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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Nos. 301401 & 304833

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

MONTECITO ESTATES, LLC, PRISCILLA TRUJILLO, and
JOHN C. BOLLIGER, Appellants,

v.

DOUGLAS J. HIMSL dba HIMSL REAL ESTATE CO., Respondent.

APPELLANTS' REPLY BRIEF

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Appeal No. 301401 – The Imposition of CR 11 Sanctions

I. The Trial Court Abused Its Discretion By Imposing CR 11 Sanctions In Response To MR. HIMSL’S CR 11 Motion Because, In His Motion, MR. HIMSL Invested Only 4 Pages On The Subject Of CR 11 – And, In That Inadequate Presentation Of The Subject, MR. HIMSL Dispositively Failed To Meet His Burden Under Biggs v. Vail

As explained in the opening brief of appellants (“BOA”), in Biggs v. Vail, 124 Wn.2d 193, 876 P.2d 448 (1994), our Supreme Court held that, in order for CR 11 sanctions to be applied, the following **specificity** must be engaged in by the CR 11 movant and the trial court:

- **which** of MONTECITO’S causes of action allegedly violated CR 11,
- **how** each such cause of action allegedly constituted a CR 11 violation,
- **what precise fees** MR. HIMSL actually incurred in specifically responding to MONTECITO’S allegedly violative causes of action, and
- the **effect of MR. HIMSL’S failure to mitigate** the amount of fees he incurred in this case.

“The burden is on the **movant** [here, MR. HIMSL] to justify the request for sanctions.”

Id. at 202 (emphasis added).

In his motion for attorneys fees to the trial court, MR. HIMSL invested only 4 pages on the subject of CR 11. [CP 1284-88] A copy of

those 4 pages is attached in the Appendix hereto (pp. 1-5).¹ As these demonstrate, MR. HIMSL'S CR 11 presentation to the trial court dispositively failed to meet his Biggs v. Vail burdens of justifying his request for CR 11 fees: **MR. HIMSL declined to discuss the actual facts of this case and, except for defamation, refused to specifically analyze any of the appellants' purportedly defective causes of action.** Instead, MR. HIMSL set forth only general legal arguments about CR 11 and conclusory statements of CR 11 violations. When the movant (here, MR. HIMSL) fails to carry his Biggs v. Vail burden to justify his request for CR 11 sanctions, those sanctions obviously are unwarranted.

MR. HIMSL'S inadequate argument to the trial court regarding CR 11 fees should be deemed to constitute his only allowable – and failed – effort to meet his Biggs v. Vail burdens. MR. HIMSL should not be allowed to try to make up for his trial-court-level, defective CR 11 motion here on appeal or upon remand.² In their BOA, the appellants asked this Court to assess the impropriety of his CR 11 presentation to the trial court in view of the Biggs v. Vail requirements. In his brief of respondent (“BOR”), **MR. HIMSL refused to respond (i.e., waived his opposition) to this dispositive issue.**

¹ MR. HIMSL did submit a reply brief, in which he provided only 2 additional pages relating to CR 11 [CP 1762-64] A copy of those 2 additional pages also is attached in the Appendix hereto (pp. 6-8).

² Which is why, in the “CONCLUSION” section of their BOA (pp. 44-45), the appellants have requested this Court reverse the trial court's imposition of CR 11 sanctions, **without any remand**. This makes particular sense where, as here, a remand would require first-time litigation of MONTECITO'S and MS. TRUJILLO'S voluntarily dismissed causes of action – the merits (let alone the CR 11 trustworthiness) of which never have been presented to (and therefore cannot be said to have been properly understood by) the trial court.

II. The Trial Court's Imposition Of CR 11 Sanctions Against The Appellants Is Neither Factually Nor Legally Supportable

There exist only two categories of causes of action to which the trial court imposed CR 11 sanctions. **First** is those the appellants voluntarily dismissed. Of those, in its *Memorandum Decision*, the trial court directly addressed only one of them (defamation) – and that, wrongly. BOA (pp. 13-16). Moreover, **all the others** share the same two characteristics: (1) the appellants voluntarily dismissed them months before MR. HIMSL ever filed his motion for CR 11 fees and, (2) as a result, the issue of their merits (let alone of their CR 11 trustworthiness) never has been presented to (and therefore cannot be said to have been properly understood by) the trial court.

Second is those 5 causes of action the trial court dismissed on summary judgment. The companion appeal addresses the dismissal of 2 of those: (1) breach of contract and (2) violation of statutory duties under RCW chapter 18.86. As the appellants' briefing about those 2 causes of action explains, the trial court's summary dismissal of them should be reversed and they should be remanded for trial. In any event, there is nothing about those 2 causes of action which is offensive to CR 11. With respect to the other 3 summarily dismissed causes of action, as explained in their BOA (pp. 46-47, including fn. 7), the appellants did not (could not) appeal the dismissal of them for two reasons: (1) because they involved associated wrongdoing on the part of MR. HIMSL'S original

attorneys (and co-defendants) in the case, THE EVERETTS, and (2) the page limitations applicable to appellate briefs prevented the appellants from addressing those other 3 causes of action on appeal.³ That said, with respect to those other 3 causes of action, the appellants presented the trial court a literal abundance of pertinent facts and law establishing not only their CR 11 trustworthiness but also the strength of their merits qualifying them for adjudication by a jury at trial. See BOA, pp. 19-25 and,

- with respect to the appellants' pertinent background facts, CP 328-62;
- with respect to legal argument supporting the appellants' cause of action for civil conspiracy/acting in concert, CP 389-95 and 805-06;
- with respect to legal argument supporting the appellants' cause of action for extortion/economic duress/business compulsion, CP 395-98;
- with respect to legal argument supporting the appellants' cause of action for common law liability of the principal (here, MR. HIMSL) for the actions of his agent (here, THE EVERETTS), CP 399-400; and
- with respect to legal argument exposing the trial court's erroneous reliance on a non-existent "litigation immunity" doctrine, CP 369-72, 742-54, 768, and 788-801.

