

No. 32284-0-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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.

BRIEF OF APPELLANT ROBERT W. MITCHELL

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I. INTRODUCTION

This case deals with the second attempt by FMS, Inc. to justify sanctions against Mr. Mitchell; the first attempt having been already reviewed and reversed by this Court of Appeals. *Rose v. FMS, Inc., et al.*, 174 Wn. App. 1065, No. 30380-2-III (2013) (unpublished)¹. In its first review, this court reversed the trial court's award of substantial sanctions (\$70,546.44) against Attorney Robert W. Mitchell (hereinafter "Mitchell") because it was not justified by CR 11 and the remaining findings were inadequate for review. In reversing the award and remanding the case to the trial court, the Court of Appeals made it clear that, if requested to do so, a new judge would have to take a fresh look at the case to determine whether any violations of CR 26 or CR 56 had occurred which would justify sanctions:

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); 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.

Instead of following this order, Judge Rebecca Baker (having previously resigned), at FMS' urging, defied the Court of Appeals,

¹ To avoid confusion, the first appeal will be referred to throughout this brief as *Rose v. FMS No. 1*.

appointed herself as a judge pro tem to the case, and on the same facts and record just reversed once more awarded CR 11 sanctions against Mr. Mitchell. This continuing fundamental error infected all decisions made by Judge Baker which are under review. Starting with her first finding of fact, Judge Baker does not hide the fact that she comprehensively relied upon her premise (already rejected by this court) that the underlying *Rose v. FMS* suit was “the attempt to obtain money to which one is not entitled to,” was for claims which “simply could not be established,” and for that reason every discovery dispute is seen by the trial court as Mr. Mitchell attempting “to *obfuscate*² the fact that his clients’ claims could not be established.” (CP 664, italics in original).

Instead of exercising discretion to reduce any sanctions awarded in light of the *Rose v. FMS No. 1* reversal, FMS sought, and Judge Baker awarded, *more* attorney hours than had been previously awarded and reversed.³ Judge Baker also reinstated a multiplier in an hourly case where fees were paid under contract to create a windfall for FMS beyond the actual

² This complaint against Mitchell is hard to reconcile with the fact, thus far undisputed, that both the late-produced documents from the Roses and the Roses’ account documents from Kohl’s would have *helped* rather than hurt the Roses’ case if only Mitchell had received them earlier in the case.

³ In her second sanctions order, Judge Baker granted FMS sanctions for 86.7 hours of paralegal fees and 278.8 hours of attorney fees. CP 681-85. This compared to her first (reversed) sanctions order, in which Judge Baker had granted FMS sanctions for only 38.9 hours of paralegal fees and 260.6 hours of attorney fees. *Rose v. FMS No. 1*, CP 1145.

fees paid, resulting in a total sanction of \$66,399.93, compared with the previous judgment of \$70,546.44.⁴ Judge Baker included explicit sanctions for alleged violations of CR 11 and almost entirely based all other sanctions on an implicit assumption that the entire case was baseless, excluding only the previously awarded sanctions for the filing of the complaint and answer to the complaint.

Because FMS and the trial court defied and countermanded the mandate of the Court of Appeals upon remand, this case should be reversed rather than being remanded, with fees and costs awarded to Mitchell.⁵

II. ASSIGNMENTS OF ERROR

1. Judge Baker erred by reimposing CR 11 sanctions, contrary to the mandate of the Court of Appeals.

2. Judge Baker erred by appointing herself as judge pro tem rather than allowing the remaining issues upon remand to be assigned to a “new judge.”

⁴ The reason Judge Baker’s 2nd sanction award is for more hours but a slightly reduced dollar amount is that she admits, in light of the reversal, that she may previously overestimated the “impeccably prepared pleadings” of FMS given the previous reversal and remand. CP 679-680. Despite this she still granted an upward lodestar multiplier of 1.25 (awarding a 25% windfall to FMS over the actual fees paid). CP 681.

⁵ In the event any remaining matter in this case is remanded, Mitchell respectfully asks that because of the doctrines of the appearance of fairness and impartiality and the history of this case, the remand should be explicitly to a new judge other than Judge Baker.

3. Judge Baker erred by imposing CR 26 and CR 56 sanctions without segregating compensable attorney's fees from those that are not compensable

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the Court of Appeals mandate directs the new judge upon remand to consider sanctions "limited to violations of CR 26(g) and CR 56(g) without consideration of the CR 11(a) sanctions rejected above," may the trial court interpret that mandate as applying only to the filing of the initial complaint, but permitting the imposition of CR 11 sanctions for other aspects of the case?

2. When the Court of Appeals mandate contemplates a "new judge" to consider remaining issues upon remand, may the original trial judge appoint herself as judge pro tem or should a new judge have been assigned by Stevens County Superior Court or, failing that, should Judge Baker have recused herself in this particular case?

