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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 32284-0-III

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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GREGORY ROSE and CATHERINE ROSE, and the marital community  
composed thereof,

*Plaintiffs,*

vs.

FMS, INC., d/b/a OKLAHOMA FMS, INC., an Oklahoma corporation,

*Defendant-Respondent,*

and

ROBERT W. MITCHELL,

*Appellant.*

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REPLY BRIEF OF APPELLANT ROBERT W. MITCHELL

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## I. INTRODUCTION

The Brief of Respondent filed by FMS makes this reply straightforward: instead of attempting to show that the trial court followed the mandate of the Court of Appeals for the proceedings upon remand, FMS in effect tries to justify why the trial court ignored them, citing law that is either unpersuasive or irrelevant in light of the law of the case.

## II. RESPONSE TO FMS' RESTATEMENT OF THE CASE

FMS presents no new claims in its Statement of the Case, and does not challenge any of the statements of fact contained in Mitchell's Opening Brief.

## III. REPLY<sup>1</sup>

### A. **The Trial Court Failed to Exercise Its Discretion Within Parameters Set by the Court of Appeals Mandate**

In FMS' response brief FMS argues that the trial court's award of sanctions was within the trial court's discretion, and that this court should decline to interfere with it since the "bar for reversal is set fairly high."<sup>2</sup>

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<sup>1</sup> For convenience this brief will address in the same order each subsection of the Argument section of the Brief of Respondent.

<sup>2</sup> FMS Br. at 4.

However, this argument ignores the clear language from the Court of Appeals that was necessitated by Judge Baker's previous failure to exercise her discretion appropriately, and her previous failure to support the exercise of her discretion with appropriate findings of fact. Moreover, "A court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law." *Worden v. Smith*, 178 Wn. App. 309, 323, 314 P.3d 1125, 1132 (Div. 3 2013). FMS acknowledges as much.<sup>3</sup> Judge Baker's initial use of her discretion proceeded from an erroneous view of the law, and therefore required reversal. Her most recent exercise of discretion proceeded from a similarly erroneous view. FMS has continuously urged Judge Baker to adopt a view of the law that this Court clearly rejected. In both cases FMS has denied that Judge Baker committed any errors. Yet as Mitchell's Opening Brief makes clear, Judge Baker simply refused to take the Court of Appeals seriously.

Because the Court of Appeals mandate becomes the law of the case upon remand,<sup>4</sup> any deviation from that mandate is an error of law that constitutes an abuse of discretion.

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<sup>3</sup> FMS Br. at 8.

<sup>4</sup> "Under the doctrine of 'law of the case,' as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are 'authoritatively overruled.'" *Greene v. Rothschild*, 68 Wn.2d 1, 10,

**B. CR 11 Sanctions Were Explicitly Rejected by the Court of Appeals.**

FMS urges this Court to affirm Judge Baker’s imposition of CR 11 sanctions based upon a distorted reading of the Court of Appeals mandate. FMS argues that the Court of Appeals opinion did not explicitly address whether or not its rejection of CR 11 sanctions extended to the entire case, or was limited to the filing of the complaint. Yet in its entire discussion of this issue, there is no mention of the key phrase in the Court’s mandate—that the (optional) proceedings on remand “**would be limited to violations of CR 26(g) and CR 56(g) . . .**” CP 314 (emphasis added). FMS’ reading of the Court of Appeals’ mandate is simply untenable in light of this language.

Significantly, FMS initially read this language to mean exactly what Mitchell now claims it means, and FMS consequently filed a motion for reconsideration, asking the Court of Appeals to “clarify” (actually, to change) its language so as to permit the award of CR 11 sanctions for conduct other than the filing of the complaint.<sup>5</sup> This motion was denied by

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414 P.2d 1013, 1016 (1966), quoted with approval in *Humphrey Industries, Ltd. v. Clay Street Associates, LLC*, 176 Wn.2d 662, 295 P.3d 231 (2013).