The point of this section is that it cannot be concluded the trial court exercised proper discretion in imposing CR 11 sanctions against the appellants: **any** finding or conclusion of the trial court, implying that **any** of the appellants' causes of action is offensive to CR 11, is neither factually nor legally supportable.

³ This is because, with respect to the appellants' 2 summarily dismissed causes of action which they were able to appeal, the appellants' briefing consumed 46 of the allowable 50 pages for its BOA explaining why the trial court erred in summarily dismissing those 2 causes of action.

III. Given The Specific Facts Of This Case, MR. HIMSL Failed To Properly Mitigate The Effect Of What He Only Ultimately Alleged Were CR 11 Violations

With specific citations to Biggs v. Vail, in their BOA, the appellants explained both that (1) MR. HIMSL failed to so mitigate (pp. 27-29) and (2) the trial court failed to take MR. HIMSL'S failure to mitigate into consideration (p. 31). To reiterate,

. . . . Normally, such late entry of a CR 11 motion would be impermissible, since without prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper. See Bryant, 119 Wn.2d at 228, 829 P.2d 1099 (Andersen, J., concurring in part, dissenting in part). Prompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation expenses.

[Deterrence] is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions. . . . (Rule 11 sanctions must be brought as soon as possible to avoid waste and delay). Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible.^{FN2} **Without such notice, CR 11 sanctions are unwarranted.** Bryant, 119 Wn.2d at 224, 829 P.2d 1099.

FN2 We adopt as our own the advice of the Advisory Committee that, in most cases, **"counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a [CR 11] motion."** Such informal notice is not a substitute for a CR 11 motion, but **evidence of such informal notice, or lack thereof, should be considered by a trial court in fashioning an appropriate sanction.**

Id. at 198 (emphases added).

In their BOA (pp. 17-18), the appellants explained the **only** causes of action about which MR. HIMSL ever provided them any notice of a specific perceived defect – “**before** proceeding to prepare and serve a [CR 11] motion,” Id. at 198 (emphasis added) – were their “tort” causes of action, on grounds of the “economic loss rule.” That single telephone call resulted in the appellants voluntarily dismissing their “tort” causes of action – an outcome which CR 11 might applaud, but certainly would not condemn. In his BOR, **MR. HIMSL did not dispute he provided no other pre-CR-11-motion notice to the appellants with respect to any other of their causes of action.** Because MR. HIMSL’S attorneys provided Mr. Bolliger no other such notice with respect to any other of the appellants causes of action, Mr. Bolliger reasonably believed MR. HIMSL’S vague reference to CR 11 (in his answer to the appellants’ complaint) was referring only to the appellants’ “tort” causes of action, on grounds of the “economic loss rule.” As held in Biggs v. Vail,

[w]ithout such notice, **CR 11 sanctions are unwarranted.**

Id., with emphasis added.

It bears repeating here that MR. HIMSL did not initially bring his motion for CR 11 sanctions until nearly 2½ years after this lawsuit was filed against him – and not until after the trial court had already summarily dismissed all causes of action against him.

The appellants acknowledge Biggs v. Vail “find[s] that notice in general that sanctions are contemplated is sufficient for the later imposition of CR 11 sanctions.” Id., at 199. However, the appellants stress that finding should not govern the outcome here, given the specific facts of this case, which are:

- MR. HIMSL’S answer contained only a vague reference to CR11,
- MR. HIMSL’S attorney engaged in a one-and-only CR 11 mitigation-notice telephone call to Mr. Bolliger– yet, MR. HIMSL’S attorney referred only to the appellants’ “tort” causes of action, which, as a result, the appellants subsequently and voluntarily dismissed,
- MR. HIMSL’S attorney **declined to exercise his opportunity to address any other of the appellants’ causes of action during that one-and-only CR 11 mitigation-notice telephone call,** and
- it wasn’t until (1) nearly 2½ years after the lawsuit was commenced against MR. HIMSL and (2) after the trial court summarily dismissed the appellants’ remaining causes of action that MR. HIMSL initially filed his motion for CR 11 sanctions.

Thus, given these specific facts of this case, the appellants ask this Court **not** to hold this appeal is governed by the aforementioned finding, particularly in view of the fact that finding arguably is in tension with the other holdings in the Biggs v. Vail decision, e.g.:

- “Normally, such later entry of a CR 11 motion would be impermissible, since without prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper.” Id., at 198.
- “Prompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses.” Id.

- “[Deterrence] is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end.” Id.
- “A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions.” Id.
- “Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party’s attention as soon as possible. [Fn. omitted.] Without such notice, CR 11 sanctions are unwarranted.” Id.
- “We adopt as our own the advice of the Advisory Committee that, in most cases, ‘counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a [CR 11] motion.’” Id., at fn. 2.
- “[T]he better practice is to inform counsel **specifically** of the nature of his or her misconduct and the possibility of CR 11 sanctions.” Id., at 199 (with emphasis added).

Given the foregoing, the law should be that, aside from merely planting a vague reference to CR 11 in its initial pleading (something which many attorneys commonly do – and something which was unsuccessfully done by **every one** of the other 5 defendants in this case), if a party actually wants to later move for CR 11 sanctions, at the earliest possible opportunity, that party should have to engage the allegedly offending party with a pre-CR-11-motion communication, **specifically** identifying the alleged CR 11 violations which he plans to be the subject of his subsequent CR 11 motion. This will give breath to all the aforequoted Biggs v. Vail holdings. Thus, the appellants request this Court hold that, given the specific facts of this case, MR. HIMSL failed to properly mitigate the effect of what he only ultimately alleged were CR 11

violations.⁴

IV. The Fact That The Appellants Voluntarily Dismissed Some Causes Of Action Does Not Itself Establish A CR 11 Violation – And The Trial Court Abused Its Discretion By Effectively So Holding

MR. HIMSL suggests the mere fact – that the appellants voluntarily dismissed some of their causes of action – compels an upholding of the trial court’s imposition of CR 11 sanctions as to those causes of action. However, the appellants, like MR. HIMSL, have been unable to locate any decisional law which supports his suggestion.