3. May sanctions be awarded based upon CR 26 or CR 56 without factual findings that satisfy *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997)?

4. In awarding sanctions, must the trial judge distinguish attorney hours attributable to sanctionable conduct from other time spent on the case

and exercise independent discretion to reasonably limit sanctions to the least severe adequate sanction?

5. Should this case be reversed and dismissed or remanded (yet again) for review by a new judge?

IV. STATEMENT OF THE CASE

The facts concerning the underlying litigation were set forth in the appellant's brief in the previous appeal, *Rose v. FMS No. 1*. To summarize them briefly here, defendant FMS initiated debt collection efforts against Gregory and Catherine Rose based upon the Roses' account at Kohl's Department Store. Attorney Robert Mitchell (appellant herein) filed a complaint against FMS, Inc. (respondent herein) on behalf of the Roses, alleging violations of both state and federal statutes protecting debtors from abusive debt collection practices, alleging that the Roses had received more than 149 telephone calls from FMS in less than six weeks. Discovery was initiated by both parties.

When Mitchell asked counsel for the file from Kohl's that had presumably been transmitted to FMS for purposes of debt collection, FMS responded that it had no such file and could not obtain it from Kohl's. Instead, counsel for FMS made its own discovery requests demanding the Roses produce the same Kohl's/Roses' account file. After a discovery

conference to resolve the dispute and at FMS' counsel's insistence, Mitchell stipulated that he would be willing to obtain the Kohl's/Roses' account file by sending a subpoena to Kohl's. Mitchell then emailed a subpoena to the legal department of Kohl's with his request for the Roses' file, but inadvertently failed to send a copy of the subpoena to counsel for FMS. See CP 433. Kohl's subsequently sent the Roses' account file documents to Mitchell.

Both parties filed motions for summary judgment; FMS argued that the telephone calls did not constitute "communications" under either the state or federal statute, and that the calls did not constitute "harassment" as a matter of law. Judge Baker granted summary judgment to FMS, not on the ground sought by FMS, but based upon the belief that the debt was not in "default," and could not serve as the basis for either statutory claim. Mitchell filed the account records he had obtained from Kohl's in compliance with FMS' demand, but the trial court ruled that, because Mitchell had failed to comply with the advance notice requirements of CR 45(b)(2), the documents obtained from Kohl's were ruled inadmissible.

Mitchell and his clients decided not to appeal the judgment. After the deadline for filing an appeal from the judgment had passed, FMS filed a motion asking Judge Baker to impose sanctions based upon CR 11 CR 26, and CR 56. Judge Baker issued an initial opinion granting the motion,

finding violations of CR 11, CR 26 and CR 56. A second letter opinion made findings regarding the reasonableness of the fees requested, but made no findings concerning the basis for the sanctions. A judgment of \$70,546.44 was entered against Mitchell. The first appeal was timely filed and briefed by both parties.

On April 30, 2013, this court issued an unpublished opinion, No. 30380-2-III, which reversed the sanctions. It found that sanctions were not justified by CR 11, since “Mr. Mitchell had a good faith basis under CR 11(a) to believe he was justified in bringing suit to protect his clients.”⁶ Regarding the claim for sanctions under CR 26 and CR 56, the opinion faults Judge Baker’s reliance upon vague characterizations (interrogatories were answered in an “offhand way”; Mitchell engaged in “bullying”) rather than being based upon specific findings that would justify sanctions. Accordingly, this court reversed the judgment and remanded the case with very clear instructions (CP 314):

Regarding CR 26(g), the court did not explain what "offhand way" means or give specific examples of thwarting discovery effort attempts. The court does not explain what actions constituted "bully[ing]." Regarding CR 56(g), the court generally refers to FMS's brief to set forth how this rule was violated. Without more, we vacate the CR 26(g) and CR 56(g) sanctions because we cannot meaningfully review them as required in *Burnet*,

⁶ *Rose v. FMS, No. 1*, p. 9.

and remand to allow, but do not direct, further proceedings. 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); 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.

Upon remand, Judge Baker appointed herself as Judge pro tem, displacing the “new judge” contemplated by the Court of Appeals. When asked to recuse herself, Judge Baker stated her belief that she could adjudicate the matters impartially, CP 614:17, and that “[j]udicial economy would be disserved if another judge were required to consider this case” CP 614:4-5.

