Wheeler

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## I. INTRODUCTION

In August 2006, Plaintiff Bret M. Wheeler entered into a partnership agreement with the Defendant Sara M. Calloway (“Defendant”) for the purpose of servicing the health insurance needs of Bret Wheeler’s existing insurance clients. The partnership was known as Packard & Wheeler Benefits Division (“PWBD”). Bret Wheeler contributed his existing clients to the partnership, as well as capital to start the business. The Defendant contributed nothing initially, except her services.

The parties operated PWBD for about one and one-half years, at which point it became apparent that their arrangement was not working. They began talks to discuss how to deal with the situation. Instead of working with her partner to reach an agreement, however, the Defendant left PWBD. One evening in February 2008, when the office was closed, she went to the office and removed all of the partnership’s client files. She also took all of the partnership’s financial information and other electronic data from PWBD’s computers, and then wiped the hard drives of the computers clean.

The Defendant then commenced her own business in direct competition with PWBD, by soliciting the partnership clients. She

continued to do business with partnership clients, even in defiance of a preliminary injunction obtained by Mr. Wheeler. She received and retained the commissions on business with partnership clients, and refused to account for them to her partner, Bret Wheeler. She excluded Bret Wheeler from the management of their partnership business.

Bret Wheeler sued the Defendant (and her husband) for, among other claims, breaches of the partnership agreement, breach of fiduciary duties, violation of the Computer Fraud & Abuse Act, conversion, and unjust enrichment. He was eventually granted summary judgment on all of these claims. In connection with the summary judgment, the trial court made specific findings that the Defendant's acts were willful and malicious. A monetary judgment establishing the amount of Mr. Wheeler's capital account in the partnership, as well as an award of attorney's fees and costs, was ultimately entered against the Defendant.

The Defendant now brings this appeal and makes several claims of error on the part of the trial court. A review of the record in this matter, however, reveals no support for her claims. The decision of the trial court should, therefore, be affirmed.

## II. FACTUAL BACKGROUND

### A. Bret Wheeler, An Experienced Insurance Agent, Formed A Partnership With Defendant.

Plaintiff Bret Wheeler is an experienced licensed insurance agent, who has practiced for more than 18 years. *CP, 426*. Since 2000, he has been doing business as Packard & Wheeler Offices. *Id.*

Prior to August 2006, Packard and Wheeler Offices had a broker relationship with Group Northwest, Inc. (“GNI”). *Id.* GNI serviced the health insurance programs of Bret Wheeler’s insurance clients. *Id.* Sara Calloway (“Defendant”) was an employee of GNI. *Id.*

On August 1, 2006, Mr. Wheeler entered into an agreement with GNI, pursuant to which Packard and Wheeler Offices assumed responsibility for providing health insurance services to Mr. Wheeler’s existing clients. *CP, 426-27*. The Agreement with GNI contained two exhibits, one listing clients that already belonged to Bret Wheeler and the other listing clients transferred by GNI to Packard and Wheeler. *Id.* Defendant left her employment with GNI to go into business with Mr. Wheeler. *CP, 427*. Mr. Wheeler and the Defendant agreed to form a partnership to service the clients listed on the Exhibits to the GNI Agreement and created the Packard & Wheeler Benefits Division (“PWBD”). *Id.*

Mr. Wheeler and the Defendant operated their business as a partnership through the remainder of 2006, through 2007, and during the first two months of 2008. *CP, 427.* They took equal draws and had equal responsibility for the monthly obligations of the partnership. *Id.*

**B. PWBD Used Computers For Its Business Activities, Including Interstate Communications.**

PWBD used computers to maintain client information, accounting information, and various other proprietary business data. *CP, 427.* PWBD also used these computers to communicate with its clients and its insurance vendors via e-mail. *CP, 427.* In addition to clients located in Washington, PWBD did business and communicated with clients in Idaho and Oregon. *CP, 427.* It also did business with insurance companies located in various states, such as Washington, Idaho, Oregon, California, Illinois, and Texas. *CP, 427.*

**C. The Defendant Surreptitiously Left PWBD, Taking Partnership Property, Without The Knowledge Or Consent Of Bret Wheeler.**

The parties operated PWBD for about one and one-half years, at which point it had become apparent that their arrangement was not working. They began talks to discuss how to deal with the situation, but instead of working to reach an agreement, the Defendant left PWBD.

During the evening hours of February 27, 2008, the Defendant snuck into the offices of PWBD, while the office was closed, and removed all – approximately 200 – client files. *CP, 271-72; 427.* In addition to removing the hard copies of the client files, the Defendant also downloaded all client information, communications, and other documents from the PWBD computers to a DVD and then wiped the information off the computers. *CP, 272; 427.* The computer files included the Outlook calendar information. *CP, 283.* She also took all the accounting records for the PWBD partnership, leaving no copy for Mr. Wheeler. *CP, 427.* After removing all the computer records from the partnership office, the Defendant never attempted to provide Mr. Wheeler with a duplicate set of the accounting records, until she was ordered to do so by the Superior Court on October 3, 2006. *CP, 279; 428; 464-65.*

After the Defendant wiped the information from the PWBD computers, Mr. Wheeler was forced to hire a computer technician to attempt to reformat the computers so they could be used. *CP, 446.* However, no usable information was ever recovered. *CP, 446; 536-38.*