The appellants voluntarily dismissed its causes of action for the reasons set forth in their BOA – not because of any dawning realization they somehow were lacking in merits. That said, when originally drafting the appellants’ complaint, Mr. Bolliger was duty bound to have named **all** the causes of action which meritoriously could have been brought against

⁴ In his BOR (pp. 37-38), citing Colorado Structures, Inc. v. Blue Mountain Plaza, LLC, 159 Wn.App. 654, 246 P.3d 835 (Div. 3 2011), MR. HIMSL wrongly argues the appellants did not have their *Supplemental Memorandum and Declaration of John C. Bolliger in Opposition to Himsl’s Motion for Attorneys’ Fees and Costs and in Opposition to Himsl’s Proposed Order Therefor* (and, therefore, the issue of MR. HIMSL’S “failure to mitigate”) timely before the trial court. Although the appellants do not have space to reproduce that briefing here, the law explaining that the appellants’ *Supplemental Memorandum* was timely filed was briefed at least twice to the trial court. [CP 549-50 and 787-88] The *Supplemental Memorandum* was filed, with a bench copy to Judge Frazier, on July 25, 2011 and Judge Frazier entered his judgment imposing CR 11 sanctions on August 5, 2011.

Moreover, Colorado Structures is inapposite on this issue. In that decision, this Court upheld the dismissal of a summary judgment brief filed after the deadline stated in CR 56 for that brief (either 28, 11, or 5 days before the hearing, as applicable) – because the filing party filed his brief only 2 days before the hearing, without any motion seeking leave to file a late brief. In this case, at a March 1, 2011 telephonic hearing, Judge Frazier set an original briefing schedule for MR. HIMSL’S CR 11 motion. A copy of MR. HIMSL’S attorney’s March 1, 2011 email to Mr. Bolliger, “memorializ[ing] today’s discussion regarding briefing on the attorney’s fee motion,” is attached in the Appendix hereto (p. 9). Perfectly complying with that schedule, the appellants served their original opposition brief on MR. HIMSL’S attorneys on March 21, 2011. See Mr. Bolliger’s March 21, 2011 email, a copy of which is attached in the Appendix hereto (p. 10). MR. HIMSL has not even alleged otherwise. Thus, Colorado Structures is not implicated by these facts.

MR. HIMSL in the suit, to avoid committing malpractice (under the doctrine of res judicata) and ethical violations (see RPC 1.1 “Competence” and RPC 1.3 “Diligence”).

A plaintiff’s attorney knows when he commences a suit that some other attorney may end up becoming his successor in representing the plaintiff (e.g., the original attorney could die, become incapacitated, quit, get fired, or move away before the case is concluded). This case originally involved 6 different defendants and multiple causes of action. Not every plaintiff’s attorney will litigate every case the same way. One might decide to litigate one set of causes of action, another might choose to forge ahead with a different set of causes of action – both, appropriately. In commencing a suit, Mr. Bolliger takes care to name all the causes of action which meritoriously can be brought against the defendant(s) in the suit – not the least of which because he doesn’t want some successor attorney second guessing him by alleging Mr. Bolliger should have, but failed to, name certain additional causes of action which the successor attorney would prefer to litigate.

The purpose of CR 11 is to deter baseless filings. Thus, each cause of action actually pleaded by the appellants must be (1) well grounded in fact, (2) warranted by existing law, and (3) not pleaded for any improper purpose. CR 11. In Eller v. East Sprague Motors, 159 Wn.App. 180, 189-90, 244 P.3d 447 (Div. 3 2010), this Court held as follows:

. . . . The fact that a party's action fails on the merits is by no means dispositive of the question of CR 11 sanctions. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). The court applies an objective standard to determine "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." Id. Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

In this case, it is established that each of the appellants' pleaded causes of action had abundant factual and legal bases – and there is **no evidence** the appellants pleaded them for any improper purpose. As this Court acknowledged in Eller, supra, a cause of action cannot properly be regarded as either factually or legally frivolous for CR 11 purposes unless it first has been determined to be factually or legally nonmeritorious. However, except for defamation, the strength of the merits of the appellants' voluntarily dismissed causes of action never have been presented to the trial court and, as such, the trial court cannot be said to have properly understood the very merits of those causes of action when it reflexed to a conclusion of frivolity under CR 11. For these reasons, the trial court abused its discretion by imposing CR 11 sanctions on untenable grounds or for untenable reasons. Id.

V. MR. HIMSL'S List Of Purported Wrongdoings On The Part Of The Appellants Is Not Grounds For The Imposition Of CR 11 Sanctions

In his BOR (pp. 9-12), MR. HIMSL lists several actions taken by the appellants which justify the trial court's imposition of CR 11 sanctions. However, when those issues were specifically litigated before

the trial court, MR. HIMSL moved for attorneys' fees. With respect to only two of those, the trial court awarded fees to MR. HIMSL. The issue of the trial court's awarding of fees, or declining to do so, with respect to those issues is not before this Court – because neither side has appealed the trial court's decisions in those regards.

VI. The Appellants Controvert The Other False Assertions MR. HIMSL Set Forth In His BOR

MR. HIMSL makes numerous false assertions in his BOR which are either (1) unsupported by the record, (2) contradicted by the record, (3) speculation on MR. HIMSL'S part, or (4) misleading on MR. HIMSL'S part. Because of the page limitation incident to this reply brief,⁵ the appellants are left to controvert MR. HIMSL'S other false assertions without accompanying discussion.⁶

⁵ In response to Mr. Bolliger's May 23, 2012 telephone inquiry to Division III's Clerk's office, Darnell informed him he is limited to 12½ pages for this reply brief addressing the CR 11 issue.

