

FILED

MAY 16 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30140-1-III

COURT OF APPEALS STATE OF WASHINGTON
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MONTECITO ESTATES, LLC, a Washington limited liability company
and PRISCILLA TRUJILLO, a single woman,

Appellants.

v.

DOUGLAS JOSEPH HIMSL, a single man, dba HIMSL REAL ESTATE
COMPANY, a Washington real estate company,

Respondent.

BRIEF OF RESPONDENT

Jeffrey P. Downer, WSBA No. 12625
Dan J. Von Seggern, WSBA No. 39239
Melody A. Retallack, WSBA No. 40871
Of Attorneys for Respondent

LEE SMART, P.S., INC.
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701 Pike Street
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I. INTRODUCTION

“Starting a lawsuit is no trifling thing. By the simple act of signing a pleading, an attorney sets in motion a chain of events that surely will hurt someone. Because of CR 11, that someone may be the attorney.” *Brigade v. Economic Dev. Bd. for Tacoma-Pierce County*, 61 Wn. App. 615, 617, 811 P.2d 697 (1991). This case amply proves that statement.

Plaintiffs-appellants Priscilla Trujillo and Montecito Estates, LLC (collectively “Montecito”) appeal the trial court’s grant of summary judgment to defendant-respondent Douglas Himsl. Montecito and its attorney, John C. Bolliger, appeal an award of attorney fees to Mr. Himsl, as CR 11 sanctions. Mr. Himsl is a licensed real estate broker in Benton County. He entered into a Listing Agreement with Montecito to sell homes it was attempting to develop in Prosser. Montecito sought to terminate the Listing Agreement. Mr. Himsl, through his then-lawyer, sought to collect his commissions by filing liens on the proceeds of sales of the homes pursuant to the Commercial Real Estate Broker’s Lien Act (RCW 60.42, the “Act”). Montecito brought this action, alleging 33 wide-ranging claims against Mr. Himsl, CP 13-15; all stemmed from Montecito’s contention that Mr. Himsl’s liens were unlawful because the property was “residential real estate” under the Act. CP 1108.

The trial court dismissed the action against Mr. Himsl on three

grounds. CP 2453. The trial court then granted Mr. Himsl's motion for attorney fees under CR 11 against both Montecito and Mr. Bolliger, stating this was the type of suit that "give[s] lawyers and the legal system a bad name" and that "CR 11 sanctions are intended to deter." CP 890.

This court should affirm the trial court's dismissal of this action on summary judgment. Because the trial court acted within its sound discretion in awarding fees, this court should affirm that decision as well.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Mr. Himsl assigns no error to the trial court's decisions.

Issues Pertaining to Assignments of Error

Montecito and Mr. Bolliger misstate the issues on appeal, which Mr. Himsl believes are more correctly stated as follows.

1. Whether the trial court correctly entered summary judgment of dismissal of all claims against a real estate broker, where: (a) all claims stemmed from the broker's allegedly wrongful filing of liens on the proceeds of sale of properties under RCW 60.42; (b) litigation immunity barred the claims against the broker, who was the plaintiffs' adversary in underlying litigation regarding those liens; (c) RCW 60.42 affords only one remedy, which is removal of the liens, and plaintiffs

abandoned that relief; and (d) plaintiffs abandoned and/or lacked proof of the dozens of claims they alleged against the broker.

2. Whether the trial court acted within its sound discretion in assessing CR 11 fees against plaintiffs and their counsel, where: (a) plaintiffs forced the broker to incur major legal expense and then abandoned most of the claims; and (b) the trial court specifically found that plaintiffs' causes of action lacked the necessary factual investigation and legal support and were motivated by vindictiveness and bad faith.

III. STATEMENT OF THE CASE

Consistent with Montecito's and Mr. Bolliger's behavior throughout this action, their Statement of the Case is a selective, misleading, and improperly argumentative rendition of the facts, omits the required citations to the record, and flouts the Rules of Appellate Procedure. Mr. Himsl offers the following Counterstatement of the Case.

A. Mr. Himsl agreed to sell homes for Trujillo/Montecito.

In 2000, Priscilla Trujillo obtained preliminary approval to subdivide her unimproved land in Prosser (the "Property") into 35 residential lots. CP 50-54. In 2005, she transferred the Property to Montecito Estates, LLC, a company she created to develop land. On December 2, 2005, Montecito entered into an Exclusive Listing and Sale Agreement (the "Agreement") with Mr. Himsl to market lots and homes

on the Property. CP 70-72. The Agreement was to be in force until December 31, 2006 and provided that Mr. Himsl was entitled to a commission on any home sold during its term, or within 180 days thereafter if the buyer learned of the property through his efforts. CP 70.

On March 7, 2006, James and Judy Curnutt signed a Real Estate Purchase and Sale Agreement (REPSA) with Montecito for a home to be built at Montecito Estates. CP 74-77. Mr. Himsl represented Montecito, and real estate agent Kathleen Laws represented the Curnutts. *Id.* In May 2006, the Curnutts terminated the REPSA because Montecito could not finish construction in accordance with the REPSA's terms. CP 95, 1007, 1133. No other lots had been sold by that time. CP 1133.

B. Mr. Himsl filed liens on the proceeds from the Property to protect his right to sales commissions.

In May 8, 2006, Ms. Trujillo attempted to unilaterally terminate the Agreement with Mr. Himsl by email. CP 91. Mr. Himsl informed Ms. Trujillo this was improper, and he intended to hold her to her contractual obligations, CP 93, including his potential entitlement to commissions on certain sales as the Agreement provided. CP 70.

Mr. Himsl consulted the Everett & Everett law firm. CP 1134. On Mr. Himsl's behalf, attorney Tyler Everett placed liens on the sales proceeds from Montecito's lots under the Commercial Real Estate Broker

Lien Act, RCW 60.42.010 (the “Act”), to secure payment of any commissions under the Agreement. CP 101-05.

The Act allows a real estate broker to place a lien on the proceeds of commercial real estate in the amount of commissions he is owed. It explicitly states the liens are not liens upon the property itself. RCW 60.42.010(2); RCW 60.42.010(1).

Whether the Montecito Estates property was residential or commercial was a disputed issue in the underlying lawsuit between Montecito and Mr. Himsl. CP 25. No appellate court has yet interpreted the Act’s definition of “commercial real estate.” RCW 60.42.005(1). Although the trial court in this action ultimately ruled the Property was “residential,” he also noted that Mr. Himsl’s argument that the Property was “commercial” was “raised in good faith ... well reasoned, and ... based on an arguable interpretation of the statutes in question.” CP 2452.

C. The liens never impaired sales of the Property.

Montecito presented no proof that Mr. Himsl’s liens affected Montecito’s ability to sell lots or convey title. To the contrary, because the liens were on the **proceeds** of the Property rather than on the Property itself, they did not impede any sale of the lots. CP 1130. Montecito’s lender, Ron Reibman, testified, “I don’t see how that lien would have stopped her from selling the lots,” CP 1047, and had no facts to suggest

that the liens had any effect on the project's profitability. CP 1048.

D. Mr. Everett tried to negotiate the liens' removal.

The Act provides for an action to compel release of liens if a property owner feels they have been improperly applied. RCW 60.42.010(8). Mr. Bolliger filed such an action in 2007, Benton County cause no. 07-2-01638-7, asking the court to remove Mr. Himsl's liens on the basis that the Property was residential rather than commercial. CP 343. At an August 3, 2007 hearing, the trial court did not decide whether the liens were valid, and no action was taken. CP 1040-41. At that hearing, Mr. Everett offered to remove the liens if Montecito would hold five percent of any sales proceeds in trust pending a determination whether Mr. Himsl in fact was owed a commission. CP 1037-38. Mr. Bolliger rejected this suggestion, which he has mischaracterized as a "ransom demand." CP 1040; App. Br. at 23. The action was dismissed on December 7, 2007 due to inaction by Montecito. CP 349.

E. Montecito sued Mr. Himsl after losing the Property.

Ms. Trujillo and Montecito failed to complete the development or to sell any of the lots. In November 2007, Montecito deeded most of the Property to a lender in lieu of foreclosure. CP 132-34.