<sup>5</sup> FMS Mtn. for Reconsideration (May 8, 2013), No. 30380-2-III, attached for convenience as Appendix A.

the Court of Appeals.<sup>6</sup> Instead of accepting the Court of Appeals mandate, FMS chose to act *as though it had won* its motion for reconsideration, and invited Judge Baker to do the same. A more brazen disregard of this Court's authority would be difficult to imagine.

**C. A New Trial Judge Should Have Reviewed the Case**

The course of this litigation demonstrates why Mitchell requested that someone other than Judge Baker review the case upon remand. As discussed in the previous section, FMS chose not to follow the Court of Appeals mandate and assured Judge Baker that she was not bound to do so.

It is unnecessary for the Court to determine that Judge Baker was actually biased in the case, or even that she violated the appearance of fairness. Instead, it is clear that a new judge may be assigned upon remand whenever doing so would promote “a just and expeditious resolution” of the case:

GMAC submitted evidence of perceived bias, which we need not detail in this opinion. But we conclude that it is unnecessary to decide whether the trial judge violated the appearance of fairness doctrine in this case. Rather, we conclude from this record and the history of this case that a just and expeditious resolution of this case will be best served by remanding this case to a different judge for further proceedings on remand. That judge will have the

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<sup>6</sup> Order Denying FMS Mtn. for Reconsideration (May 23, 2013), No. 30380-2-III, attached for convenience as Appendix B.

opportunity to provide a fresh perspective to the proper and prompt resolution of this case.

*GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 154, 317 P.3d 1074, 1087 (Div. 1 2014). In its Opinion remanding this case for further proceedings, this Court made it clear that the case should have been assigned to a different judge. It was error for Judge Baker to disregard this instruction.

As to the meaning of the Court’s language—whether it was mandating a new judge or simply observing that the previous judge had retired—it is instructive to consider similar language used in *Gronquist v. Washington State Department of Licensing*, 175 Wn. App. 729, 309 P.3d 538 (Div. 2 2013). There the appellant asked the Court of Appeals to assign the case to a different judge upon remand. However, the Court of Appeals declined to rule on the request, because it was unnecessary to do so: “[Gronquist] asks us to ‘remand the case back for a full and fair hearing before a different judge.’ Br. of Appellant at 20. But the trial court judge is now retired. Thus, Gronquist’s case will presumptively be heard by a different judge on remand.” Compare the language used by this Court in remanding the case: “The trial judge has retired. A new judge will have to, if asked, review the record and assess anew whether sanctions are warranted under CR 26(g) and CR 56(g); . . .” CP 314.

Rather than treating it as a passing observation, Judge Baker should have recognized it as a directive.

**D. FMS Cannot Avoid the Application of *Burnet***

FMS inexplicably suggests that “*Burnet* should have no applicability to the current appeal.” FMS Br. 12; see also, *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). This is puzzling in light of the clear holding of the Court of Appeals: “Without more, we vacate the CR 26(g) and CR 56(g) sanctions because we cannot meaningfully review them as required in *Burnet*, and remand to allow, but do not direct, further proceedings.” CP 314.

FMS argues that “*Burnet* is distinguishable from the present case,” FMS Br. at 13, and cites *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006) as though it somehow rendered *Burnet* inapplicable.<sup>7</sup>

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<sup>7</sup> It is true that in *Mayer* the court rejected the argument that in every case awarding monetary sanctions, a record must be made of the court’s evaluation of the *Burnet* factors. No one would claim that a court’s award of \$500 as sanctions for a motion to compel requires an evaluation of the *Burnet* factors. However, it is equally true that the Washington Supreme Court has repeatedly said that a court “may impose only the least severe sanction that will be adequate to serve its purpose in issuing a sanction.” *Barton v. State, Dept. of Transp.*, 178 Wn.2d 193, 215, 308 P.3d 597, 609 (2013). Where, as in this case, a court awards a sanction that dwarfs the size of the amount in controversy in the underlying case, it should explain why it has chosen such a large award in order to permit meaningful appellate review. When this court in the previous appeal remanded the case to the trial court for a review in light of the *Burnet* factors, it was merely applying the more general principle that appellate review for abuse of discretion requires a commensurate record. In any event, the law of the case is dispositive of whether *Burnet* applies.