**D. The Defendant Committed Other Acts In Violation Of Her Duties To Her Partner, Mr. Wheeler.**

In addition to removing all client files and electronic data from the offices of PWBD Division, the Defendant also committed other acts which

violated the duties she owed to the partnership of PWBD and her partner, Mr. Wheeler. For example, she solicited an existing employee of PWBD, Andrea Brown, and offered Ms. Brown a job with her new business. *CP*, 272. Ms. Brown resigned from PWBD and immediately began employment with the Defendant. *CP*, 218. The Defendant removed funds from the partnership's joint checking account, without the knowledge or permission of Mr. Wheeler, and deposited the money into an account for her new business. *CP*, 271-72. She notified the State of Washington that the trade name of Packard & Wheeler Benefits Division was cancelled, again without notifying and receiving permission to take that action from her partner, Mr. Wheeler. *CP*, 265. She also copied the layout and information from the PWBD website and created a website for her new business that was virtually identical. Once again, she did not receive permission from Mr. Wheeler to do so. *CP*, 274.

The Defendant also sent letters to all of the partnership clients to announce her new business. *CP*, 272. She told partnership clients that her relationship with Mr. Wheeler had terminated, that she was the writing agent for their insurance business, and that they would enjoy the same level of service with her new business as they had with the partnership. *CP*, 275-76. One such client, Pounders Jewelry, decided not to do business with the Defendant. However, when she was informed, soon

after she had taken the Pounders Jewelry file from the PWBD office, that Pounders wanted to stay with Packard & Wheeler, she did not return the client's file to Mr. Wheeler. *CP*, 276. Another client, Ziegler Family and Ziegler Building Supply, had their lawyer contact the Defendant to advise her that the Zieglers wished to leave their insurance business with Mr. Wheeler, and demand that the Zieglers' files be returned to Mr. Wheeler. The Defendant refused to return the files to Mr. Wheeler, however, until after the Superior Court entered an Order requiring her to return them. *CP*, 287; 464-65.

### **III. PROCEDURAL BACKGROUND**

Based on the facts set forth above, Bret Wheeler's Second Amended Complaint alleged causes of action for dissolution of the partnership pursuant to RCW 25.14.275, conversion, breach of fiduciary duties, tortious interference with business relations, constructive fraud, intentional misrepresentation, negligent misrepresentation, unjust enrichment, breach of the partnership agreement, and violations of the Computer Fraud and Abuse Act pursuant to 18 U.S.C. § 1030 *et seq.* *CP*, 199-208. Mr. Wheeler filed a Motion For Order Directing Clerk To Issue Prejudgment Seizure/Writ of Attachment on May 21, 2008 and, after a hearing on the matter, an Order Directing Clerk To Issue Prejudgment

Seizure/Writ of Attachment and an Order For Immediate Possession Of Property To Plaintiff were entered on June 6, 2008. *CP, 246*. Mr. Wheeler then filed a Motion For Preliminary Injunction on August 29, 2008. *CP, 408-25*. An Order Granting Motion For Preliminary Injunction and Order Re: Return Of Property were entered on October 3, 2008. *CP, 460-65*. The Order Granting Motion For Preliminary Injunction stated:

Defendant Sara M Calloway . . . is hereby enjoined from engaging in the following conduct during the pendency of this matter:

a. Soliciting business from, conducting business with, or communicating with any and all customers and/or clients of Bret Wheeler and/or the partnership known as Packard & Wheeler Benefits Division; and

b. Continuing to engage in any insurance business using confidential client information taken from Bret Wheeler and/or the partnership known as Packard & Wheeler Benefits.

*CP, 462*.

The Order For Return Of Property provided that on or before October 8, 2008, the Defendant was required to return all partnership property to Packard & Wheeler Benefits Division, including:

1. All files and records for clients previously belonging to the partnership known as Packard & Wheeler Benefits Division, including any copies of the files previously returned to Bret Wheeler pursuant to the Court's Order of June 6, 2008 which she has retained at her place of business or elsewhere, and a record and list of all clients and renewal dates.

2. All electronic data belonging to the partnership known as Packard & Wheeler Benefits Division, including all copies made of said data.

3. Any other property belonging to the partnership known as Packard & Wheeler Benefits Division, including but not limited to office and computer equipment.

*CP, 464-65.*

Upon learning that the Defendant was continuing to violate the terms of the Preliminary Injunction by refusing to return partnership files and information, Bret Wheeler filed a Motion for an Order of Contempt on October 30, 2008. Mr. Wheeler filed a Supplemental Motion For Order Of Contempt on December 24, 2008, when it was discovered that the Defendant was continuing to contact and do business with PWBD clients, in violation of the Preliminary Injunction.

Thereafter, the Calloways filed bankruptcy and the Superior Court lawsuit was stayed, until Mr. Wheeler was granted relief from the automatic stay on June 10, 2009. Subsequently, an Order Denying Defendants' Motion For Leave To Amend Answer to Second Amended Complaint and a Judgment Against Defendants For Plaintiff's Attorney Fees Expended In Connection With Defendants' Motion To Clarify were entered on June 25, 2009.

An Order Granting Plaintiff's Motion For Contempt Against Defendants For Violation Of The Preliminary Injunction was entered by the trial court on July 22, 2009. The order provided that sanctions would be entered against the Defendants for Bret Wheeler's attorney's fees and costs incurred in connection with the Supplemental Motion For Contempt, upon submission of a fee affidavit. An Order Granting Plaintiff's Attorneys Fees and a Judgment for those fees were entered by the Superior Court on August 12, 2009.