Montecito and Trujillo sued Mr. Himsl, Chicago Title Company, and the Curnutts, in September 2008 under Benton County cause no. 08-2-

02526-5. They filed a second suit against Mr. Himsl in 2009, and the two were ultimately consolidated under cause no. 09-2-02527-1. CP 1, 143. The complaints alleged numerous causes of action, including breach of contract, civil conspiracy, tortious interference with business expectations, negligence, and extortion. The complaints alleged that the liens clouded title to the lots, prevented Montecito from obtaining the necessary financing, and caused Montecito to lose the property. CP 5-7, 11-12, 357. Plaintiffs' Second Amended Complaint, filed October 21, 2009, contained 27 causes of action. Because Mr. Bolliger had lumped some of them together, there actually were up to 33 separate causes of action against Mr. Himsl, and many causes of action against other defendants. CP 1-16.

Mr. Himsl's answer to the First Amended Complaint alleged that it was "frivolous, advanced without reasonable cause, and contrary to law on its face," and that he was entitled to fees and costs under CR 11. CP 1832.

F. Montecito voluntarily dismissed most of its claims before summary judgment.

Initially, it was impossible to tell which of these dozens of claims Montecito intended to allege against which defendants. Mr. Himsl therefore moved for an order compelling a more definite statement, which the trial court granted. CP 2044-45. Each cause of action required Mr. Himsl's counsel to address different facts and issues. On June 14, 2010,

some 20 months into the litigation, Montecito served a “Second Amended More Definite Statement.” CP 159-66. Without explanation, this document stated that plaintiffs were “no longer pursuing” 14 of their enumerated claims against Mr. Himsl. CP 160, n.1. Up to that point, Mr. Himsl’s defense costs and attorney fees totaled \$120,227.70. CP 1418.

On December 20, 2010, less than five months before trial, Mr. Bolliger filed a “Third Amended More Definite Statement,” abandoning three more causes of action, CP 308-16, again without explanation. By then, Mr. Himsl’s costs totaled \$192,934.66. CP 1418. This left only eight causes of action remaining against Mr. Himsl: 5.1, Breach of Express Contract; 5.13, Civil Conspiracy and/or Acting in Concert; 5.17, Extortion/Duress/Business Compulsion; 5.19, Common Law Liability on a Principal’s Part for the Actions of an Agent; 5.20, Unjustified Filing of Liens under RCW 60.42; 5.21, Breach of Statutory Duties under RCW 18.86; 5.26, Violation of CR 11; and 5.27 Violation of RCW 4.84.185. CP 13-15. Finally, at the last possible moment, Montecito conceded in Opposition to Himsl’s Motion for Summary Judgment that the causes of action for Unjustified Filing of Liens, Violation of CR 11, and Violation of RCW 4.84.185 were no longer at issue. CP 402-03.

Thus, only after more than two years of preparation and a very large expenditure of attorney fees, Montecito abandoned all but five of its

original 33 causes of action. By then, Mr. Himsl's counsel had been forced to expend tremendous effort in preparation to defend against dozens of causes of action that Mr. Bolliger ultimately abandoned.

G. Mr. Bolliger's tactics violated court rules and orders and forced Mr. Himsl to unnecessary legal expense.

Mr. Bolliger's actions forced the defense to devote unusually large, and otherwise unnecessary, legal expense to this litigation.

1. Mr. Bolliger filed an overbroad and illegible witness disclosure.

Mr. Bolliger's initial witness disclosure was not only deficient, but handwritten, disorganized, and illegible. CP 2077-84. Mr. Himsl was forced to move to require an amended Disclosure. CP 2085-87. Mr. Bolliger eventually disclosed at least 116 witnesses. A paralegal for Mr. Himsl's counsel expended great effort and many hours trying to interview these individuals and determine what, if any, relevant information they possessed. She spoke with 33 of them prior to Mr. Himsl's summary judgment motion. Only **two** of these 33 stated that anyone had contacted them on plaintiffs' behalf regarding this litigation. CP 1298.

2. Mr. Bolliger repeatedly and improperly sought privileged information.

Mr. Bolliger's initial discovery requests improperly sought attorney-client communications. CP 1928. On December 18, 2009, the trial court granted Mr. Himsl's motion for a protective order. CP 2050-52.

On March 30, 2010, and in direct violation of that order, Mr. Bolliger served discovery requests on the Everetts, Mr. Himsl's former attorneys, again seeking some of the same privileged information. CP 1367-72. When the Everetts refused to provide privileged information, Mr. Bolliger moved to compel its production, which was denied. *Id.* Mr. Bolliger went so far as to serve a Subpoena Duces Tecum on the Everetts' malpractice insurer, clearly an improper request. CP 1400-02.

3. Mr. Bolliger repeatedly noted a "Motion for Declaratory Judgment" in violation of the trial court's order.

In December 2009, Mr. Bolliger first moved for partial summary judgment on the residential versus commercial status of the property, characterizing his motion as one for Declaratory Judgment. CP 17-45. The trial court denied Mr. Bolliger's motion without prejudice and ruled that it could be heard on the summary judgment timetable only after Ms. Trujillo was deposed. CP 1374-75.

Mr. Bolliger violated this order. He re-noted his motion for hearing on April 29, 2010, prior to Trujillo's deposition and thus in direct violation of the trial court's order. CP 1379-81. Mr. Himsl was forced to move to strike the improperly re-noted motion. CP 2190-95. On October 1, 2010, Mr. Bolliger yet again re-noted his motion, again prior to Ms. Trujillo's deposition. For the second time, Mr. Himsl was forced to incur

attorney time and expense in moving to strike. CP 1383-88.

4. Mr. Himsl was forced to move to compel plaintiffs' discovery responses.

Mr. Himsl was forced to move to compel plaintiffs' responses to his proper discovery requests regarding Montecito's and Ms. Trujillo's finances. CP 1390-91. Even after the court's March 5, 2010 order compelling discovery, Mr. Bolliger provided clearly incorrect answers. For example, an Interrogatory requesting a list of any bank accounts held by Montecito was answered "N/A," even though Mr. Bolliger already had provided some scattered records for those very accounts. CP 2110-11. Mr. Himsl successfully moved for sanctions in response. CP 2375-77.

5. Mr. Bolliger failed to consult damages experts for more than two years after filing the action.

Montecito's disclosure of experts on economic damages was untimely by any standard. CP 2386-90. When Mr. Himsl moved to exclude this testimony, it became apparent that Montecito's development experts, Terry Phillips and Ron Asmus, had never even been engaged until very late in the suit. Their engagement letter, enclosing documents for their review is dated November 4, 2010, CP 1410, 1414, more than two years after the complaint was filed.

6. Mr. Bolliger attempted to reinstate causes of action he had dismissed with prejudice.

Even after the trial court had heard and taken under advisement

Mr. Himsl's summary judgment motion, Mr. Bolliger moved to reinstate several causes of action he had previously dismissed **with prejudice**. CP 644-60. That motion was denied. CP 733. Montecito appealed that ruling but abandoned that issue on appeal. App. Br. at 46, n.7.

H. Mr. Bolliger filed a baseless disciplinary complaint against Mr. Himsl to the Department of Licensing and improperly cited the investigation to the trial court.

Ms. Trujillo filed a complaint against Ms. Himsl with the Department of Licensing (DOL) in 2007, based on the events that underlie this suit. In addition to the civil lawsuit, Mr. Himsl was forced to incur substantial legal fees defending against the complaint to DOL. Ultimately, DOL dismissed the complaint, evidently concluding that insufficient evidence existed to support it. CP 1346-47. Yet despite that conclusion, Mr. Bolliger continued to insinuate to the trial court that DOL had somehow found it meritorious. CP 360, n.10. In all, almost 15 pages of Mr. Bolliger's Opposition to Mr. Himsl's Motion for Summary Judgment were devoted to this defunct investigation. CP 346-60. *See also* App. Br. at 14-16. That brief also grossly misstates the testimony of Christina Hoover. *See* § V.O., *infra*; *cf.* App. Br. at 15.

I. Montecito failed to present proof of its claims.

Montecito appeals the dismissal of only two of the five causes of action that were dismissed on summary judgment. App. Br. at 46 n.7. Mr.