⁶ These include, e.g.: "the liens never impaired sales of the property," "Mr. Bolliger failed to consult damages experts for more than two years after filing the action," "Mr. Bolliger filed a baseless disciplinary complaint against Mr. Himsl to the Department of Licensing and improperly cited the investigation to the trial court," "Montecito failed to produce proof of its claims," "Mr. Bolliger violates the Rules of Appellate Procedure," "Mr. Himsl's liens did not affect title to the property," "Mr. Bolliger never argued for an extension or modification of existing law," "Mr. Bolliger's conduct caused any delay in filing Mr. Himsl's motion for attorney's fees," "Montecito submitted factually false pleadings," "the trial court's award of fees pursuant to the Agreement is not before this court," "in May 2006, the Curnutts terminated the REPSA because Montecito could not finish construction in accordance with the REPSA'S terms," "[the 2007] action was dismissed on December 7, 2007 due to inaction by Montecito," "Montecito's disclosure of experts on economic damages was untimely by any standard," "ultimately, DOL dismissed the complaint, evidently concluding that insufficient evidence existed to support it," "that brief also grossly misstates the testimony of Christina Hoover," "Montecito filed a show-cause action for removal of the liens but later abandoned it," "Mr. Himsl . . . mitigated the cost of litigation so far as possible," "Mr. Bolliger's . . . service of the brief by fax violates RAP 5.4(b)," "numerous materialmen's liens also were in place on the property," "any difficulties Montecito encountered simply cannot be ascribed to Mr. Himsl's liens," "Montecito challenges the trial court's application of litigation immunity by . . . arguing that it applies only to defamation suits," "Montecito[] conten[ds] that the trial court's grant of summary judgment stands or falls on Bruce v. Byrne-Stevens & Associates Engineers, 113 Wn.2d 123, 776 P.2d 666 (1989)," "the fact that the [Curnutts'] sale did not close was due to Montecito's failures, not Mr. Himsl's," "the only 'unlawful act' complained of was Mr. Himsl's filing of liens under the Act, which occurred after the Agreement had been terminated, and refusing to release the liens on

The appellants believe this Court will see through MR. HIMSL'S strategy of throw-everything-imaginable-up-against-the-wall-and-hope-something-sticks. It is inappropriate for MR. HIMSL to deluge his appellate brief with such false assertions – a strategy on his part which itself is offensive to CR 11. If this Court has any questions about any of MR. HIMSL'S listed false assertions, Mr. Bolliger invites the same during oral argument.

Thank you for your time.

DATED this 13 day of June, 2012.

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demand," "Montecito[] . . . admits that it does not allege a claim of professional negligence against Mr. Himsl, making this argument irrelevant," "a CR 11 motion is not a judgment on the merits of an action, but rather on a collateral issue," "the merits of these claims, however, are not determinative of this [CR 11] issue," "the argument on these claims consists of a laundry list of case citations for each cause of action, with no analysis of how this authority might apply to the evidence in this case," "Mr. Bolliger did not challenge these Findings of Fact, which thus are verities on appeal," "the grounds for CR 11 sanctions were extensively set forth in Mr. Himsl's pleadings," "Montecito fails to assign error to the trial court's alleged reliance on Mr. Himsl's incorrect statement [that the imposition of CR 11 sanctions is mandatory], so this court should ignore it," "the trial court's Memorandum Opinion shows that it . . . did not feel that the law compelled it to sanction Mr. Bolliger's conduct," and "Mr. Bolliger admitted that he and his law firm commingled their assets."

Appeal No. 304833 – *The Summary Dismissal Of The Plaintiffs' Case*

The trial court entered judgment declaring MR. HIMSL committed unlawful acts when he recorded his liens against each and every one of the 35 lots in the Montecito Estates residential subdivision. [CP 302-07] At long last, in his BOR (p. 24), MR. HIMSL acknowledges he did so despite the fact he produced only one potential buyer (THE CURNUTTS, who eventually rescinded) with respect to only one of the lots, as follows:

Second, other than the Curnutts, there were no buyers before the Agreement expired, so that there was no one for Mr. Himsl to identify.

It is these unlawful acts – the unlawful recording of his 35 liens – which are the bases for MONTECITO'S causes of action for (1) breach of contract (including the contract's subsumed duty of good faith and fair dealing) and (2) violation of his statutory duties under RCW chapter 18.86. Before the trial court, and as set forth in their BOA (pp. 55-77), the appellants produced ample evidence for a jury to conclude that MR. HIMSL'S **breaches** (35 unlawful liens) both

1. **caused** MONTECITO to be unable to obtain **follow-on financing** for the project [CP 542-46, 575-78, 627-28, and 631-37] and **caused** MONTECITO to be unable to obtain **follow-on real estate brokerage services** for the project [CP 411-14, 575-78, 600-03, and 627-28] – both of which problems **directly caused** MONTECITO to lose the project and property and
2. **monetarily damaged** MONTECITO in an amount between

\$994,000 and \$1.4M [CP 575-78 and 623-27] in lost profits for the project (not counting other categories of recovery which MONTECITO has prayed for, including the loss of use of that money and the recovery of its attorneys' fees).

MR. HIMSL endeavors to avoid the foregoing by stating that the statutory scheme (RCW chapter 60.42) – under which he unlawfully purported to record his 35 liens – somehow prohibits MONTECITO from suing him for the monetary damages he caused MONTECITO to incur, merely because RCW chapter 60.42, in MR. HIMSL'S words, “doesn't express any private right of action.” This Court may well ask MR. HIMSL, “Who cares what RCW chapter 60.42 does or does not express, given the fact you wrongly invoked RCW chapter 60.42 when filing your 35 unlawful liens in the first place?” The point is, RCW chapter 60.42 hasn't had anything to do with this case, once the trial court declared MR. HIMSL'S 35 liens were not lawful under that statute – a declaration which MR. HIMSL declined to challenge on appeal. MR. HIMSL never has come forth with any alternative theory – either presented to the trial court or to this Court – which suggests his 35 liens were somehow lawfully recorded against the Montecito Estates residential subdivision. MR. HIMSL'S 35 liens are unlawful. That is settled.

As such, MONTECITO is entitled to sue MR. HIMSL for his wrongdoing under any viable theory (cause of action), including the two which here are at issue: (1) breach of contract (including the contract's subsumed duty of good faith and fair dealing) and (2) violation of his

statutory duties under RCW chapter 18.86.