On August 21, 2009, Bret Wheeler filed a Motion For Partial Summary Judgment on his claims for breach of partnership agreement, breach of fiduciary duties, violations of the Computer Fraud & Abuse Act, conversion, and unjust enrichment. *CP, 490-92*. On September 28, 2009, the Defendants filed a Memorandum Opposing Plaintiff's Motion For Partial Summary Judgment and in support of that Memorandum, also filed the Declaration of Sara M. Calloway In Support Of Defendants' Memorandum Opposing Plaintiff's Motion For Partial Summary Judgment. *CP, 22-37*. Both were filed on September 28, 2009.

Bret Wheeler then filed a Motion To Strike and Reply Re: Motion For Partial Summary Judgment, on October 5, 2009. *CP, 510-20*. The basis of the Motion To Strike was that the Declaration of Sara M.

Calloway In Support Of Defendants' Memorandum Opposing Plaintiff's Motion For Partial Summary Judgment contained sworn testimony by the Defendant that was almost identical to a declaration she had submitted in support of a Motion for Reconsideration, which the trial court had stricken as contradictory to her prior declarations and deposition testimony. *CP, 511-12*. The trial court agreed. *CP, 56-57*.

On October 28, 2009, the trial court granted Bret Wheeler's Motion For Partial Summary Judgment. *CP, 54-58*. It entered summary judgment in favor of Mr. Wheeler, establishing that his capital account in the PWBD partnership consisted of a) all funds he contributed to the business; b) all clients he brought into the business (including, but not limited to, those clients listed in the exhibits to the GNI agreement; and c) one-half of all proceeds generated as a result of work done by the Defendant for PWBD clients from February 28, 2008 through the final resolution of this matter. *CP, 56*. The trial court also specifically found that the Defendant's submission of a declaration containing the same testimony that had previously been stricken by the court, and submitting the same arguments that had previously been denied by the court, were a violation of CR 11, entitling Bret Wheeler to sanctions. *CP, 56-57*.

Upon submission of a Declaration of Bret Wheeler as to the amount of his damages and the value of his capital account in PWBD (as defined by the trial court's October 28, 2009 order), and after considering the respective submissions and arguments made by counsel for Mr. Wheeler and by the Defendant, the trial court entered a Judgment in favor of Mr. Wheeler in the total amount of \$339,482.62, plus pre-judgment interest through December 3, 2009 of \$64,622.45. *CP, 59-63*. In addition, after considering the Declaration Of Michael H. Church Re: Total Attorney's Fees And Costs, the trial court entered judgment for Mr. Wheeler's attorney's fees and costs in the amount of \$95,995.37, for a total judgment of \$500,100.44. *CP, 161-62*.

The Defendant then filed an appeal with this Court. *CP, 163-67*. Upon Defendant's request for entry of a final and appealable order, Mr. Wheeler filed a Motion To Amend Order Granting Plaintiff's Motion For Partial Summary Judgment, and submitted a proposed order, on February 3, 2010. *CP, 527-35*. In addition to containing the necessary language to establish it as a final and appealable order, (*See Commissioner's Ruling dated March 8, 2010*) the proposed Amended Order included findings that all Defendants' acts pertaining to the claims upon which Mr. Wheeler had been granted summary judgment were "willful and malicious," in order to

conform to the evidence and findings that were established at the hearing on Plaintiff's Motion For Partial Summary Judgment. *CP, 527-35.*

A hearing on the Motion To Amend was held on February 26, 2010. After hearing argument of counsel for Mr. Wheeler and of the Defendant, the trial court entered the Amended Order Granting Plaintiff's Motion For Partial Summary Judgment And Motion To Strike, which included the language proposed by Mr. Wheeler. *CP, 190-94.*

#### IV. ARGUMENT

Defendant argues on appeal that 1) the trial court erred by awarding Mr. Wheeler excessive attorney fees and by failing to provide her with an itemized bill; 2) the trial court unjustly barred her from presenting her defense; 3) genuine issues of material fact remain concerning Defendant's continuing statutory and fiduciary duties owed to the partnership and the applicability of 18 U.S.C. § 1030, the Computer Fraud and Abuse Act; 4) the trial court erred by entering judgment on independent claims of fraud, false pretenses, willful and malicious intent, and other wrongful acts; and 5) insufficient evidence existed to support the amount of the judgment entered against her. *Brief of Appellant, at 1-3.* A review of the evidence and of the procedural history in this matter,

however, reveals that the Defendant's arguments are unavailing. Plaintiff respectfully asks this Court to affirm the trial court's rulings.

**A. The Trial Court Properly Awarded Attorney Fees to Mr. Wheeler.**

In her Assignments of Error, the Defendant asserts that the trial court erred "in awarding excessive attorneys fees and denying the request for itemization of presented fees." *Brief of Appellant, at 2*. She also asserts that she is entitled to an itemization and explanation of the attorney fees awarded to Mr. Wheeler by the trial court. *Brief of Appellant, at 30*. She has provided no argument or citation to authority for these assertions, however. She has also failed to show that the trial court abused its discretion in making the award to Mr. Wheeler. Her claims in that regard fail.