Himsl addresses all five claims here, because the grounds for dismissal support the trial court's award of CR 11 fees.

1. Montecito offered no proof of breach of contract.

At her October 20, 2010 deposition, Ms. Trujillo was specifically asked for proof of her breach-of-contract claim. Rather than identify any specific proof, she referred to unspecified "documentation" she said would be in Mr. Bolliger's office. CP 1084. The only agreement with Mr. Himsl that Ms. Trujillo could recall was the Listing Agreement. CP 1084-85.

2. Montecito offered no proof of defamation or trade libel.

Mr. Bolliger's account of the defamation claim grossly misstates the record. He asserts that Ms. Trujillo was "unable to understand" the phrasing of the question regarding untrue statements by Mr. Himsl and that Mr. Bolliger properly objected to it. App. Br. at 14. Mr. Bolliger attempted to make a blanket objection. CP 1085. When asked numerous other questions about what false statements Mr. Himsl had made, Ms. Trujillo expressed no lack of understanding. CP 1337. Despite a long colloquy, Ms. Trujillo could identify only two specific statements by Mr. Himsl that she claimed were false. CP 1086-90. One of these two statements was never made, and the other is demonstrably true.

First, Ms. Trujillo testified that Mr. Himsl contacted Christina Hoover at Creekside Realty and sent her a document purporting to show

he had liens on the Property. CP 1333. The alleged contact between Mr. Himsl and Ms. Hoover in fact never occurred. Ms. Hoover testified that Mr. Himsl did not contact her. CP 1112-13. She actually received the document in question from Chicago Title, not Mr. Himsl. CP 1089. Second, Ms. Trujillo asserts that Mr. Himsl told Chicago Title that the Curnutt REPSA had fallen through, but even she assumes that statement was true when Mr. Himsl said it. CP 1088-89. Ms. Trujillo could not identify any other allegedly false statements by Mr. Himsl, let alone any that rose to the level of defamation. CP 1091.

3. Montecito offered no proof of Civil Conspiracy involving Mr. Himsl.

Asked to state what facts showed the Everetts worked in concert with Mr. Himsl to harm her, Ms. Trujillo stated only that the Everetts filed the liens on Mr. Himsl's behalf and did not remove them at her request. CP 1097-99. She could not recall any other such facts. CP 1100.

Montecito alleged that Mr. Himsl and Chicago Title conspired to avoid paying the Curnutts' earnest money to Montecito and to induce Montecito to grant deeds of trust on its property in favor of Chicago Title. At deposition, Ms. Trujillo could cite no specific proof of such allegations and claimed only that an "[t]here is a stack of over about five inches thick of documentation that was gathered by the Washington State Department

of Real Estate Licensing that I think are all facts.” But she could not name any specific document that proved that allegation. CP 1092-94.

Montecito also failed to provide any proof that Mr. Himsl conspired or acted in concert with the Curnutts. Ms. Trujillo could cite no facts that would prove this claim. She cited Mr. Himsl’s use of the Curnutts’ REPSA in filing the liens, CP 1095, but, nothing shows the Curnutts ever knew of the liens or discussed them with Mr. Himsl. Ms. Trujillo stated only that it “seems very odd” Mr. Curnutt did not contact her after she tried to terminate the Agreement. CP 1095-97.

4. Montecito offered no proof of Extortion/Business Compulsion.

Montecito presented no proof of Extortion/Business Compulsion. Throughout the litigation, Mr. Bolliger characterized Mr. Everett’s letter with the offer of settlement as a “ransom demand.” CP 363, App. Br. at 23. The trial court found this an “irrational and unreasonable interpretation of this letter, and it reflects plaintiffs’ vindictive motive in bringing many of their unwarranted causes of action.” CP 891. Ms. Trujillo could point only to statements by Mr. Himsl or his counsel in court and their refusal to remove the liens, CP 1101-02, but could not say that his conduct compelled her to incur any business loss. CP 1103.

J. The trial court granted summary judgment of dismissal on three separate and independent grounds.

The trial court granted summary judgment to Mr. Himsl on three discrete grounds. First, litigation immunity applied. All claims against Mr. Himsl stemmed from the liens that the Everetts filed on his behalf. CP 1108. The trial court held that the liens were action by attorneys representing Mr. Himsl in litigation and that litigation immunity therefore applied to that action in favor of both litigants and their attorneys, CP 2451, and dismissed the claims against Mr. Himsl. CP 2450.

Second, the Act provides for a show-cause action if the property owner contends a lien was wrongly filed. RCW 60.42.010(1). The property owner may recover her attorney fees and costs through this process. RCW 60.42.020(3). The trial court held that the show-cause hearing was the sole remedy for unlawfully filed liens and that no other lawsuit based on the liens was authorized, CP 2452, and dismissed all claims against Mr. Himsl on this basis as well. CP 2453.

Third, the trial court held that Montecito possessed no proof of its claims. *Id.* The trial court stated that Mr. Himsl's counsel "effectively and correctly analyzed" this point, adopted that analysis, and dismissed the claims on their merits. *Id.*

K. The trial court awarded Mr. Himsl CR 11 attorney fees.

Mr. Himsl moved for attorney fees and costs on three bases: (1)

under the attorney fee provision in the Agreement, (2) that the claims violated CR 11 because they were filed without reasonable investigation and/or were not based on the law, and (3) under RCW 4.84.185 on the basis that the action as a whole was frivolous. After a March 31, 2011 hearing on Mr. Himsl's motion, the trial court assessed \$165,011.52 in fees as a CR 11 sanction, jointly and severally against Mr. Bolliger, Ms. Trujillo, and Montecito. CP 877. The court also awarded Mr. Himsl \$131,011.58 against Montecito under the Agreement's fee clause. CP 875.

IV. SUMMARY OF ARGUMENT

The trial court properly granted summary judgment of dismissal on three separate grounds. First, litigation immunity barred Montecito's claims, because the liens were action by attorneys representing Mr. Himsl's interest in litigation. Second, Montecito filed a show-cause action for removal of the liens but later abandoned it; no other remedy for unlawfully filed liens exists. Third, Montecito failed to present proof of the merits of their claims. This court should affirm summary judgment.

The trial court properly assessed CR 11 sanctions against Montecito and Mr. Bolliger. Mr. Himsl gave notice he would seek sanctions at the outset of the suit and mitigated the cost of litigation so far as possible. Mr. Bolliger argues that sanctions cannot be based on any

causes of action that were voluntarily dismissed but cites no legal basis for this argument and ignores that Mr. Himsl incurred more than \$100,000 in fees before the causes of action were dropped. The trial court properly considered the briefing of both parties and then explained its ruling in a well-considered Memorandum Decision and Findings of Fact and Conclusions of Law. The record amply supports the trial court's findings and shows that it acted well within its discretion.

V. ARGUMENT

A. Mr. Bolliger violates the Rules of Appellate Procedure.

Mr. Bolliger's brief repeatedly violates the RAPs. His Statement of the Case violates RAP 10.3(a)(5). It is improperly argumentative and contains numerous factual statements that lack the required citations to the record. App. Br. at 51-52. His very service of the brief by fax violates RAP 5.4(b). *See* Proof of Service.

B. This court reviews the summary judgment order de novo but reviews the fee award for abuse of discretion.

A trial court's grant of summary judgment is reviewed de novo. *Smith v. Stockdale*, 166 Wn. App. 557, 271 P.3d 917, 921 (2012). This court "reviews not only the decision of the trial court, but may also determine whether the trial court's decision can be affirmed on alternate grounds." *Id.* (citation omitted). Here, Montecito's appeal from the trial court's grant of summary judgment to Mr. Himsl is reviewed de novo.

However, a decision to impose sanctions is reviewed for abuse of discretion only. *Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). Abuse of discretion occurs only if a decision is “manifestly unreasonable” or based on untenable grounds. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009). “Manifestly unreasonable” means a view no reasonable person would take. *Id.* Untenable grounds are when the court relies on unsupported facts or applies the wrong legal standard. *Id.*

Montecito and Mr. Bolliger conflate these standards of review. They argue against the CR 11 sanctions “because their claims had merit.” Thus, they wrongly ask this court to apply the more lax de novo standard, rather than the proper abuse-of-discretion standard, to the fee award.