MR. HIMSL'S insistence that RCW chapter 60.42 "doesn't express any private right of action" compels a conclusion that it internally provides an "exclusive remedy" for its violations. For example, in the Industrial Insurance Act, the legislature expressed just such an "exclusive remedy" provision, as follows:

. . . . The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents **is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation**, except as otherwise provided in this title; and to that end **all civil actions and causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished**, except as in this title provided.

RCW 51.04.010, with emphases added, a copy of which is attached in the Appendix hereto (p. 11). RCW chapter 60.42, however, contains no "exclusive remedy" remedy provision whatsoever.

Worse yet for MR. HIMSL, his assertion that RCW chapter 60.42 "doesn't express any private right of action" constitutes another example of his lacking in candor to this Court. See, e.g., the following:

(4) Proceedings under this section shall not affect other rights and remedies available to the parties under this chapter **or otherwise**.

RCW 60.42.020, emphasis added, a copy of which is attached in the Appendix hereto (p. 12). The legislature's use of the words "or otherwise" in RCW 60.42.020(4) expresses its clear intent that remedies for violations of RCW chapter 60.42 are not limited to those set forth only in that chapter. Thus, despite MR. HIMSL'S insistence to the contrary, RCW chapter 60.42 expressly allows "private rights of action" for its violations.

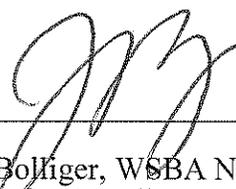
Based upon the foregoing, the appellants request this Court remand for a jury trial MONTECITO'S causes of action against MR. HIMSL for (1) breach of contract (including the contract's subsumed duty of good faith and fair dealing) and (2) violation of his statutory duties under RCW chapter 18.86.

Thank you for your time.

DATED this 13 day of June, 2012.

BOLLIGER LAW OFFICES

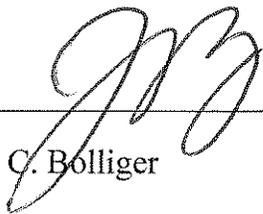
By: _____


John C. Bolliger, WSBA No. 26378
Attorneys for Appellants

I swear under penalty of perjury under the laws of the state of Washington the facts set forth above are true and correct.

DATED this 13 day of June, 2012.

Kennewick, WA
City, state where signed



John C. Bolliger

DECLARATION OF SERVICE

STATE OF WASHINGTON)
COUNTY OF BENTON) ss.

I, John C. Bolliger, declare as follows:

On the date set forth below, I caused a true and correct copy of this document to be sent to the following persons and entities in the manner shown:

<u>Jeffrey P. Downer/Dan J. Von Seggern</u>	<input type="checkbox"/>	regular mail
	<input type="checkbox"/>	e-mail no. dvs@leesmart.com
Lee Smart	<input type="checkbox"/>	facsimile no. (206) 624-5944
1800 One Convention Place	<input type="checkbox"/>	Pronto Process & Messenger Service, Inc.
701 Pike Street	<input type="checkbox"/>	hand-delivery by John C. Bolliger
Seattle, WA 98101-3929	<input checked="" type="checkbox"/>	Federal Express No. 7985 0669 5165

I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

DATED this 13 day of June, 2012.

Kennewick, WA

City, state where signed


Signature

Appendix

1 violated, Mr. Himsl successfully moved for sanctions. Order granting Sanctions, Von Seggern
2 Dec. at Ex. 15. Plaintiffs even improperly served a Subpoena Duces Tecum on co-defendants
3 Everett's malpractice insurer. Subpoena, Von Seggern Dec. at Ex. 16.

4 Finally, after Mr. Himsl's Motion for Summary Judgment had been heard and while this
5 court's decision was pending, Mr. Bolliger moved to reinstate the causes of action that he had
6 previously dismissed. That motion too was denied. Order Denying Motion for Order
7 Reinstating Claims, Von Seggern Dec. at Ex. 17. None of these actions by plaintiffs were
8 proper, and Mr. Himsl, through his counsel, had to respond to all of them. This caused an
9 inordinate expenditure of effort and attorney time over and above what should have been
10 involved in simply defending against plaintiffs' claims.

11 III. LEGAL AUTHORITY

12 **A. Sanctions under CR 11 are appropriate because plaintiffs and Mr. Bolliger**
13 **filed complaints that were baseless and without making the required**
14 **reasonable inquiry.**

15 **1. Plaintiffs' pleadings clearly violated CR 11, so that imposition of**
16 **sanctions is mandatory.**

17 Civil Rule 11 establishes the standard that attorneys or parties must meet when filing
18 pleadings, motions, and legal memoranda. The rule is intended to deter baseless filings and to
19 curb abuses of the judicial system. The rule imposes upon attorneys, and in some instances
20 parties, the responsibility to insure assertions made and positions taken in litigation are done so
21 in good faith and not for an improper purpose. A party or an attorney, or both, may be
22 sanctioned for a CR 11 violation. *Layne v. Hyde*, 54 Wn. App. 125, 136, 773 P.2d 83 (1989).

23 A pleading may subject its drafter to sanctions if it is (1) baseless and (2) signed without
24 reasonable inquiry. CR 11; *Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994). A
25 filing is baseless if (a) it is not well grounded in fact or (b) not warranted by (i) existing law or
(ii) a good-faith argument for the alteration of existing law. CR 11. Whether a reasonable

1 inquiry has been made by the signing attorney is determined by reviewing the circumstances of
2 the particular case. *Miller v. Badgley*, 51 Wn. App. 285, 301, 753 P.2d 530 (1988). An
3 attorney's blind reliance on a client seldom constitutes a reasonable inquiry. *Id.* (citing
4 *Southern Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783, 788 (5th Cir. 1986) and *Coburn*
5 *Optical Indus. v. Cilco, Inc.*, 610 F. Supp. 656, 659 (M.D. N.C. 1985)).