Whatever distinctions might be drawn, *Burnet* remains the law of the case.<sup>8</sup> Even assuming that *Burnet* could be distinguished, it remains the law that governed the remand of this case.

**E. Segregation Was Required By the Court of Appeals Mandate**

Compounding its error in failing to recognize the application of *Burnet*, FMS argues that it was not required to engage in segregation of the fees attributable to conduct subject to sanction under CR 26(g) and CR 56(g) from the conduct for which sanctions were improperly awarded under CR 11. FMS cites *Hume v. American Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994) for the proposition that segregation is unnecessary if the claims (some of which justify attorney fees and others which do not) are “so related that no reasonable segregation of successful and unsuccessful claims can be made.” FMS Br. at 18. In arguing that it is impossible to distinguish the claims based upon CR 26(g) and CR 56(g) from all of the other conduct in the case FMS is simply refusing to do what the Court of Appeals directed it and Judge Baker to do upon remand: to determine “whether sanctions are warranted under CR 26(g) and CR 56(g) . . . limited to violations of CR

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<sup>8</sup> See the discussion of the law of the case in footnote 4.

26(g) and CR 56(g) *without consideration of the CR 11(a) sanctions rejected above.*” CP 314.

**F. The Alleged CR 45 Violation Are Indeed Irrelevant.**

FMS argues that this Court should not consider the alleged violation of CR 45. Mitchell agrees. In its opening brief Mitchell included as an appendix a detailed review of Judge Baker’s Findings of Fact and Conclusions of Law. Mitchell did so anticipating that FMS might mine the record for alleged misconduct that would justify sanctions under CR 26(g) or CR 56(g), and argue that, even if this court were to strike the second attempt to impose CR 11 sanctions, *some* sanctions were still justified. Now that it is clear that FMS has relied entirely upon CR 11, both at the trial court level and now on appeal, as the basis for *all* of the sanctions awarded by the trial court, it is unnecessary to consider any of the factual issues that might have become relevant had FMS attempted to comply with the Court’s direction with regard to the proceedings upon remand.

**G. Judge Baker’s “Findings of Fact” Do Not Support the Court’s Imposition of Sanctions.**

As noted in the previous section, Mitchell included a detailed analysis of Judge Baker’s Findings of Fact and Conclusions of Law. The purpose of that analysis was to demonstrate that, despite their length, the

Findings of Fact and Conclusions of Law fell short of what the Court of Appeals instructed Judge Baker to do upon remand—to consider the claims for sanctions based solely on CR 26(g) or CR 56(g). Applying the proper labels to them would not cure their fundamental defect, which is that they fail to provide a basis upon which sanctions could be awarded.

**H. The Proper End of This Case is Dismissal.**

FMS agrees with Mitchell in this respect: a second remand would benefit no one.<sup>9</sup> FMS argues that the judgment below should simply be affirmed. If, instead, the record demonstrates that the Court of Appeals mandate was not followed, then that judgment must be reversed and the order of sanctions vacated. The proper disposition of this appeal is similarly simple and final: dismissal of the case with costs to the appellant.

**I. Having Twice Failed to Present Proper Findings of Fact, Respondent Has Forfeited Any Claim to Attorney Fees.**

FMS argues that it is entitled to attorney fees on multiple grounds, including the claim that this appeal was frivolous. None of FMS' claims for attorney fees withstand scrutiny. Beginning with the claim that "Mitchell had no reasonable possibility of obtaining a reversal of the trial

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<sup>9</sup> "[N]o remand is necessary or required under the law." FMS Br. at 3.