C. Mr. Himsl’s liens did not affect title to the Property.

Regardless of the residential versus commercial character of Montecito’s property, the liens Mr. Himsl filed did not affect title. Such a lien is not “upon real property.” RCW 60.42.010(1). A lien on the proceeds of property merely directs the escrow agent to pay the claimant from the owner’s net proceeds. RCW 60.42.010(8). The lien documents are clearly titled “NOTICE OF CLAIM OF LIEN AGAINST PROCEEDS.” CP 101. Montecito falsely argues that Mr. Himsl liened the property itself. App. Br. at 1, 23. This canard was the basis of

Montecito's and Trujillo's argument that the liens caused the failure of the Montecito Estates subdivision, and of most of the claims in their lawsuit.

Further, Montecito has consistently ignored that numerous materialmen's liens also were in place on the Property. Unlike Mr. Himsl's liens, these liens **did** affect the title. CP 1113. Any difficulties Montecito encountered cannot simply be ascribed to Mr. Himsl's liens.

D. The trial court properly dismissed Montecito's claims.

1. Litigation immunity barred Montecito's claims.

Montecito challenges the trial court's application of litigation immunity by (1) denying that the doctrine exists and (2) arguing that it applies only to defamation claims. Both assertions are wrong.

Mr. Bolliger speciously tries to support his argument on a mere text search. He supposedly typed "litigation immunity" into the Westlaw legal database and did not recover any Washington case law. App. Br. at 78. This hardly disproves the existence of litigation immunity. Settled law establishes that statements and conduct by attorneys in representing their clients are privileged. *Jeckle v. Crotty*, 120 Wn. App. 374, 386, 85 P.2d 931 (2004); *McNeal v. Allen*, 95 Wn. 2d 265, 621 P.2d 1285 (1980). This rule furthers a public policy that attorneys enjoy "the utmost freedom in their efforts to secure justice for their clients." *Id.* at 267.

Nor is litigation immunity limited to defamation. For example, the

judicial-action privilege barred claims against an opponent's attorneys for interference with a business relationship, outrage, infliction of emotional distress, and civil conspiracy. Allowing such claims against opposing counsel "would stand the attorney-client relationship on its head and would compromise an attorney's duty of undivided loyalty to his or her client and thwart the exercise of the attorney's independent professional judgment on his or her client's behalf." *Jeckle*, 20 Wn. App. at 385-86 (citations and internal quotations omitted).

In filing the liens, Mr. Himsl's then-attorneys were merely representing their client. The trial court properly held that filing the liens was an action taken in representation of Mr. Himsl and therefore privileged. This court should affirm summary judgment on this basis.

Montecito's contention 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) is simply incorrect. App. Br. at 82. The line of authority stemming from *McNeal* (which is cited in *Bruce*) amply shows that actions taken in furtherance of litigation are privileged, as the trial court noted. CP 776-80. Even if the holding of *Bruce* cannot be determined, the trial court's decision remains sound.

Montecito argues that "if Mr. Himsl is 'immune' from suit in this case, then – by extension – nobody would ever be able to sue anyone for

anything.” App. Br. at 87. Montecito cites no legal authority for this baseless argument. The cases discussing the litigation privilege/immunity set out its specific purpose and scope. *Jeckle*, 120 Wn. App. at 385 and citations therein. Litigation immunity does not bar anyone from “suing anyone for anything.” It **does** bar a suit based on conduct in litigation. The trial court correctly dismissed the action on that basis.

2. The trial court correctly held that the Act provides the sole remedy for improper liens.

The Act provides for a show-cause procedure and for the award of costs and attorney fees in **an action to have the liens removed** but does not create any other remedy. RCW 60.42.020. Where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. *Karahalios v. Natl. Federation of Fed. Employees, Local 1263*, 489 U.S. 527, 533, 109 S. Ct. 1282, 103 L. Ed. 2d 539 (1989). Nothing in RCW 60.42 provides or implies any other right of action. See § IV.J.1, *supra*. No legal authority shows any other remedy for improperly filed liens. Montecito offers none. The trial court correctly granted summary judgment on this basis.

3. The trial court granted summary judgment because Montecito offered no proof of its claims.

a. Montecito failed to prove breach of contract.

Montecito spends almost 18 pages of its brief arguing that the trial

court erred in dismissing its breach-of-contract claim against Mr. Himsl. App. Br. at 61-78. In nearly eight of these pages, it argues that Mr. Himsl had certain duties under the contract. *Id.* at 61-68. This is irrelevant. First, Mr. Himsl never denied the existence of a specific duty under the contract, including making a “continuous, good-faith effort” to sell the homes in Montecito Estates. CP 1132-36. This is Mr. Himsl’s **only** specific duty under the Agreement. Second, Montecito cites several “duties” that are not only nonexistent but in some cases nonsensical.

i. Mr. Himsl met his duty to attempt to sell the properties.

Montecito’s argument that Mr. Himsl breached his duty to make a good-faith effort to sell the properties is merely a litany of criticisms of the specific methods Mr. Himsl used. App. Br. at 61. Whether Mr. Himsl did or did not agree to have a weekly sales meeting, or “adequately” made the floor plan flyers, or “stalled” in getting the artwork to the designer for the website, are questions regarding **how** an effort to sell homes was executed, not whether or not a good-faith effort was made. Montecito provides no other proof that Mr. Himsl breached his duty to try to sell the homes.

ii. Mr. Himsl did not breach any duty to identify to Montecito the persons on whose purchases he claimed to be owed a commission.

Montecito argues that Mr. Himsl somehow breached a “duty” to

provide the names of purchasers before the expiration of the Agreement. App. Br. at 58-59. This “duty” simply does not exist. First, no provision in the Agreement imposes any such duty, and Montecito cites none. Second, other than the Curnutts, there were no buyers before the Agreement expired, so that there was no one for Mr. Himsl to identify. The doctrine of impossibility excuses a party from performing a contract where performance is impossible or impracticable due to extreme and unreasonable difficulty, expense, injury or loss. *Metro. Park Dist. of Tacoma v. Griffith*, 106 Wn. 2d 425, 439-40, 723 P.2d 1093, 1102 (1986) (citations omitted). Mr. Himsl could not have breached a duty that the agreement did not impose in the first place, by failing to do what is logically and physically impossible. The trial court correctly held that Montecito failed to prove breach of contract.

iii. Mr. Himsl did not breach a “duty” not to assert a right to a commission on the Curnutt sale.

Mr. Himsl produced ready, willing, and able purchasers in the Curnutts. The fact that the sale did not close was due to Montecito’s failures, not Mr. Himsl’s. Whether or not Mr. Himsl actually earned a commission on the sale, his claim that he was owed a commission was not a breach of the contract. Montecito cites no authority or contract provision that imposes a duty not to assert a debatable commission.

Because there was no such “duty” to have been breached, the trial court correctly held that there was no breach.

iv. Mr. Himsl did not breach a “duty” not to commit any unlawful acts in performing the agreement.

Montecito argues that Mr. Himsl breached a contractual duty to avoid committing any unlawful act in performing the agreement. App. Br. at 60. This argument fails for two reasons. First, no such duty exists. Montecito offers only a tortured reading of *Calhoun, Denny, & Ewing v. Whitcomb*, 90 Wn. 128, 155 Pac. 759 (1916) in support of this notion. *Calhoun* states only that a contract is presumed lawful and as such will be adjudged lawful unless it could be performed only through performance of some illegal act. *Id.* at 143. The law “always presumes honesty of action and intent unless the contrary affirmatively appears.” *Id.* The opinion says nothing about a contractually imposed duty not to break the law.

Second, Montecito offered no proof that Mr. Himsl broke the law “in his performance of the parties’ contract.” 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 demand. App. Br. at 63. It is axiomatic that a party has no duties under a terminated agreement unless it so provides. Anything Mr. Himsl did or did not do after the contract was terminated cannot have

breached it. The trial court correctly held that, as a matter of law, Montecito failed to prove any breach of contract.

b. No cause of action exists for a breach of duties under RCW 18.85 or 18.86.