6 Where it becomes apparent during the course of a lawsuit that the claims cannot be
7 supported, sanctions may be imposed for continuing the suit's prosecution. *McDonald v.*
8 *Korum Ford*, 80 Wn. App. 877, 912 P.2d 1052 (1996). In *McDonald*, plaintiffs' attorney was
9 sanctioned for failing to dismiss claims after plaintiff's deposition testimony made it clear that
10 she lacked the required evidence. *Id.*

11 Once a CR 11 violation occurs, the imposition of sanctions is mandatory. *Miller*, 51
12 Wn. App. at 300. Such sanctions may include requiring the attorney or party in violation of CR
13 11 to pay the opposing party "the amount of reasonable expense incurred because of the
14 baseless filing of a pleading, motion, or legal memorandum, including reasonable attorneys
15 fees." CR 11. Sanctions in an amount equal to the amount expended in opposing a filing
16 violating CR 11 are appropriate. *See Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 791 P.2d
17 829, *amended* 57 Wn. App. 107 (1990), *affirmed* 119 Wn.2d 210, 829 P.2d 1099 (1992)).

18 **2. Plaintiffs' claims against Mr. Himsl have always been baseless.**

19 Plaintiffs' entire lawsuit was baseless, in that the claims were not well grounded in fact.
20 This court so held on summary judgment. Furthermore, this is demonstrated by plaintiffs'
21 inability to produce any evidence whatsoever to support their claims. While the court did rule
22 in plaintiffs' favor on two legal issues, neither supported any finding of liability on Mr. Himsl's
23 part. First, the court granted plaintiffs' motion for "declaratory judgment," holding that the
24 Montecito Estates property was "non-commercial." In so ruling, however, the court made no
25

1 finding that Mr. Himsl was in any way liable for plaintiffs' damages (if any). Second, the court
2 held that use of RCW Chapter 60.42 was unlawful. Again, there was no finding that this
3 conferred any liability on Mr. Himsl; in fact, in granting summary judgment the court expressly
4 stated that "the fact that the liens were unlawful, however, does not give rise to an action for
5 damages." Memorandum Decision at 8. In no other case were plaintiffs able to support **any** of
6 their causes of action. The court dismissed all claims against Mr. Himsl on summary judgment,
7 stating that it agreed with Mr. Himsl that plaintiffs had failed to put forth a prima facie case for
8 any of their claims.

9
10 **3. Plaintiffs' counsel failed to conduct reasonable inquiry into their
claims before filing suit.**

11 The *Miller* court set out factors to be considered in determining whether an attorney's
12 inquiry was "reasonable" including (1) the time that was available to the signer; (2) the extent
13 of the attorney's reliance upon the client for factual support; (3) whether the signing attorney
14 accepted a case from another member of the bar or forwarding attorney; (4) the complexity of
15 the factual and legal issues; and (5) the need for discovery to develop factual circumstances
16 underlying a claim. *Miller*, 51 Wn. App. at 302-3.

17 Here, the first factor argues against plaintiffs, as there is no evidence that Mr. Bolliger
18 was in any way pressed for time. Mr. Himsl filed his liens on the Montecito Estates proceeds
19 on August 2, 2006. Mr. Bolliger actively litigated the propriety of the liens in another action in
20 2007. He did not file the first of these actions against Mr. Himsl until September 2008. There
21 was almost a year remaining on the three-year statute of limitations for plaintiffs' tort claims
22 (and even more time on claims such as breach of contract).

23 Second, rather than conducting the reasonable investigation that CR 11 explicitly
24 requires, Mr. Bolliger appears to have relied entirely on his client for factual support, as
25 expressly disapproved of by the *Miller* court. *Miller*, 51 Wn. App. at 302 (citing *Coburn*

1 *Optical Ind. v. Cilco*, 610 F. Supp. 656, 659 (M.D. N.C. 1985)) (“[i]f all the attorney has is his
2 client's assurance that facts exist or do not exist, when a reasonable inquiry would reveal
3 otherwise, he has not satisfied his obligation”).

4 Notably, the entire case for damages depended on how much, if any, would have been
5 earned from the Montecito Estates subdivision. It would seem prudent to investigate what this
6 figure might have been, rather than simply accepting plaintiffs' own statement on the subject.
7 However, no expert on this issue was retained before filing suit, and indeed not until almost the
8 eve of trial. The engagement letters sent to plaintiffs' development experts, Terry Phillips and
9 Ron Asmus, enclosing documents for their review are dated November 4, 2010. It thus appears
10 that they were not consulted until **more than two years** after the complaint was filed. Von
11 Seggern Dec. at Exhibit 18; *Id.* at Ex. 19. The second factor therefore also argues that the
12 investigation was not “reasonable.”

13 The third factor does not apply, as the case was not transferred from another attorney.
14 The fourth factor argues in Mr. Himsl's favor, as Mr. Bolliger himself has repeatedly stressed
15 that the issues in this case are simple (so simple, apparently, that plaintiffs felt no need to
16 depose any of defendant's experts). As plaintiffs already possessed nearly all of the relevant
17 evidence in this case from the beginning, discovery should not have been necessary to develop
18 their claims, and the fifth *Miller* factor also argues that an adequate investigation was not done.

19 To cite but one specific example of the failure to investigate, one of the original claims
20 against Mr. Himsl was for Defamation. Proof of this would require, at a minimum, a
21 defamatory statement by Mr. Himsl. When directly asked at her deposition, plaintiff Trujillo
22 was unable to identify even a **single** statement that she knew Mr. Himsl made that was even
23 untrue, let alone defamatory. Trujillo Dep. at 33-7; *Id.* at 42; *Id.* at 47. Had Mr. Bolliger
24 undertaken even a basic inquiry into this issue, the defamation claim and the expense to Mr.
25

1 Himsl in preparing to defend against it for over two years could have been avoided. Because
2 plaintiffs' claims were both baseless and signed without reasonable inquiry, CR 11 demands
3 that sanctions be imposed.