court,” FMS Br. at 23. FMS further argues that Mitchell utilized this appeal “simply to delay the inevitable.” *Id.* at 23. Quite the contrary. Just as Mitchell demonstrated in the first appeal that FMS has consistently misused CR 11 to prevent Mitchell from obtaining a fair hearing of his claims, so here Mitchell is seeking to prevent its misapplication in clear violation of the previous mandate of this court.<sup>10</sup>

FMS has now had two opportunities to present its case to the trial court in a way that properly focused on the only substantive issue in the case—whether Mitchell’s failure to serve a copy of the Rule 45 subpoena on opposing counsel was deserving of some modest sanction, and what that sanction should have been—but FMS has squandered those opportunities in favor of a “scorched earth” tactic that has unnecessarily prolonged this litigation. Any claim that FMS might once have had for sanctions has been forfeited by its own misconduct.

Given FMS’ aggressive and consistently erroneous application of CR 11, it is tempting to suggest that Mitchell himself should be entitled to

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<sup>10</sup> Notably, FMS’ claim that Mitchell’s opposition is “frivolous” is a reflexive show of bravado rather than a genuine assessment of the merits of the respective positions. After all, FMS in the previous appeal stated that Mitchell’s claim was so weak that it deserved an award of sanctions for a frivolous appeal; but far from being devoid of any possibility of reversal, Mitchell’s position actually prevailed. Similarly, since Mitchell anticipates that it will prevail upon this second appeal, he views FMS’ repeated assertion of RAP 18.9 as tactical rather than sincere. It is regrettable that the rules do not provide a remedy for a case like this, in which a party is forced to obtain appellate relief for a clearly erroneous result below.

some form of sanction to offset the unnecessary fees and costs that he has incurred in defending himself. But in recognition of the additional cost of pursuing such a remedy (since a new judge would be required to review the record and make appropriate findings), and in anticipation of the sheer relief of putting an end to this unnecessary and costly litigation, Mitchell asks only for a final dismissal of the case, with costs.

#### IV. CONCLUSION

For the foregoing reasons, appellant Mitchell requests the Court of Appeals reverse the judgment below and award costs to Mitchell for prevailing on appeal.

Submitted this 27<sup>th</sup> day of March, 2015.

ALBRECHT LAW PLLC

By:   
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David K. DeWolf, WSBA #10875  
Attorneys for Appellant Robert W. Mitchell

**CERTIFICATE OF SERVICE**

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On March 27, 2015, I served the document to which this is annexed pursuant to written stipulation between the parties as follows:

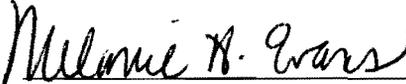
Email to:

[rmartens@martenslegal.com](mailto:rmartens@martenslegal.com)  
[mkennedy@martenslegal.com](mailto:mkenedy@martenslegal.com)  
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Prepaid first class U.S. Mail to:

Richard L. Martens  
Jane J. Matthews  
Matthew M. Kennedy  
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Seattle, WA 98104-4436

Signed on March 27, 2015 at Spokane, Washington.

  
Melanie A. Evans

APPENDIX A TO REPLY BRIEF OF APPELLANT

No. 30380-2-III

COURT OF APPEALS,  
DIVISION III  
OF THE STATE OF WASHINGTON

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GREGORY ROSE and CATHERINE ROSE, and the marital community  
composed thereof,

Appellants,

v.

FMS, INC., d/b/a OKLAHOMA FMS, INC., and Oklahoma corporation,

Respondent.

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**RESPONDENT'S MOTION FOR CLARIFICATION AND/OR  
RECONSIDERATION**

---

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## **I. IDENTITY OF MOVING PARTY**

Defendant/Respondent FMS, Inc., d/b/a Oklahoma FMS, Inc., (“FMS”), is the moving party.