RCW 18.86 *et seq.* sets forth a real estate broker's duties. It does not expressly state or in any way imply that it creates a right of action.

Washington courts follow United States Supreme Court precedent on the issue of whether a statute implies a right of action. *See Bennett v. Hardy*, 113 Wn.2d 912, 920, 784 P.2d 1258; 1990 (“Borrowing from the test used by federal courts in determining whether to imply a cause of action...”). A private right of action arises only where it can be inferred from the statutory text. Unless “congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.” *Karahalios v. Natl. Federation of Fed. Employees, Local 1263*, 489 U.S. 527, 547, 109 S. Ct. 1282, 103 L. Ed. 2d 539 (1989) (citation omitted) (neither the language nor the structure of the Civil Service Reform Act, 5 USC 7114(a)(1), showed any Congressional intent to provide a new remedy).

Here, RCW Chapter 18.86 merely codifies a real estate broker's duties. As in *Karahalios*, nothing in the language of the statute provides

for a private right of action. As in *Karahalios*, another part of Washington’s statutory scheme sets forth procedures for enforcement. “[S]tatutes relating to the same subject matter are to be considered together to ascertain legislative policy and intent.” *Bennett*, 113 Wn.2d at 926. RCW 18.86 (defining a real estate broker’s duties) and RCW 18.85 (authorizing the Director of the Department of Licensing to discipline licensees) relate to the same subject matter and should be considered together. “[V]iolation of RCW 18.86.030 is a violation of RCW 18.85.230.” RCW 18.86.031. RCW 18.85.230 (recodified as RCW 18.86.361 effective July 1, 2010) sets out the Director’s disciplinary authority. Nothing in RCW 18.85 or 18.86 implies any intent by the Legislature to create a private right of action. As in *Karahalios*, RCW 18.86’s enumeration of a real estate broker’s duties does not create any right of action other than the remedies set forth in RCW 18.85.

The cases Montecito cites do not support a contrary result. In *Boguch v. Landover Corp.*, 153 Wn. App. 595, 224 P.3d 795 (2009), the court analyzed alleged violations of RCW 18.86 solely as the “duty” component of a negligence claim, not as actionable in themselves. Five pages of *Boguch* analyzed the evidence that would be required to establish causation **even after** a violation of the statute was found. *Id.* at 610-614. Nowhere does the *Boguch* court hold that violation of RCW 18.86 itself

creates a cause of action or that plaintiff “properly stated a private cause of action for the realtors’ violation of RCW 18.86.040,” as Montecito asserts. *Id.* at 595; App. Br. at 73. Montecito’s assertion that *Bloor v. Fritz*, 143 Wn. App. 718, 180 P.3d 805 (2008) held a “suit against real estate broker properly stated a private cause of action for Realtor’s violation of RCW 18.86.030” is false. The *Bloor* court affirmed a trial court decision that violation of RCW 18.86.030 supported the finding of the element of negligent communication of a common-law negligent-misrepresentation claim., *id.* at 733, not that violation of RCW 18.86 was itself actionable.

Nor does *Preview Properties, Inc. v. Landis*, 161 Wn.2d 383, 165 P.3d 1 (2007) aid Montecito. Plaintiff had alleged, among other claims, a claim of violation of RCW 18.86.030. The Supreme Court noted that error was not assigned to the award under RCW 18.86.030, and the Court of Appeals never considered it in its unpublished decision. *Id.* at 387-88. Neither the Supreme Court nor the Court of Appeals squarely addressed whether violation of RCW 18.86 is actionable. *Id.* at 389.

In *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (2009) the plaintiff purchasers sued defendant real estate brokers after a landslide on the subject property. Among the claims was the allegation that defendants violated RCW 18.86.050(1)(c). The main focus of *Jackowski* was whether plaintiffs’ “statutory and common-law claims” survived the economic-loss

rule, *id.* at 15, not whether RCW 18.86 provides a cause of action. It cited no authority to show that there was such a cause of action and discussed the claim under RCW 18.86 in the general context of professional malpractice, along with the plaintiff's common-law claims. Furthermore, the Supreme Court has accepted review of *Jackowski*. See 168 Wn.2d 1001, 226 P.3d 780 (2010) (granting review). *Jackowski* therefore is of dubious precedential value on any issue.

c. Montecito has no claim against Mr. Himsl for "professional negligence."

Montecito's argument that the issue of whether Mr. Himsl breached his duty under RCW 18.86 should go to a jury is nonsensical. It admits that it does not allege a claim of professional negligence against Mr. Himsl, App. Br. at 75-76, making this argument irrelevant.

4. Montecito concedes the issue of Liability of a Principal for the Actions of an Agent.

Montecito alleged vicarious liability against Mr. Himsl on the basis that the Everetts were his agents, and he was therefore responsible for their actions. However, the trial court dismissed all claims against the Everetts under the doctrine of litigation immunity. CP 776-80. Montecito assigned error to the trial court's dismissal of the Everetts but have abandoned that issue again citing space limitations. App. Br. at 46, n.7. The propriety of the Everetts' actions in filing the liens is therefore a

verity for purposes of this appeal. As the Everetts have no liability for their actions, Mr. Himsl can have no liability as their principal.

E. Imposition of CR 11 sanctions based on dismissed causes of action was within the trial court's discretion.

Mr. Bolliger argues that, because the parties never fully briefed the numerous claims Montecito voluntarily dismissed, the trial court could not have had a basis for finding that they lacked the reasonable investigation CR 11 requires. This argument fails for the following reasons.

First, this is essentially an improper argument for *de novo* review of the merits of the claims. The **only** issue with respect to sanctions is whether the trial court properly exercised its discretion. The amply sets forth the trial court's reasoning, both in the Memorandum Decision imposing sanctions and in the Findings of Fact and Conclusions of Law. CP 849-56, 888-91. A trial court's Findings of Fact that are supported by substantial evidence are not to be disturbed on appeal. *Merriman v. Cokely*, 168 Wn.2d 627, 631, 230 P.2d 162 (2010). As discussed more fully below, this decision meets and exceeds that standard.

Second, Mr. Bolliger cites no legal authority for the notion that briefing on a claim is required before it may be found frivolous. A CR 11 motion is not a judgment on the merits of an action, but rather on a collateral issue. *Biggs v. Vail*, 124 Wn.2d 193, 198, 876 P.2d 448 (1994)

(citation omitted) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447 (1990)). Sanctions may be levied for the filing of baseless papers even where the offending party voluntarily dismissed the action. *Cooter & Gell*, 496 U.S. at 398.

Mr. Bolliger's numerous filings related to the dismissed claims clearly violated CR 11. He brought a total of 33 claims against Mr. Himsl. After nearly two years of very costly litigation, Mr. Bolliger inexplicably dismissed 14 of these. CP 852. A further set of claims was dismissed five months later. *Id.* He never presented any proof of any of the dismissed claims. For more than two years, Mr. Himsl was forced to expend time and resources in investigating and preparing a defense against all the causes of action Mr. Bolliger had alleged. *Id.* Dismissing claims late in litigation is completely different than withdrawing an offending pleading at an early stage. The effort associated with preparing a defense to these claims was expended, the costs incurred, and the annoyance and disruptions associated with defending against them suffered, regardless of whether they were eventually dismissed.

Mr. Himsl's Motion for Attorney Fees clearly showed the costs associated with defending this suit up to the point at which some of the claims were dismissed. His legal expenses exceeded \$100,000 before Mr. Bolliger dismissed the first batch of these claims and were more than

\$190,000 when he dropped the second batch of claims. CP 1418.

Mr. Bolliger argues that he needed to bring “all the causes of action which meritoriously could have been brought against Mr. Himsl.” App. Br. at 41. This argument contradicts Mr. Bolliger’s admission that he dismissed the cause of action for respondeat superior because they thought about it and decided that it “really is a legal doctrine, not an official cause of action.” App. Br. at 18. Had Mr. Bolliger given that cause of action any serious consideration **before** the Complaint was filed, it would never have been included at all. Had he given the entirety of his complaint the consideration that CR 11 requires, Mr. Himsl would have avoided most or all of the fees that were the subject of his fee motion and Mr. Bolliger’s concern about his own malpractice liability. App. Br. at 40.