**1. *The Court need not consider Defendants' arguments because she did not raise them in the trial court and has provided no argument or authority in support of them.***

RAP 2.5(a) provides that, with a few exceptions not applicable here, this Court need not consider any claim of error not raised in the trial court. RAP 2.5(a); *Elber v. Larson*, 142 Wn. App. 243, 250, 173 P.3d 990 (2007). "The purpose of this general rule is to give the trial court an opportunity to correct errors and avoid any unnecessary retrials." *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447,

*review denied*, 145 Wn.2d 1004, 35 P.3d 380 (2001). The Defendant did not object to the entry of the attorney fee award against her, nor to the denial of a request for an itemization/explanation of the fees in the trial court. Therefore, the Court need not consider her arguments on this appeal.

Even if this Court does entertain the attorney fee issue, the Defendant fails to provide any argument or legal authority as to why such award was allegedly excessive. *Brief of Appellant, at 30*. As stated by our Supreme Court, the court “will not consider issues on appeal that . . . are not supported by argument and citation of authority.” *McKee v. American Home Products*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989).

At the beginning of her argument on the attorney fee issue, Defendant acknowledges that she “did not object to the cost and attorney fees presented by Wheeler’s counsel” at the trial court level. *Brief of Appellant, at 30*. She argues that she had requested an itemization and explanation of the fees and that “this is a completely reasonable, common and fair practice.” *Brief of Appellant, at 30*. However, she has provided no legal argument or authority supporting her entitlement to an itemization and explanation of fees beyond the summary that was filed and ruled on by the trial court.

Instead of providing authority or argument, the Defendant states that as pro se defendants they did not understand the documents provided to them. *Id.* This is not sufficient. “Courts hold pro se litigants to the same standard as attorneys, and an attorney’s incompetence or neglect is not excusable.” *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993); *Lane v. Brown & Haley*, 81 Wn. App. 102, 107 (1996), *rev. denied* 129 Wn.2d 1028 (1996).

Defendants have failed to object to the entry of the attorney fee award at the trial court level. Defendants have failed to provide authority or argument regarding her assertion of error. Plaintiff respectfully requests that this Court not consider them.

**2. *The trial court properly exercised its discretion in making the attorney fee award in favor of Mr. Wheeler.***

On appeal, this Court reviews the legal basis for an award of attorney fees de novo, but reviews the reasonableness of such award for an abuse of discretion. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993). A trial court abuses its discretion when its decision is based on manifestly unreasonable or untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In support of the award for attorney fees Mr. Wheeler provided a Declaration from his counsel, Michael H. Church, which included a detailed itemization of the attorney fees and costs expended in the case on behalf of Mr. Wheeler. *CP, 64-66.* The trial court reviewed the Declaration, and at the presentment hearing stated:

Well, it is the opinion of the Court that the proposed orders are appropriate. Mr. Church has dotted every “i” and crossed every “t” and done everything exactly by the book here. His fees are accurately and appropriately laid out here. They make perfectly good sense for the context of this kind of a case. This is not a simple case. The legal fees obviously reflect that.

*CP, 179.*

Mr. Wheeler’s attorney fees were presented and properly documented by his lawyer, Michael Church. *CP, 64-66.* The trial court considered the evidence and determined that entry of judgment for fees and costs in the amount sought was appropriate. *CP, 179.* The Defendant has not provided any argument to the contrary and has failed to show that the trial court abused its discretion. Her argument that the attorney fees judgment was in error cannot be sustained.

**B. The Trial Court Properly Granted Mr. Wheeler's Motions to Strike The Defendant's Declaration; Entry Of CR 11 Sanctions Was Appropriate; and Defendant Had Ample Opportunity To Present Her Case.**

Defendant next argues that the trial court erred in striking her declaration as contradictory to previous statements made under oath. *Brief of Appellant, at 16*. She also argues that the Court's entry of CR 11 sanctions against her was inappropriate, and that she was prevented from fully presenting her case. However, the Defendant provides no legal authority for her arguments, and a review of the record shows that the trial court acted appropriately. Her claims of error in that regard fail.

***1. The trial court properly struck the Defendant's declaration as contradictory to previous statements she made under oath.***

Review of a trial court's ruling on a motion to strike is normally reviewed for abuse of discretion, but when the motion to strike is made in conjunction with a motion for summary judgment, this Court reviews the trial court's ruling de novo. *Orion Corp. v. State*, 109 Wn.2d 621, 638, 747 P.2d 1062 (1987); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). In a de novo review, this Court engages in the same inquiry as the trial court.

The Defendant has, once again, failed to provide any authority in support of her arguments that the trial court erred in striking the

declaration in question. She does assert that by striking the declaration the trial court “violated its duty to consider all facts and evidence submitted, and all reasonable inferences for the facts, in a light most favorable to the non-moving party,” and cites *Wilson v. Steinbach* and *Douglas v. Freeman. Brief of Appellant, at 18*. The Plaintiff, however, is aware of no authority providing that the same standard of deference afforded to a non-moving party in a summary judgment is applicable to review of a motion to strike. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006).

The record here shows that on November 19, 2008 the trial court struck a declaration submitted by Defendant in support of her Motion for Reconsideration, which contained testimony that “contradicts her earlier statements in deposition and/or declaration.” *CP, 229*. Approximately a year later, Defendant filed a near-identical declaration in support of her Response To Plaintiff’s Motion For Partial Summary Judgment. *CP, 512*. Recognizing this blatant attempt at a second bite at the apple, the trial court granted the Plaintiff’s Motion To Strike the second declaration, noting that Defendants had submitted a declaration “containing the same testimony that was previously stricken by the Court, and have submitted the same arguments that have previously been denied by order of the Court.” *CP, 56*.