## **II. STATEMENT OF RELIEF SOUGHT**

Pursuant to RAP 12.4, FMS asks this Court to either reconsider or clarify the portions of its opinion concluding that the trial court “lacked tenable grounds to impose CR 11 sanctions” (p. 9) and, on remand, directing that the trial court’s consideration of sanctions “would be limited to violations of CR 26(g) and CR 56(g) without consideration of the CR 11(a) sanctions rejected above.” (p. 11). Respectfully, these holdings and directives to the trial court on remand are at least ambiguous and, possibly, in error because they suggest that the trial court cannot consider sanctions regarding the trial court’s undisputed and uncontested conclusion that Mr. Mitchell committed a violation of CR 11(a) separate and independent of the violation for filing a baseless complaint that this Court reversed on appeal.

Respectfully, because the trial court found a separate and independent violation of CR 11(a) based on Mr. Mitchell’s admitted late and improper filings, this Court should either reconsider or clarify its

opinion reversing and remanding the matter. The learned trial court specifically noted that the “more recent filings outside [CR 6 and LCR 6], on the basis that the filings needlessly increased the costs of the litigation, in violation of CR 11(a) and [imposed sanctions under] this court’s inherent authority to control the litigation.” CP 998. The trial court’s ruling on that issue was not appealed or even disputed before this Court. Consequently, this Court should either clarify or reconsider its opinion to explicitly affirm that portion of the trial court’s ruling thereby allowing the trial court on remand to consider the appropriate sanction for that undisputed violation of CR 11(a) or, at a minimum, clarify that such sanctions are still available.

### **III. FACTS RELEVANT TO MOTION**

There were two separate rulings by the trial court imposing sanctions against Mr. Mitchell under CR 11(a). *See* CP 997-99. One was for filing a baseless complaint, which was the focus of Mr. Mitchell’s appeal and this Court’s opinion issued on April 30, 2013, reversing the trial court ruling as to CR 11(a).

The second CR 11(a) violation was for the numerous filings by Mr. Mitchell *after* the sanctions hearing on February 15, 2011. As the trial court explained in the July 11, 2011, letter ruling:

With respect to the materials filed by either party subsequent to item 9 above, I note that court rules do not permit the filing of an indefinite number of "supplemental" responses, without regard to the time frames anticipated by CR 6 and LCR 6. I have granted the defendant's motions to strike the plaintiffs' filings and have thus only considered the defendant's responses or supplemental surreply materials in conjunction with the motions to strike plaintiffs' filings. I would indicate that the materials filed by plaintiffs after item 8 above were untimely and amounted to a surreply to the defendant's properly filed reply materials, and therefore should not have been submitted.

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The motion for sanctions should be granted, on all three bases set forth in the initial motion for sanctions, and as to the more recent filings outside the rule, on the basis that the filings needlessly increased the costs of the litigation in violation of CR 11(a) and this court's inherent authority to control the litigation.

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Further, Mr. Mitchell's incessant filing of declaration after declaration was clearly designed to delay the inevitable as well as to increase the costs of the litigation to the defendant.

CP 997-98.

The trial court specifically identified and listed in the order each of Mr. Mitchell's improper filings, indicated that she read them, and made the specific finding that they were "untimely" and amounted to an improper "surreply to the defendant's properly filed reply materials," and their filing "was clearly designed to delay the inevitable as well as to increase the costs of the litigation to the defendant." *Id.* This conclusion tracks with, and is authorized by, the prohibition under CR 11(a) against filings "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." CR 11(a). Accordingly, the trial court ruled that "the filings needlessly increased the costs of the litigation in violation of CR 11(a)." CP 998. That finding was not contested.

Significantly, Mr. Mitchell's appellate brief is silent as to this particular CR 11 violation. Even after FMS discussed it in its Respondent's brief in Argument, Section C, pp. 37-38, Mr. Mitchell's reply brief was again silent as to this separate basis for a violation of CR 11(a). Given this, it is understandable that the Court apparently overlooked this issue in its opinion of April 30, 2013.

Regardless, because neither the trial court's conclusion that Mr. Mitchell committed a separate violation of CR 11(a) based on Mr.