Mr. Bolliger argues that it was somehow improper for Mr. Himsl to move for CR 11 fees after winning summary judgment. App. Br. at 32. He cites only the **dissent** in *Biggs*, 124 Wn.2d at 203. App. Br. at 31. This is obviously not part of the *Biggs* holding (and therefore not the law). *Biggs* is readily distinguishable. There, the CR 11 motion was first brought long after the trial court’s decision (and after the case had already been appealed and remanded once). *Biggs v. Vail*, 119 Wn.2d 129, 830 P.2d 350 (1992) (reversing trial court’s initial award of attorney fees under RCW 4.84.185). Here, sanctions were entirely appropriate due to the

unreasonable and harassing nature of Mr. Bolliger's conduct in filing such a large number of claims, only to abandon most of them.

F. The trial court acted within its discretion in awarding CR 11 sanctions for most causes of action.

Mr. Bolliger argues the claims decided on summary judgment were not only not frivolous, but meritorious. App. Br. at 19-25. The merits of these claims, however, are not determinative of this issue. What is determinative is whether the trial court abused its discretion in making its award of attorney fees. The trial court's decision is amply supported by its Findings of Fact, and its reasoning is fully set forth in its Memorandum Decision. CP 849-53, CP 888-91. Because the claims were baseless and were filed without the reasonable inquiry that CR 11 requires, the trial court was well within its discretion to find that Mr. Bolliger violated CR 11 and to award attorney fees as a sanction.

1. The trial court properly found that the claims were baseless.

The trial court found that Montecito had not put forth a prima facie case for any of the claims, and indeed could not produce any facts supporting them, even when asked point-blank. CP 852. Mr. Himsl's Memorandum in Support of his Motion for Summary Judgment analyzed the lack of proof of each of Montecito's remaining causes of action. CP 945-53. The trial court agreed that that brief "correctly analyzed" the lack

of evidence presented and adopted that analysis as one of several reasons for granting the summary judgment motion. CP 2453.

The trial court also noted it had carefully reviewed Montecito's materials in opposition to summary judgment, and after that review it agreed with Mr. Himsl's position. *Id.* The trial court therefore based its ruling on full review of both parties' briefing, providing an ample basis for its decision.

The trial court set forth a reasoned analysis for its finding that the claim of "extortion" was "absurd" and a "glaring example of Plaintiffs' bad faith." CP 890-91. Mr. Bolliger's claim that this was not a "legitimate business dispute" ignored the fact that the Agreement entitled Mr. Himsl to commission on certain sales in Montecito and was attempting to protect this interest. App. Br. at 23; CP 70. As the trial court noted, Mr. Bolliger's characterization of Mr. Himsl's settlement offer as a "ransom demand" was an "irrational and unreasonable interpretation of this letter, and it reflects plaintiffs' vindictive motive in bringing many of their unwarranted causes of action." CP 891.

The sections of Appellants' Brief arguing that these claims had merit are illustrative of Mr. Bolliger's lack of support for them. 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. App. Br. at 21-22, 25-26. This in no way shows that the claims had merit or that they did not violate CR 11.

2. The trial court found that the claims were filed without proper investigation.

The trial court found Mr. Bolliger failed to make the required investigation before filing suit. For example, Ms. Trujillo could not identify a single false statement by Mr. Himsl to support her defamation claim. CP 1091. Had Mr. Bolliger asked his client the same questions that she was asked at deposition, it would have been clear that no proof of this claim existed. The trial court's Finding of Fact No. 28 correctly states that the majority of plaintiffs' claims "were not the result of a reasonable inquiry." CP 853. Mr. Bolliger did not challenge these Findings of Fact, which thus are verities on appeal. *Merriman*, 168 Wn.2d at 631.

3. Both Mr. Himsl and the trial court specifically set forth the conduct that violated CR 11.

Mr. Bolliger contends Mr. Himsl and the trial court failed to specify which causes of action violated CR 11, or how. To the contrary, the grounds for CR 11 sanctions were extensively set forth in Mr. Himsl's pleadings and in the court's Memorandum Decision and Findings of Fact and Conclusions of Law. CP 1285-88.

Mr. Himsl's Motion for Attorney Fees discussed in detail the standard for imposing sanctions and the evidence showing that plaintiffs

had failed to make the “reasonable inquiry” required by CR 11. *Miller v. Badgley*, 51 Wn. App. 285, 301, 753 P.2d 530 (1988) sets out factors to be considered in determining whether the investigation was reasonable; these were analyzed in detail in Mr. Himsl’s briefing below. CP 1286-87.

The trial court must make explicit findings as to which filings violated CR 11 and “how such pleadings constituted a violation.” *Biggs*, 124 Wn.2d at 202. Here, the trial court found that most of Mr. Bolliger’s claims were baseless and filed without the “reasonable inquiry” required by CR 11. CP 852, 854, 888-89. The Complaint itself is therefore an offending pleading. Where it becomes apparent during the course of a lawsuit that the claims cannot be supported, sanctions may be imposed for further filings in the suit. *McDonald v. Korum Ford*, 80 Wn. App. 877, 912 P.2d 1052 (1996). The trial court also correctly found that Mr. Bolliger’s numerous filings after Ms. Trujillo’s deposition further violated CR 11. CP 855.

4. There was no abuse of discretion.

The record clearly shows that a reasonable judge could have found that the claims were baseless and filed without reasonable inquiry. *Magana*, 167 Wn.2d at 583. The trial court did not abuse its discretion when it held exactly that and awarded sanctions.

G. Mr. Bolliger never argued for extension or modification of existing law.

Mr. Bolliger now claims that the motion for CR 11 sanctions should have been denied because their arguments “warrant[ed] the extension or modification of what the Court perceives existing law to be.” App. Br. at 26. Other than the conclusory statement quoted above, Mr. Bolliger does not explain what any such “extension or modification of ... existing law” would have been. A conclusory allegation, contrary to current jurisprudence, that is made without any support whatsoever does not represent a good faith argument to modify existing law. *Spiller v. Ella Smithers Geriatric Center*, 919 F.2d 339, 346, 57 *Fair Emp. Prac. Cas. (BNA)* 99 (5th Cir. 1990). Mr. Bolliger’s argument on this point is wholly without support, and this court should ignore it. RAP 10.3(a)(6).

H. Mr. Himsl properly mitigated the cost of the litigation.

1. This issue is not properly before this court.

Mr. Bolliger argues that Mr. Himsl failed to mitigate his litigation expense. Mr. Bolliger improperly raises this issue for the first time on appeal. This court therefore should ignore it. *Felsman v. Kessler*, 2 Wn. App. 493, 498-9, 468 P.2d 691 (1970). Mr. Bolliger’s oral and written opposition to the fee motion nowhere mentions any “mitigation.” CP 812-48; RP 4-76. He first mentioned mitigation in his “Supplemental Memorandum and Declaration” in opposition to fees, which he filed July

25, 2011, long after the March 31, 2011 hearing on the fee motion and the trial court's June 23, 2011 Memorandum Decision on that motion. CP 838-39. The Supplemental Memorandum was grossly untimely and was not properly before the trial court. Once the filing deadlines have passed, a court may accept late filings "only if a motion is filed explaining why the failure to act constituted excusable neglect." *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 660, 246 P.3d 835 (2011). Mr. Bolliger never explained the late filing of his Supplemental Memorandum. Because the issue of mitigation was never properly raised to or considered by the trial court, it is raised for the first time here, and this court should ignore it. *Felsman*, 2 Wn. App. at 498-99.

2. Montecito and Mr. Bolliger were on notice that Mr. Himsl would seek sanctions.

Mr. Bolliger argues that Mr. Himsl "failed to mitigate" the attorney fees incurred by not moving for CR 11 sanctions until late in the case and implies that the trial court erred in making the award for this reason. App. Br. at 26-27. Mr. Bolliger cites *Biggs*, 124 Wn.2d at 198, for the proposition that CR 11 sanctions are unwarranted where a motion for sanctions was filed late in the case. The *Biggs* Court **approved** the imposition of sanctions and clearly stated that sanctions **may** be imposed later: "[N]otice in general that sanctions are contemplated is sufficient for

the later imposition of CR 11 sanctions.” *Id.* at 199.