Defendant's only argument in support of her claim of error appears to be that the second time she attempted to circumvent the trial court's orders she included a few additional facts in her declaration and, therefore, the declarations were not identical. *Brief of Appellant, at 17.* However, the additional facts she included were of no consequence to the summary judgment motion nor to this appeal. Notably, the Defendant has not even argued she did not attempt to circumvent the trial court's prior order when she filed the identical declaration. She has simply made *no* meaningful argument as to why the trial court erred in striking her declaration and, therefore, cannot prevail on this claimed error.

**2. *Under the circumstances presented to the trial court, the award of CR 11 sanctions was appropriate.***

CR 11 provides that, by signature of a party or an attorney to a pleading, motion, or memorandum, the party certifies the document meets four specific requirements. Among those requirements is that the document is "well-grounded in fact" and "is not interposed for any improper purpose, such as to harass or to cause any unnecessary delay or needless increase in the cost of litigation." CR 11 (a)(1) and (3).

A party may be subject to CR 11 sanctions if three conditions are met: (1) the pleading or motion is not well grounded in fact, (2) the pleading or motion is not warranted by existing law, and (3) the party who

signs the pleadings failed to conduct a reasonable inquiry into the legal or factual basis of the pleading or motion. *Lockhart v. Grieve*, 66 Wn. App. 735, 743-44, 834 P.2d 64 (1992). The civil rule grants the trial judge discretion to determine whether sanctions should be imposed. CR 11(a). When a CR 11 issue is reviewed, the court considers the purpose behind the rule: “To deter baseless filings and to curb abuses of the judicial system.” *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

On appeal, this Court reviews awards of CR 11 sanctions for abuse of discretion; absent such a showing, it will not disturb the trial court’s decision. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004); *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 132, 783 P.2d 82 (1989).

Defendant claims the trial court erred by awarding sanctions based on her attempt to introduce testimony and arguments already excluded by court order or found by the court to be unavailing. *Brief of Appellant, at 17*. She again provides no legal authority regarding CR 11 sanctions or the applicable standard of review. As such, this Court should refuse to consider her claim. *McKee*, 113 Wn.2d at 705. Even if this Court chooses to review the trial court’s decision to award sanctions under CR 11, however, the record reveals the trial court did not err.

Mr. Wheeler fully argued the CR 11 standards in his Motion To Strike And Reply Re: Motion for Partial Summary Judgment, listing each of the three conditions described in *Lockhart*. *CP*, 518. Mr. Wheeler specifically identified how the Defendant's conduct satisfied each of the three prongs. *CP*, 518. He showed that she had submitted a declaration and a memorandum inconsistent with her prior testimony, had made arguments which were not warranted by existing law, and had failed to conduct a reasonable inquiry into the legal or factual basis of the pleading or motion. *CP*, 9. The trial court considered the submissions of and heard arguments by both parties, and ultimately found that the *Lockhart* conditions had been met. *CP*, 56-57. Therefore, the trial court did not abuse its discretion in awarding such sanctions. The Defendant's claim of error on this issue has no merit.

**3. *The Defendant exercised multiple opportunities to present and argue her case in this matter.***

The Defendant contends that the trial court's October 28, 2009 Order granting Mr. Wheeler's Motion to Strike her declaration and awarding CR 11 sanctions "completely barred Calloway from testifying in her own defense." *Brief of Appellant*, at 17-18. A basic review of the transcripts and clerk's papers in this matter, however, reveals that nothing could be further from the truth.

From the inception of this matter, Defendant had numerous opportunities to present her case and argue it before the trial court, with the assistance of five different law firms. Even after the last of her attorneys withdrew from her representation, the Defendant was given ample opportunity to represent herself. For example, at the presentment hearing held on December 3, 2009, the Defendant testified for an extended period of time – her testimony continues for five pages of the hearing transcript. *CP, 172-77*. Thus, any argument that she has been prevented from “having her day in court” (*Brief of Appellant, at 18*) is without merit.

C. **Summary Judgment In Favor Of Wheeler Was Proper, As No Genuine Issues of Material Fact Remained To Be Determined.**

Summary judgment is appropriate when, viewing the facts and reasonable inferences in favor of the non-moving party, the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is further appropriate when, in view of all of the evidence, reasonable persons could reach only one conclusion. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). An appellate court reviews summary judgment orders de novo and makes the same inquiry as the trial court. *Wilson*, 98 Wn.2d at 437.

Defendant contends that genuine issues of material fact existed as to: (1) when the partnership actually dissolved; (2) when the partnership terminated; and (3) when Calloway's duties to the partnership terminated. *Brief of Appellant, at 20*. She then proceeds to discuss the Washington Revised Uniform Partnership Act (RUPA) standards involving fiduciary duty, and the Computer Fraud and Abuse Act (CFAA), as supposed support for her claims. *Brief of Appellant, at 18-26*. The Defendant's arguments, however, fail.