Mitchell's numerous "supplemental" filings after the sanctions hearing nor the findings supporting that conclusion were disputed by Mr. Mitchell on appeal, the trial court's conclusion that Mr. Mitchell violated CR 11(a) on this separate basis should be either: (1) explicitly affirmed to avoid any confusion regarding it on remand and allow the trial court to consider the appropriate sanction for the violation, or (2) the opinion should be clarified to allow the trial court to again consider whether CR 11(a) sanctions are appropriate based on the improper supplemental filings.

#### **IV. STATEMENT OF GROUNDS FOR RELIEF SOUGHT**

Mr. Mitchell never denied that the numerous filings specifically identified in the trial court's July 11, 2011, letter order were untimely and improper, and never denied the motives the trial court ascribed to those late filings. Unchallenged factual findings are considered verities on appeal and are treated as the established facts of the case. *See, e.g., In Re Estate of Lint*, 135 Wn.2d 518, 532-33, 957 P.2d 755 (1998); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Similarly, the trial court's conclusion that Mr. Mitchell committed a separate violation of CR 11(a) through his numerous untimely and otherwise improper filings after the sanctions hearing was never challenged by Mr. Mitchell on appeal. Unchallenged conclusions of law

are treated as the law of the case. *See State v. Moore*, 73 Wn. App. 805, 811, 871 P.2d 1086 (1994); *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993).

Nevertheless, this Court's April 30, 2013, opinion is vague and ambiguous as to the trial court's ability to consider an appropriate sanction for the undisputed CR 11(a) violation on remand, or whether the trial court can even consider the CR 11 violation at all. On the one hand, the opinion refers only to the trial court's conclusion that Mr. Mitchell violated CR 11(a) by failing to conduct a reasonable investigation of the facts and the law prior to filing the complaint. But the Court's opinion more broadly concludes that "the court lacked tenable grounds to impose CR 11 sanctions," and later instructs the trial court on remand that "if sanctions are warranted they would be limited to violations of CR 26(g) and CR 56(g) without consideration of the CR 11(a) sanctions rejected above." *See* Opinion, pp. 9 & 11.

This conclusion and subsequent directive can be interpreted to either leave the separate violation of CR 11(a) for the numerous late filings open to consideration by the trial court because those sanctions were not "discussed above" or as precluding the trial court's consideration because "if sanctions are warranted they would be limited to violations of CR 26(g)

and CR 56(g).” Consequently, the opinion, as presently written, may well result in further appeals. This can be avoided by the Court clarifying and/or reconsidering its ruling now, prior to remand. Because it was never disputed that Mr. Mitchell’s numerous late filings violated CR 11(a), this Court should clarify that the trial court may consider an appropriate sanction for that violation of CR 11(a) on remand.

If the Court did, in fact, intend to preclude the trial court from considering the late-filing violation of CR 11(a) on remand, it should reconsider that ruling. Given the absence of any dispute concerning the trial court’s separate conclusion that Mr. Mitchell’s numerous supplemental filings subsequent to the sanctions hearing violated CR 11(a), this Court should amend its opinion to affirm this ruling of the trial court and allow the trial court on remand to consider the appropriate sanction for this violation of CR 11(a).

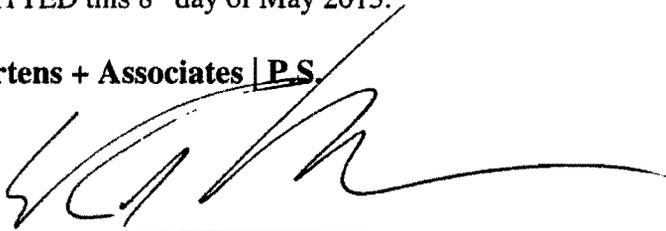
## V. CONCLUSION

Whether it requires mere clarification by the addition of a few words to this Court’s opinion or reconsideration, FMS requests that the Court amend its opinion to narrow its reversal of the trial court’s rulings regarding CR 11(a) to *only* the violation predicated upon the filing of a baseless complaint, and affirm the trial court’s undisputed ruling that Mr.