Here, Mr. Himsl so notified Montecito repeatedly, and very early in the case. He prayed for CR 11 sanctions in his answers to the first Complaint, CP 916, and to the First Amended Complaint. CP 1832. This clearly meets the notice requirement under *Biggs*, 124 Wn.2d at 199.

3. Mr. Bolliger’s conduct caused any delay in filing Mr. Himsl’s motion for attorney fees.

Mr. Himsl’s motion for attorney fees was filed late in the case because the full extent of Mr. Bolliger’s egregious conduct became apparent only then. Ms. Trujillo was deposed in November and December 2010. That testimony laid bare that she possessed no proof of her claims. *See* § III.I, *supra*. Mr. Himsl moved for fees just three months after that deposition. The timing of Ms. Trujillo’s deposition was due to Mr. Bolliger’s own failure to respond to discovery requests for materials that Mr. Himsl’s counsel needed before deposing her. This forced Mr. Himsl to move to compel, which the trial court granted on March 5, 2010. *See* § III.G.4, *supra*. Even after that, Montecito and Mr. Bolliger persisted in providing evasive and obviously false answers. CP 1390-95. These discovery violations delayed progress of the case, including Ms. Trujillo’s deposition. Mr. Bolliger’s continued pursuit of their claims after the deposition further increased Mr. Himsl’s legal expenses. As in

McDonald, 80 Wn. App. at 877, Mr. Bolliger's' legally improper filings continued after it was clear that plaintiffs lacked evidence. Sanctions were warranted for that reason too.

The true extent of Mr. Bolliger's lack of investigation as to their claimed damages became known after his dilatory disclosure of expert witnesses on the issue of damages. CP 1414. He did not consult his damages experts until **more than two years** after the complaint was filed. Mr. Himsl moved for fees promptly thereafter. *See* § III.G.5, *supra*.

I. The trial court specifically awarded fees for responding to the misconduct and did not engage in “fee-shifting.”

Far from simply using CR 11 as a fee-shifting mechanism, the trial court considered the degree to which Mr. Himsl incurred fees in responding to Mr. Bolliger's baseless claims and misconduct. The trial court's Memorandum Decision shows that it carefully weighed whether the suit and its claims were frivolous and made a reasoned decision in making its award. CP 884. To the degree the trial court found a few claims might have been meritorious, it reduced the fee award accordingly. CP 891. Mr. Bolliger's contention that the trial court's decision that it could not impose fees under the contract or RCW 4.84.185 somehow shows that the CR 11 sanctions are “fee shifting” is simply nonsensical.

Finally, on March 31, 2011, Mr. Bolliger **conceded that Mr.**

Himsl's attorney fees were reasonable in amount. RP 62-63.

J. The trial court properly sanctioned Ms. Trujillo and Montecito, who are as culpable as Mr. Bolliger.

A court may sanction “the person who signed it, a represented party, or both” for a CR 11 violation. CR 11(a). Ms. Trujillo and Montecito are “represented parties” under the rule. A court has broad discretion in deciding against whom to assess sanctions. *Miller*, 51 Wn. App. at 303. Montecito admits that the court may impose sanctions on a party that is responsible for the offensive pleading. App. Br. at 33. Where the evidence supports a finding that the party was “the catalyst behind [a] frivolous motion,” the trial court’s award of sanctions was affirmed. *Chevron U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir. 1985).

Here, the record amply shows that Ms. Trujillo and Montecito are as responsible as Mr. Bolliger for having caused the complaint to be filed, as they persisted in allegations they knew they could not prove. They were “the catalyst” behind filing of the suit. As such, CR 11 clearly allows sanctions against Ms. Trujillo and on Montecito.

K. The trial court exercised its discretion in awarding sanctions.

Mr. Bolliger points out that CR 11 was amended to make imposition of sanctions permissive, rather than mandatory, and the language of Mr. Himsl’s motion for CR 11 sanctions was therefore

incorrect. App. Br. at 33. Mr. Himsl and his counsel regret that error, which was inadvertent. But Mr. Bolliger's attempt to bootstrap a reversal of the fee award on this basis fails for three reasons.

First, Mr. Bolliger improperly raises this issue for the first time on appeal. He did not raise this point to the trial court when opposing the motion for fees, CP 736-68, or in oral argument on that motion. He first raised it in his "Supplemental Memorandum and Declaration," long after the court already had ruled. CP 838-39. That pleading was grossly untimely and not properly before the trial court. *See* § IV.H.1, *supra*. Because that issue was never properly raised to or considered by the trial court, it is raised for the first time here, and this court should ignore it. *Felsman*, 2 Wn. App. at 498-99. Second, Montecito fails to assign error to the trial court's alleged reliance on Mr. Himsl's incorrect statement, so this court should ignore it. RAP 10.3(a)(4); *Wood v. Wash. Nav. Co.*, 1 Wn.2d 324, 327, 95 P.2d 1019 (1939). Third, the trial court's Memorandum Opinion shows that it actually exercised discretion and did not feel that the law compelled it to sanction Mr. Bolliger's conduct. The trial court cited the conduct it considered improper. The court opined that "a large portion of plaintiffs' case cannot be supported by any rational argument on the law or facts," and "a large portion of their lawsuit was brought without a legal or factual basis and without reasonable advance

inquiry.” CP 884, 888. The court noted:

It is evident to the court that these claims were not the result of a reasonable inquiry or a good faith belief that they were legally or factually meritorious. It is obvious that these claims were filed vindictively and in bad faith, and were advanced for purposes harassment [sic], nuisance and spite. These are the types of suits that give lawyers and the legal system a bad name, and these are the types of suits CR 11 sanctions are intended to deter.

CP 890. In addition to its Memorandum Opinion, the trial court also adopted Findings of Fact and Conclusions of Law. CP 849-56. The Findings clearly show the trial court viewed Mr. Bolliger’s behavior as egregious and warranting sanctions. The trial court found that “[p]laintiffs’ counsel failed to make even a basic investigation and inquiry before filing this action.” CP 853. The trial court found that most of Montecito’s claims “were filed vindictively, in bad faith, and were advanced for purposes of harassment, nuisance, and spite” And that Mr. Bolliger continued to litigate this suit aggressively even after Ms. Trujillo “was unable to cite any evidence to support numerous causes of action.” CP 852-53. Likewise, in its Conclusions of Law, the trial court stated, “The widespread violations of CR 11 in this lawsuit clearly justify a significant sanction” and an award of attorney fees “is appropriate as a sanction in this case and will serve to deter such conduct in the future.” CP 855. These are hardly the findings of a trial court that imposed

sanctions only because it believed the law gave it no discretion.

L. Mr. Bolliger has not assigned error to the lack of a ruling on his Motion for Reconsideration.

Mr. Bolliger complains that the trial court issued its ruling on Himsl's Motion for Attorney Fees and Costs before it ruled on his Motion for Reconsideration of the court's Order Granting Summary Judgment. App. Br. at 6, 34. However, he fails to assign error to this. He assigns error only to the trial court's grant of Mr. Himsl's motion for CR 11 sanctions, but does not address this issue. *Id.* at 1. Because error was not assigned, this court should not consider this issue. RAP 10.3(a)(4).

M. This court should ignore the assertion that the time Mr. Himsl expended on "losing efforts" should be deducted.

All claims in this lawsuit stemmed from the liens Mr. Himsl filed on proceeds of the Montecito property. CP 1108. This issue was part and parcel of Montecito's overall lawsuit, and Mr. Himsl was forced to expend resources on it because of the large number of frivolous claims that were filed. Mr. Bolliger's assertion that Mr. Himsl engaged in "extensive discovery" to respond to his "Motion for Declaratory Judgment," App. Br. at 34, also is wrong, since the same discovery would have been needed whether or not that motion had ever been filed.