***1. Defendant is not entitled to review of her argument that genuine issues of material fact exist as to when the partnership of PWBD dissolved.***

Defendant contends that a genuine issue of material fact exists as to when the partnership of PWBD dissolved. *Brief of Appellant, at 20*. However, she failed to object to the trial court's October 3, 2008 finding of fact which specifically stated "[th]e partnership of Packard & Wheeler Benefits Division has not been formally dissolved and wound up." *CP, 461*. Calloway also failed to assign error to the trial court's Order Granting Preliminary Injunction, which included this specific written finding. Unchallenged findings of fact are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Thus, Defendant is not entitled to review of this argument.

2. ***No genuine issue of material fact exists as to when Defendant's duties to the partnership terminated.***

RCW 25.05.165 provides:

(1) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (2) and (3) of this section.

(2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(a) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(c) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

In her opening brief, the Defendant cites to several provisions of RCW 25.05.165 and claims that all of the duties detailed in the statute terminated as of February 25, 2008. *Brief of Appellant, at 23.* However, she ignores other provisions of the statute (specifically, RCW 25.05.165(2)(a) and (b)) that clearly indicate a partner's duty of loyalty to the partnership and her partner continue even *after* the date the partnership is terminated.

RCW 25.05.165(2)(a) and (b) provide that the fiduciary duty continues through the *winding up of the partnership business*. Therefore, even if the partnership of PWBD was dissolved on February 25, 2008, which it was not, the Defendant had a continuing duty to account for and hold as trustee for the partnership and Mr. Wheeler any profit derived by her in the conduct *and* the winding up of partnership business. RCW 25.05.165(a). She further had the duty to account for and hold as trustee for the partnership and her partner any profit derived from her use of *partnership property*, including the appropriation of a partnership opportunity. RCW 25.05.165(a). Moreover, she had a duty to refrain from dealing with the partnership business as a party who had an interest adverse to the partnership. RCW 25.05.165(b).

There can be no question that the files the Defendant took from the partnership office were *partnership* property. As cited by Defendant herself, “Property acquired by a partnership is property of the partnership and not of the partners individually.” *CP*, 35. The Defendant has conceded this fact: “Plaintiff and Sara Calloway each had an equal right to the partnership files.” *CP*, 35.

In addition, the Defendant has never contended that the partnership business has been wound up (and there is no evidence that it has).

Pursuant to statute, her fiduciary duties to Mr. Wheeler to account to the partnership and hold any profit derived by her from the use of partnership property, and to refrain from dealing with the partnership as a party having an interest adverse to the partnership, therefore, continue to this very day.

There is also no genuine issue of material fact regarding whether the Defendant improperly competed with the partnership under RCW 25.05.165(2)(c). As argued to the trial court, the Defendant may have been free to start up her own insurance business and compete with Mr. Wheeler for *new* clients, but she certainly had no right to take the *existing partnership clients* – which she admits were partnership property – and appropriate that business for herself. RCW 25.05.165(2)(a). Further, when the Defendant competed with the partnership business by pursuing *partnership* clients for her own benefit, she was acting as a party with interests adverse to those of the partnership, in direct violation of RCW 25.05.165(2)(b).

Based on the evidence before the trial court, no genuine issues of material fact remained to be determined. Therefore, it properly granted summary judgment on Mr. Wheeler's claim, and the Defendant's assertion of error in that regard is unavailing.

3. ***Summary judgment was appropriate on plaintiff's claim under the Computer Fraud and Abuse Act.***

A plaintiff may establish a civil cause of action under the CFAA by demonstrating that a person has (i) “knowingly and with intent to defraud,” (ii) accessed a “protected computer,” (iii) “without authorization” or with authorization that “exceeds authorized access,” and as a result (iv) has furthered the intended fraudulent conduct and obtained “anything of value.” *Pacific Aerospace & Electronics, Inc. v. Taylor*, 295 F. Supp. 2d 1188, 1195 (E.D.Wash. 2003), citing 18 U.S.C. § 1030(a)(4). A “protected computer” includes a computer “which is used in interstate or foreign commerce or communication.” 18 U.S.C. § 1030(e)(2)(B). Pursuant to the CFAA, one “exceeds authorized access” when accessing a computer without authorization for the purpose of obtaining or altering information in the computer that the accessor is not entitled to obtain or alter. 18 U.S.C. § 1030(e)(6). Finally, the term “damage” means “any impairment to the integrity or availability of data, a program, a system, or information.” 18 U.S.C. § 1030(e)(8).

The Defendant claims that the trial court erred in granting summary judgment to Mr. Wheeler on his claim under the CFAA. *Brief of Appellant*, at 24. In support of her claim she states, rather speciously, that “[p]laintiff’s Second Amended Complaint fails to cite to any specific

section of the Act which Plaintiff alleges was violated.” *Brief of Appellant, at 24.* This statement, however, completely disregards the extensive citations to provisions of CFAA which are contained in the Memorandum filed by Plaintiff in support of his Motion For Partial Summary Judgment and the subsequent Reply. *CP,17-18; 515-16.*

Defendant’s next argument is that the case law relied upon by the trial court in granting summary judgment on the CFAA claim, *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp.2d 1121 (W.D. Wash. 2000) is not binding on this Court. *Brief of Appellant, at 25.* Instead, she cites to *Cenveo Corp. v. Celumsolutions Software GMBH & Co. KG*, 504 F.Supp.2d 574 (D.Minn.2007). *Brief of Appellant, at 25.* She claims the Minnesota case supports her argument that the *Shurgard* decision has been the subject of “extensive criticism.” *Brief of Appellant, at 25.* She asserts that *Cenveo* “explicitly declined to follow *Shurgard* because that decision relied on a previous version of the CFAA.” *Brief of Appellant, at 25.* The Defendant fails to disclose, however, that the *Cenveo* court declined to follow *Shurgard* on the very narrow basis that the previous version of the CFAA did not define “loss.” That hardly constitutes the “extensive criticism” of the *Shurgard* decision which the Defendants claim.