4
5 **4. Pursuant to CR 11, plaintiffs and Mr. Bolliger are jointly and severally liable for Mr. Himsl's attorney fees.**

6 CR 11 expressly allows for sanctions to be levied against "the person who signed it, a
7 represented party, or both" when the Rule is violated. CR 11(a). A court has broad discretion
8 in deciding against whom to assess sanctions. *Miller*, 51 Wn. App. at 303. The court may
9 order sanctions against an attorney who fails to conduct a "reasonable investigation." *Watson*
10 *v. Maier*, 64 Wn. App. 889, 898, 827 P.2d 311 (1992). And the court may order sanctions
11 against a party who is responsible for the offending pleading. *In re Cooke*, 93 Wn. App. 526,
12 529, 969 P.2d 127 (1999). As the record amply shows, neither Mr. Bolliger nor Ms Trujillo
13 can substantiate their allegations, and neither has made the "reasonable inquiry" mandated by
14 the rule. Accordingly, sanctions should be levied against them jointly and severally.

15 **B. The court should award fees under RCW 4.84.185 because plaintiffs' suit**
16 **was frivolous.**

17 **1. RCW 4.84.185 provides for an award of fees incurred in defending a**
18 **frivolous suit.**

19 RCW 4.84.185 provides:

20 In any civil action, the court having jurisdiction may, upon written findings by
21 the judge that the action, counterclaim, cross-claim, third party claim, or defense
22 was frivolous and advanced without reasonable cause, require the non-prevailing
23 party to pay the prevailing party the reasonable expenses, including fees of
24 attorneys, incurred in opposing such action, counterclaim, cross-claim, third
25 party claim, or defense. This determination shall be made upon motion by the
prevailing party after a voluntary or involuntary order of dismissal, order on
summary judgment, final judgment after trial, or other final order terminating
the action as to the prevailing party. The judge shall consider all evidence
presented at the time of the motion to determine whether the position of the non-
prevailing party was frivolous and advanced without reasonable cause. In no

1 whatsoever could be rendered “non-frivolous” merely by inclusion of a claim asking for a
2 declaratory judgment on some aspect of the relevant law, or even for one stating that “the sky is
3 blue.”

4 The authority provided by plaintiffs on this point is inapposite. In *Jeckle v. Crotty*, 120
5 Wn. App. 374, 85 P.3d 931 (20034), the claim that was found non-frivolous was an issue of
6 first impression (whether an opponent’s attorney may be sued for a CPA violation). This claim
7 was not a mere request for a clarification of existing law, but could itself have led to an award
8 of damages, had it been allowed to go forward. *Biggs v. Pail*, 119 Wn.2d 129,136, 830 P.2d
9 350 (1992), is similar, in that the one claim that was held non-frivolous was for breach of
10 contract and could have itself resulted in an award of damages, not merely an interpretation of
11 law. In contrast, the issues on which this court ruled in plaintiffs’ favor were simply
12 interpretations of existing law that did not themselves represent grounds for an award of
13 damages. All claims for which relief could have been granted plaintiffs were unquestionably
14 frivolous and were dismissed.

15
16 **E. CR 11 sanctions are necessary to punish and deter Mr. Bolliger’s
misconduct.**

17 **1. Fees and costs should be assessed against Mr. Bolliger under CR 11**

18 CR 11, and the case law cited in Himsel’s Memorandum, clearly allow CR 11 sanctions
19 to be imposed against an attorney. Mr. Bolliger cites no case law, statute, or rule that would
20 prevent an award of fees against him here, merely pointing out that Montecito reviewed and
21 verified the complaint before he himself signed it. This appears to be an attempt to shift
22 responsibility for this grossly improper lawsuit to Mr. Bolliger’s (conveniently defunct) client.
23 However, if Mr. Bolliger in fact relied completely on Montecito’s/Trujillo’s investigation and
24 understanding of the facts, then sanctions under CR 11 are clearly justified as such reliance
25 would **demonstrate** that the “reasonable inquiry” required by the Rule was not made. *Miller v.*

1 *Badgley*, 51 Wn. App. 285, 301, 753 P.2d 530 (1988). As the *Miller* court noted, the purpose
2 of the 1985 amendment to CR 11 is to “emphasiz[e] the responsibilities of the attorney and
3 reinforce those obligations by the imposition of sanctions.” *Id.* at 299.

4 Plaintiffs correctly note that the court in *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82
5 P.3d 707 (2004) held that sanctions were warranted when it is “patently clear that a claim had
6 no chance of success.” In this case, Ms. Trujillo’s deposition, in which she was unable to
7 provide any facts supporting her claims, provides that clarity. Plaintiffs could not support their
8 claims, and Mr. Himsl successfully moved for dismissal on that basis. While Mr. Himsl could
9 not have made that determination until the deposition, plaintiffs and their counsel were surely
10 aware at the time that the suit was filed of what facts they did (or did not) possess. The court
11 had no difficulty finding that the claims could not be supported at the time Mr. Himsl moved
12 for dismissal. A simple inquiry by plaintiffs’ counsel **at the time the suit was filed** would
13 have made it clear to him too that the claims were not supportable. Under *Skimming*, then, it is
14 entirely appropriate for sanctions to be awarded in this case. *Skimming*, 119 Wn. App. at 755.

15 It should also be noted that the *Skimming* court did not hold that the plaintiff’s actions
16 were proper or that the suit was not frivolous, but merely noted that there was nothing in the
17 limited record (in particular, the trial court made no findings regarding the denial of sanctions)
18 to allow reversing the trial court. *Id.* at 755-6.

19 This lawsuit is a prime example of the kind of conduct that CR 11 was written to deter.
20 The underlying claims are baseless. Plaintiffs’ counsel clearly undertook no investigation into
21 the validity of the claims before filing suit. He admits that the dismissal of many of plaintiffs’
22 claims occurred “after stages of discovery were conducted in the case.” Opposition at 25. That
23 is **precisely** what the Rule is intended to avoid. CR 11 **required** Mr. Bolliger to investigate
24 these dozens of claims **before** he declared this war, not after the litigation had proceeded for
25

1 more than a year. And the litigation continued, even after it was clear that Mr. Bolliger never
2 possessed prima facie proof for any of his more than 30 imaginative but frivolous claims. Mr.
3 Bolliger's grossly excessive and improper litigation tactics forced Mr. Himsel to endure this
4 litigation and to incur the associated costs.