This court should reject Mr. Bolliger's assertion that this was a "losing effort" by Mr. Himsl. First, he cites no authority to support it, so

this court should ignore it. RAP 10.3(a)(6). Second, the assertion is false. At the same hearing at which the residential/commercial issue was decided, the trial court heard Mr. Himsl's argument that attorney fees could not be awarded on the basis of the liens and correctly held that plaintiffs could not recover attorney fees in this action merely because the liens were unlawful. CP 2381, 2453. That later proved to be one of the three bases on which the action was ultimately dismissed. CP 2453.

N. This court should reject Mr. Bolliger's assertion of the amount of resources he expended and his conclusory statement that the claims were not made in bad faith.

Mr. Bolliger asserts he would not have invested his office's resources in a suit filed for the purposes of "delay, harassment, nuisance, spite, or vindictiveness." App. Br. at 37. This is not a legal argument, but an unsupported conclusion that he acted reasonably. The sanctions issue is now before the court precisely because Mr. Bolliger **did not** act reasonably, but rather pursued a largely frivolous suit for more than two years. He also asserts that he and his client never contemplated any bad-faith motive in filing or prosecuting this litigation. App. Br. at 36. This self-serving conclusion is not a proper or legally supported argument, and this court should ignore it as well. *Housing Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 184, 19 P.3d 1081 (2001).

O. Montecito submitted false pleadings.

Mr. Bolliger's assertion that no factual assertions verified by Ms. Trujillo have been proven false is itself false. His Memorandum opposing summary judgment, CP 326-405, discusses at length a phone call Mr. Himsl allegedly made to Christina Hoover at Creekside Realty, stating:

Also **during that week**, HIMSL telephoned Creekside Realty's agent for the project, Christina Hoover, in what turned out to be a successful attempt to talk Creekside Realty out of listing the homes in the Montecito Estates residential subdivision for sale.

CP 339 (emphasis in original). The Memorandum recites that Mr. Himsl faxed a document entitled "Title Comparison," CP 596-99, detailing liens on the properties to Ms. Hoover. CP 339. Ms. Trujillo declared under oath that "the facts set forth in ... [that] Memorandum ... are true and correct." CP 576. These alleged statements by Ms. Hoover came from DOL investigator Shannon Taylor and thus were inadmissible hearsay.

Mr. Bolliger repeatedly cited this as "evidence" to the trial court. CP 28-29, 339, 825; App. Br. at 15. However, both Mr. Bolliger and Ms. Trujillo were present at Ms. Hoover's November 12, 2010 deposition, where she testified that she had never spoken to Mr. Himsl and did not believe that he faxed her the "Title Comparison" document. See § II.F.2, *supra*. They therefore knew their allegations were false long before filing opposition to summary judgment or their opening brief to this court.

Ms. Trujillo's January 21, 2011 Declaration was unquestionably intentionally false. Mr. Bolliger signed a similar Declaration and drafted, signed, and filed the Memorandum containing this false information. He later reiterated the same false account in his Supplemental Memorandum. CP 825. He declared under oath that the same falsehoods were true. CP 846. Filing pleadings one knows to be factually false violates CR 11.

Mr. Bolliger's misconduct persists even now. When Mr. Bolliger offered this improper "evidence" to the trial court, Mr. Himsl moved to strike it as hearsay. CP 772. The trial court did strike this material. CP 772-73. Thus the trial court did not consider it, and it cannot be considered on appeal. Despite that, Mr. Bolliger again improperly offers it as evidence that the complaint had some merit. App. Br. at 14-15.

P. CR 11 allows sanctions against an attorney individually.

CR 11 makes no reference whatsoever to an attorney "in his capacity as an employee-attorney." To the contrary, it requires that a pleading be "signed by at least one attorney of record in the attorney's individual name," and that the attorney's WSBA number be stated. CR 11(a). Nothing refers to a signature by a representative of a firm. *Id.* The Rule further provides that a sanction may be imposed "upon the person who signed it, a represented party, or both." *Id.* Mr. Bolliger cites absolutely no authority for the proposition that his firm, and not the

individual attorney, is the proper target of sanctions. Sanctions against Mr. Bolliger personally were proper exactly as contemplated by the Rule.

Mr. Bolliger and The Bolliger Law Center, Inc. are intertwined and inseparable. In a March 31, 2011 hearing, Mr. Bolliger admitted that he and his firm commingled their assets. “I’m Bolliger Law Center, Inc., doing businesses as Bolliger Law Offices, and every check I write for myself is a – for a personal matter is a business check. And it goes down as a personal draw. You know? And then it – then it’s counted by my accountant as personal income and I pay taxes on it.” RP 57-58.

Q. The trial court’s award of fees pursuant to the Agreement is not before this court.

Mr. Bolliger is correct that the fee award against Montecito under the Agreement is not before this court. He did not assign error to this ruling, and this court should not consider it. *Olympia Brewing Co. v. Northwest Brewing Co.*, 178 Wn. 533, 538, 35 P.2d 104 (1934).

R. Mr. Himsl, not Mr. Bolliger, is entitled to attorney fees on appeal.

There is simply no basis for Mr. Bolliger to be awarded attorney fees, and he cites no authority to show that he is. Rather, Mr. Himsl is entitled to fees on appeal. RAP 18.1 permits a fee award only when authorized by law. *Pruitt v. Douglas County*, 116 Wn. App. 547, 560, 66 P.3d 1111 (2003). Merely citing RAP 18.1, without supporting argument,

citation to authority, and the underlying grounds for fees is not enough. A request for fees on appeal will be denied in such circumstances. *Id.* See also *Bay v. Jensen*, 147 Wn. App. 641, 661, 196 P.3d 753 (2008).

Mr. Himsl, on the other hand, is actually entitled to fees on appeal under both the Agreement and CR 11. CP 881. The Agreement expressly provides for an award of fees. CP 71. A party may be awarded attorney fees based on a contract at both the trial and appellate levels. *Renfro v. Kaur*, 156 Wn. App. 655, 666, 235 P.3d 800, 805, *rev. denied* 170 Wn. 2d 1006, 245 P.3d 227 (2010). Mr. Himsl is entitled to fees on appeal, just as he was in the trial court. Where it becomes apparent during the course of a lawsuit that the claims cannot be supported, sanctions may be imposed for continuing to make filings in the suit. *McDonald*, 80 Wn. App. at 883-84. Here, the trial court held that most of the claims in Mr. Bolliger's lawsuit were not well grounded in fact and violated CR 11. The trial court so held on summary judgment, citing Ms. Trujillo's inability to provide facts supporting the claims. CP 888; *see also* § II.F., *supra*. Those claims are still baseless, and appeal of the frivolous claims is itself frivolous. Fees may be awarded under CR 11 for a frivolous appeal. *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990). By prosecuting this appeal, Mr. Bolliger continues to file pleadings that violate CR 11. Mr Himsl will be entitled to his fees incurred in

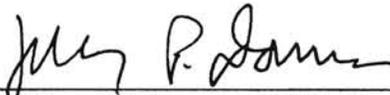
responding to those pleadings too.

VI. CONCLUSION

“About half of the practice of a decent lawyer is telling would be clients that they are damned fools and should stop.” *McCandless v. Great Atlantic & Pac. Tea Co.*, 697 F.2d 198, 201-02 (7th Cir. 1983). Mr. Bolliger should have told Montecito and Ms. Trujillo to stop and should have followed the same advice himself. His dogged refusal to do so forced Mr. Himsl’s counsel to incur hundreds of thousands of dollars in fees. This court should affirm summary judgment of dismissal and the fee award in Mr. Himsl’s favor. The trial court was right: “These are the types of suits that give lawyers and the legal system a bad name, and these are the types of suits CR 11 sanctions are intended to deter.” CP 890.

Respectfully submitted this 14th day of May, 2012.

LEE SMART, P.S., INC.

By: 

Jeffrey P. Downer, WSBA No. 12625
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Of Attorneys for Respondent Himsl

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on May 15, 2012, I caused service of the foregoing pleading on each and every individual herein:

**VIA FEDERAL EXPRESS
OVERNIGHT DELIVERY**

Court of Appeals, Div. III
500 N. Cedar St.
Spokane, WA 99201

Mr. John Bolliger
5205 W. Clearwater Avenue
Kennewick, WA 99336

DATED this 15th day of May, 2012 at Seattle, Washington.



Linda Bender, Legal Assistant