The Defendant also argues that she “could not have violated the CFAA because as a partner/owner in the business, [she] had full access and authorization to any and all business computers, and the proprietary information belonged to [her] as well. [Defendant] was not an employee with limited access and/or authorization.” *Brief of Appellant, at 26.*

Once again, the Defendant fails to cite to any legal authority in support of the proposition that a partner could not be found liable under the CFAA. This argument also completely disregards the fact that there is nothing in the CFAA limiting its application to acts committed by an employee against an employer, or by any particular class of individual, for that matter. The language of the Act states only “[w]hoever knowingly, and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access . . .” is guilty of a violation of the CFAA. 18 U.S.C. § 1030(a)(4). Defendant clearly falls within the sphere of “whoever.” Moreover, her act of removing all partnership electronic data from partnership computers, without the knowledge or consent of her partner, with the intent to defraud her partner and the partnership, and in violation of her partnership duties, meets the definition of “exceeds authorized access” under the CFAA. *CP, 271, 272, 427, 446, 536-38.*

Based upon all the evidence before the trial court and the applicable law, the trial court did not err by granting summary judgment in favor of Mr. Wheeler on his CFAA claim. The Defendant's claim of error on this issue has no value.

**D. Calloway Misunderstands The Findings Set Out In The Judgment And Amended Judgment.**

Calloway's argument on this alleged error is very difficult to interpret. It appears she is asserting that the trial court erred by entering judgment on independent claims of fraud, false pretenses, willful and malicious intent, and other wrongful acts. *Brief of Appellant, at 28.* Not only is her interpretation of the language of the Judgment inaccurate, but she has not preserved this issue for appeal.

***1. The trial court did not enter judgment on independent claims of fraud, false pretenses, willful and malicious intent, and other wrongful acts.***

The Defendant's assertion that the trial court granted additional claims in its Amended Order or Amended Judgment is inaccurate. Calloway is most likely confusing the additional findings made by the trial court with separate legal claims.

The October 28, 2009 Order Granting Plaintiff's Motion for Partial Summary Judgment and Motion to Strike granted summary judgment "as to Plaintiff's causes of action for breach of partnership agreement, breach

of fiduciary duty, violations of the Computer Fraud and Abuse Act, conversion, and unjust enrichment.” It also established the elements of Mr. Wheeler’s capital account. *CP*, 54-58.

Similarly, the Amended Order Granting Plaintiff’s Motion for Partial Summary Judgment and Motion to Strike entered on February 6, 2010 provides that “Plaintiff’s Motion For Partial Summary Judgment is granted and Plaintiff is awarded partial final judgment as to Plaintiff’s claims for breach of partnership agreement, breach of fiduciary duties, violations of the Computer Fraud and Abuse Act, conversion and unjust enrichment . . .” The following clarifying language is added at the end of the sentence: “*and other wrongful acts of Defendants, all of which the Defendants committed by use of false pretenses and fraud while acting in a fiduciary capacity. All of Defendants’ acts pertaining to such claims were willful and malicious.*” *CP*, 190-94 (emphasis added).

The issues described in the additional clarifying language were before the trial court at the time summary judgment was entered. The additional clarifying language was consistent with the trial court’s earlier findings and rulings, and is supported by the record before this Court. Therefore, it was appropriate for the trial court to include the additional language in the Amended Order.

The Defendant's assertion that the trial court somehow granted summary judgment on a fraud claim, such as that defined in WAC 192-100-050, is simply incorrect. Mr. Wheeler did not move for summary judgment on a fraud claim. *CP, 4-20*. Instead, Mr. Wheeler proved that the Defendant violated the Computer Fraud and Abuse Act and violated her fiduciary duties by engaging in fraudulent, willful behavior. *CP, 4-20*. The language referred to simply clarifies that, based upon a particular type of behavior, the Defendant was found to be in violation of the claims listed in both the original Order and Amended Order. *CP, 190-94*. There was no error by the trial court in that regard.

**2. *Defendant failed to properly object to the inclusion of the additional language in the Amended Order; thus, she did not preserve her objection for appeal.***

Pursuant to *Lake Air, Inc. v. Duffy*, 42 Wn.2d 478, 482, 256 P.2d 301 (1953), the trial court "must be afforded an opportunity to rule upon the question before it can be presented" on appeal. If the objection is not specific enough to inform the trial court and the other party of the actual alleged issue, the trial court lacks the opportunity to correct any error. *City of Seattle v. Carnell*, 79 Wn. App. 400, 403, 902 P.2d 186 (1995). Without such specificity, the error is not preserved for appeal. *Id.*, at 403, 404. *See also, Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 674 P.2d 939 (1962) (holding that a general objection which does not specify the

particular ground on which it is based is insufficient to preserve a question for appellate review; an objection must be accompanied by a reasonably definite statement of the grounds so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect).