Mitchell's numerous untimely and otherwise improper filings after the sanctions hearing constituted a separate violation of CR 11(a). Or, in the alternative, simply clarify that the second basis for CR 11(a) sanctions can be considered by the trial court, if appropriate, on remand.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of May 2013.

**Martens + Associates | P.S.**

By 

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**CERTIFICATE OF SERVICE**

I certify that on the day and date indicated below, I filed and caused to be served the foregoing on behalf of Respondent FMS, Inc. d/b/a Oklahoma FMS, Inc. on the following counsel as indicated below.

<b>Counsel for Appellant</b> George M. Ahrend, Esq. Matthew C. Albrecht, Esq. Ahrend Albrecht, PLLC 16 Basin Street S.W. Ephrata, Washington 98823 Email: <a href="mailto:gahrend@ahrendalbrecht.com">gahrend@ahrendalbrecht.com</a> Email: <a href="mailto:malbrecht@ahrendalbrecht.com">malbrecht@ahrendalbrecht.com</a>	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail Telefax Hand Delivery Overnight Delivery E-mail
<b>Counsel for Amicus Curiae</b> Professor Alan L. McNeil, Esq. University Legal Assistance Gonzaga University School of Law 721 North Cincinnati Street Spokane, Washington 99220	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. Mail Telefax (509.313.5805) Hand Delivery Overnight Delivery E-mail

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 8<sup>th</sup> day of May, 2013 at Seattle, Washington.



Leehwa McFadden  
Paralegal for Martens + Associates | P.S.

# MARTENS AND ASSOCIATES, PS

**May 08, 2013 - 11:08 AM**

## Transmittal Letter

Document Uploaded: 303802-130508 fms' motion for reconsideration\_clarification.pdf

Case Name: Rose v. FMS, Inc., d/b/a Oklahoma FMS, Inc.

Court of Appeals Case Number: 30380-2

Party Represented: FMS, Inc., d/b/a Oklahoma FMS, Inc.

Is This a Personal Restraint Petition?  Yes  No

Trial Court County: Stevens - Superior Court # 10-2-00332-9

### Type of Document being Filed:

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion: Motion for Reconsideration
- Response/Reply to Motion: \_\_\_\_\_
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: \_\_\_\_\_

### Comments:

Motion for Clarification and/or Reconsideration

Proof of service is attached and an email service by agreement has been made to gahrend@ahrendalbrecht.com, malbrecht@ahrendalbrecht.com, rmartens@martenslegal.com, and sstolle@martenslegal.com.

Sender Name: Leehwa Mcfadden - Email: [Imcfadden@martenslegal.com](mailto:Imcfadden@martenslegal.com)

APPENDIX B TO REPLY BRIEF OF APPELLANT

Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

*The Court of Appeals  
of the  
State of Washington  
Division III*

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May 23, 2013

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CASE # 303802  
Gregory Rose, et ux v. FMS, Inc., et al  
STEVENS COUNTY SUPERIOR COURT No. 102003329

Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:jcs  
Encl. (1)

FILED

MAY 23 2013

COURT OF APPEALS  
DIVISION III  
SPRINGFIELD, WASHINGTON

**COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III**

GREGORY ROSE and CATHERINE  
ROSE, and the marital community  
composed thereof,

Appellants,

v.

FMS, INC., d/b/a OKLAHOMA FMS,  
INC., an Oklahoma corporation,

Respondent.

No. 30380-2-III

ORDER DENYING MOTION  
FOR RECONSIDERATION

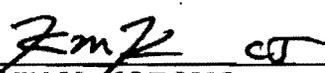
THE COURT has considered respondent's motion for reconsideration of this court's decision of April 30, 2013, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, respondent's motion for reconsideration is hereby denied.

DATED: May 23, 2013

PANEL: Jj. Brown, Kulik, Korsmo

FOR THE COURT:

  
\_\_\_\_\_  
KEVIN M. KORSMO  
CHIEF JUDGE