5 The fact that the pleadings (principally the complaint) were not "hurriedly thrown
6 together" makes Mr. Bolliger's conduct even more egregious. Far from being under time
7 pressure, perhaps due to an impending statute of limitations, Mr. Bolliger had ample time to
8 conduct the investigation into the reasonableness of the claims that the Rule requires. CR 11
9 places the burden to ensure that filings are compliant with the Rule on the attorney as well as
10 the client, as the attorney (who is trained in the law) is in a much better position than his client
11 to make that determination.

12 Mr. Bolliger correctly notes that CR 11 sanctions can have a "chilling" effect. That is
13 exactly the point: the type of misconduct in which Mr. Bolliger engaged here **should** be
14 "chilled." He never should have filed this action or the several others associated with it. He
15 litigated it for more than two years, at great expense to the opposing parties. The personal and
16 professional toll on Mr. Himsel was great. Given the lack of evidence for plaintiffs' claims, the
17 court should find that the suit was prosecuted out of spite or for the purpose of harassment.
18 This is exactly the type of conduct that CR 11 is designed to punish. If there is any case in
19 which sanctions, including an award of fees under CR 11, are warranted, it is this one.

20
21 ~~2. Neither Mr. Bolliger nor plaintiffs ever made any request
whatsoever for an "extension" or "modification" of existing law.~~

22 ~~Montecito has never suggested that the existing state of the law warranted any
23 extension or modification. This argument, post-summary judgment, is simply an untimely and
24 mis-titled request for reconsideration. The phrasing of their argument is telling:~~

25 ~~"Montecito's good faith arguments, set forth herein and in its prior briefings, warrant~~

Subj: **Briefing schedule for motion on attorney's fees**
Date: 3/1/2011 14:32:19 Pacific Standard Time
From: dvs@leesmart.com
To: Jcbolliger@aol.com
CC: Jpd@leesmart.com

Dear John-

This is to memorialize today's discussion regarding briefing on the attorney's fees motion.

- 1) Hims'l's motion for attorney's fees and costs will be heard telephonically on March 31, 2011, at 9:00 AM.
- 2) The parties agree to serve the briefing on each other by email. All emails are to be cc'd to both Jeff Downer and myself.
- 3) Hims'l's brief will be filed by 5:00 PM on March 8, 2011
- 4) Montecito's Response will be served by 5:00 PM on March 21, 2011.
- 5) Hims'l's Reply will be due by 5:00 PM on March 28, 2011.

Any outstanding orders in the matter will also be presented at the March 31 hearing.

Thank you.

Dan

Dan J. Von Seggern | Attorney at Law | VCard
<http://www.leesmart.com/vcard/Dan_Von_Seggern.vcf> | Email
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Subj: **Montecito's Opposition to Himsi's Motion for Attorneys' Fees**
Date: 3/21/2011 16:11:38 Pacific Daylight Time
From: Jcbolliger@aol.com
To: dvs@leesmart.com, michael@everettlaw.net, tyler@everettlaw.net, tim@cokerothlaw.com,
jpd@leesmart.com

Gentlemen:

Montecito's referenced brief appears in the attached .pdf file.

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1 2
(2 screens)

West's RCWA 51.04.010

West's Revised Code of Washington Annotated Currentness

Title 51. Industrial Insurance (Refs & Annos)

Chapter 51.04. General Provisions (Refs & Annos)

⇒51.04.010. Declaration of police power--Jurisdiction of courts abolished

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

CREDIT(S)

[1977 ex.s. c 350 § 1; 1972 ex.s. c 43 § 1; 1961 c 23 § 51.04.010. Prior: 1911 c 74 § 1; RRS § 7673.]

HISTORICAL AND STATUTORY NOTES

Laws 1972, Ex.Sess., ch. 43, § 1, in the first sentence, substituted "employment" for "hazardous work"; and, in the last sentence, following "injured in" substituted "their" for "extrahazardous".

Laws 1977, Ex.Sess., ch. 350, § 1, throughout the section, substituted "workers" for "workmen".

Source:

Laws 1911, ch. 74, § 1.

RRS § 7673.

Comparative Laws:

Ariz.--A.R.S. § 23-1022.

Cal.--West's Ann.Cal.Labor Code, §§ 3601, 3602.

Conn.--C.G.S.A. § 31-293a.

Del.--19 Del.C. § 2304.

D.C.--D.C. Official Code, 2001 Ed. § 32-1504.

Fla.--West's F.S.A. § 440.11.

11

Washington Statutes
Title 60. Liens
Chapter 60.42. Commercial real estate broker lien act

Current through Chapter 199, 2012 Regular Session

§ 60.42.020. Disputed claim – Order to show cause – Hearing

(1) An owner of commercial real estate subject to a recorded notice of claim of lien against proceeds under this chapter, who disputes the broker's claim in the notice of claim of lien against proceeds, may apply by motion to the superior court for the county where the commercial real estate, or some part thereof, is located for an order directing the broker to appear before the court at a time no earlier than seven nor later than fifteen days following the date of service of the motion and order on the broker, to show cause as to why the relief requested should not be granted. The motion must state the grounds upon which relief is asked and must be supported by the affidavit of the owner setting forth a concise statement of the facts upon which the motion is based.

(2) The order to show cause must clearly state that if the broker fails to appear at the time and place noted, the notice of claim of lien against proceeds must be released, with prejudice, and the broker must be ordered to pay the costs requested by the owner, including reasonable attorneys' fees.

(3) If, following a hearing on the matter, the court determines that the owner is not a party to an agreement which will result in the owner being obligated to pay to the broker a commission pursuant to the terms of a commission agreement, the court shall issue an order releasing the notice of claim of lien against proceeds and awarding costs and reasonable attorneys' fees to the owner to be paid by the broker. If the court determines that the owner is a party to an agreement which will result in the owner being obligated to pay to the broker a commission pursuant to the terms of a commission agreement, the court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the broker, to be paid by the owner. Such orders are final judgments.

(4) Proceedings under this section shall not affect other rights and remedies available to the parties under this chapter or otherwise.

History. 1997 c 315 § 3.