Although the Defendant now claims she objected to the inclusion of the clarifying language in the Amended Order at the presentment hearing, the record reveals she merely commented on the additional language without actually lodging an objection. *CP, 172*. Her statement to the trial court was, “I am not sure that that is what I understood that the Court found. So I do want to point that out.” *CP, 172*. This was not a clear or valid objection. There was no “reasonably definite” statement of the grounds for any objection sufficient to inform the trial court of the question Defendant raised or to afford Mr. Wheeler’s counsel an opportunity to correct any alleged deficiency. It did not have the specificity required to preserve the issue for appeal. Therefore, Defendant’s claim of error in that regard cannot be sustained.

**E. Substantial Evidence Supports the Damages Awarded by the Trial Court.**

The calculation of damages is a question of fact. *Womack v. Von Rardon*, 133 Wn. App. 254, 263, 135 P.3d 542 (2006). This Court

determines whether the trial court's findings of fact are supported by substantial evidence. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

Although Defendant never objected to the trial court's summary judgment granting Mr. Wheeler's capital account, she now challenges the amount of the trial court's damage award. *Brief of Appellant*, at 30. Defendant, however, had an opportunity to present evidence supporting a different damage amount and it was considered by the trial court. *CP*, 68-95.

The trial court reviewed Mr. Wheeler's declaration testimony in support of his calculation of damages. *CP*, 161. The Defendant did not submit her own calculations; instead, she filed a Response To Proposed Judgment and offered as evidence the unauthenticated emails of three so-called "experts" who expressed disagreement with Mr. Wheeler's valuation of the business of PWBD. *CP*, 68-95. Significantly, the Defendant provided no information that would, in fact, establish these three individuals as experts. *CP*, 73-75. Mr. Wheeler also provided an

additional declaration in reply to the Defendant's Response To Proposed Judgment. *CP, 521-26*. Mr. Wheeler's reply declaration pointed out the deficiencies in the evidence submitted by the Defendant, and provided the court with additional information to substantiate his calculation of damages. *CP, 521-26*.

The trial court considered all of the evidence before it on the issue of damages and clearly concluded that Mr. Wheeler's computations and the evidence supporting them were more persuasive than the Defendant's. The record before this Court confirms that conclusion.

The Defendant also appears to argue that Mr. Wheeler's accounting should not have been considered by the trial court because it had previously been provided to her in connection with settlement negotiations. *Brief of Appellant, at 31*. She cites to ER 408 as support for her contention; however, she obviously misapprehends the meaning and application of that evidence rule.

ER 408 provides that evidence of making an offer of settlement is not admissible to prove liability for the claim or the invalidity of the claim or its amount. Comment 408 provides in part:

[R]ule 408 makes the evidence inadmissible and is based on the policy of promoting complete freedom of communication in compromise negotiations. Parties are encouraged to make whatever admissions may lead to a

successful compromise without sacrificing portions of their case in the event such efforts fail.

*Bulaich v. AT & T Information Systems*, 113 Wn.2d 254, 263, 778 P.2d 1031, 1036 (1989), citing Comment 408.

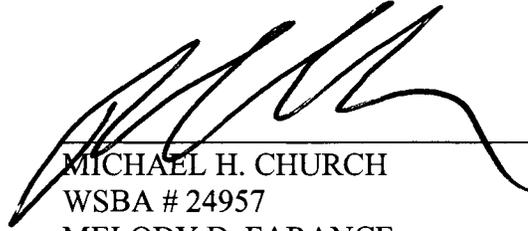
Thus, the protection afforded pursuant to ER 408 flows to the party making the settlement offer, not to the party to whom the settlement offer is made. The purpose of the rule is to protect the party making the settlement offer from having the evidence of that offer used against him in an attempt to establish liability. Had the Defendant made a settlement offer to Mr. Wheeler, ER 408 clearly would have prevented Mr. Wheeler from using the fact of her settlement offer as evidence that she was liable to him on his claims. That is not the situation presented here, however. Mr. Wheeler was not barred from using the same damages calculation he submitted in conjunction with settlement negotiations as support for the establishment of the monetary amount of his Judgment against the Defendant. Thus, the Defendant's argument in that regard fails.

## V. CONCLUSION

The Defendant has failed to produce any argument or authority in support of most her contentions of error. The record before this Court establishes that the trial court did not abuse its discretion or otherwise err in granting the relief it afforded to Mr. Wheeler. Therefore, Plaintiff Bret

Wheeler respectfully asks this Court to deny the Defendant's appeal and affirm the decisions of the court below.

RESPECTFULLY SUBMITTED this 8th day of October, 2010.

A handwritten signature in black ink, appearing to read "Michael H. Church", is written over a horizontal line.

MICHAEL H. CHURCH

WSBA # 24957

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Attorneys for Plaintiff/Respondent

Bret M. Wheeler

CERTIFICATE OF SERVICE

I hereby certify that on the 8<sup>th</sup> day of October 2010, I caused to be served a true and correct copy of RESPONDENT'S MOTION TO EXTEND TIME FOR FILING BRIEF by the method indicated below, and addressed to the following:

**PRO SE APPELLANT**

Sara and Eric Calloway  
824 E. Longfellow  
Spokane, WA 99207

- U.S. Mail, Postage Prepaid  
 Overnight Mail  
 Certified Mail, Prepaid

  
\_\_\_\_\_  
Jessica Grover