A hearing was held regarding FMS’ renewed motion for sanctions, and Judge Baker issued her Opinion, Judgment, Findings of Fact and Conclusions of Law on February 5, 2014. In this opinion, Judge Baker “duly notes” the Court of Appeals opinion reversing sanctions based upon CR 11, but inexplicably holds that CR 11 sanctions could still be awarded, since the Court of Appeals holding was limited to finding that the filing of the complaint was not frivolous. Her understanding of the Court of Appeals’ mandate was limited to a prohibition against awarding FMS “any fees or costs **associated with answering plaintiffs’ complaint.**” CP 711 (emphasis added). More specifically, she found: “Defendant is entitled to

an award of its fees and costs reasonably incurred in bringing the motion for sanctions and in responding to plaintiffs' improper filings of items 10, 11, 16, and 20, above. As supported further below, this necessarily includes all fees and costs reasonably related to items 1 through 30, above." CP 713. "Items 1-30" are listed at CP 708-11 and include virtually every document filed in connection with FMS' motion for sanctions.

The Opinion, Judgment, Findings of Fact and Conclusions of Law exceed 35 pages in length. Despite their length, they lack supporting evidence, are conclusory in nature, and fail to conform to the findings that were required by the Court of Appeals' opinion reversing the initial award of sanctions. Nonetheless, they resulted in an award of sanctions for 365.5 hours of attorney and paralegal time (compared with 299.5 hours in the first, reversed, sanctions judgment). CP 681-85. The total amount of the sanctions was \$66,399.93—constituting 94% of the original judgment. Rather than devote an inordinate amount of this brief to detailing the errors contained in the findings of fact and conclusions of law, Mitchell attaches to this brief an appendix responding in tabular form to each of the proposed findings of fact and conclusions of law but does not believe that detailing of the errors is necessary to dispose of the case. From the review of proceedings above, the argument for reversal can be stated succinctly.

V. SUMMARY OF ARGUMENT

The trial court erred in numerous ways, beginning with the refusal to confine herself to the mandate of the Court of Appeals: Judge Baker was directed to consider only those alleged violations of CR 26 and CR 56 and make findings appropriate to those claims.

Moreover, it should not have been Judge Baker who considered any renewed request for sanctions under CR 26 and CR 56. In specifying that “a new judge” would address any such request, the Court of Appeals contemplated a fresh look at the case to determine if sanctions were truly warranted. Styled as an attempt to promote judicial economy, Judge Baker’s decision to appoint herself as judge *pro tem* can be more plausibly explained as an attempt to reimpose the same sanctions, disguised as an award conforming to the mandate of the Court of Appeals. Even at that, Judge Baker could not resist the temptation to openly reinstate an award based upon CR 11, misreading the clear mandate of the Court of Appeals.

Even if the preceding reasons were not sufficient to justify reversal, a final defect remains: despite the second opportunity to present and then enter findings of fact that would satisfy the standards of *Burnet v. Spokane Ambulance*, both FMS and Judge Baker failed to satisfy both the requirement that the sanctions be based upon reviewable findings, as well

as the requirement that the award be limited to sanctionable conduct rather than including time devoted to ordinary litigation.

Because the respondent has failed on two occasions to present findings of fact that would justify any sanctions at all, this case should be reversed and all sanctions dismissed with prejudice; alternatively, a new trial judge should be instructed to consider whether Mitchell should recover sanctions from FMS for its failure to comply with CR 26.

VI. ARGUMENT

A. **The trial court erred in failing to evaluate the CR 26(g) and 56(g) sanctions “without consideration of the CR 11(a) sanctions rejected [by the Court of Appeals].”**

Judge Baker failed or refused to follow the clear instructions for remand issued in the Court of Appeals opinion, which directed a **new judge** (if asked) to “assess anew whether sanctions are warranted under CR 26(g) and CR 56(g); 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.” CP 314. Judge Baker construed the exclusion of CR 11 sanctions as applying only to those fees and costs incurred in **answering the complaint**. CP 711. She then concluded that she could award CR 11 sanctions based on conduct other than the filing of the complaint:

The CR 11(a) aspect of this ruling is separate and apart from this Court's erroneous ruling that the filing of the

plaintiffs' complaint was frivolous and called for CR 11 sanctions. The Court of Appeals' Unpublished Opinion makes no mention of the separate bases for CR 11 sanctions, instead reversing this Court's conclusion that CR 11 sanctions were inappropriate when it relied on the concept that the complaint had been frivolous. In regard to these separate bases for CR 11 sanctions, then, the doctrine of *ex [sic] expressio unius est exclusio alterius* applies; see *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 575-576, 141 P.3d 1 (2006) [sic]⁷. This Court may, and under the circumstances of this case should, award some CR 11 sanctions.

CP 734.

It is difficult to imagine a more willful misreading of the appellate mandate. It would be one thing if the opinion had stated simply, “if sanctions are warranted they would be without consideration of the CR 11(a) sanctions rejected above.” In that case it would be conceivable that the phrase “rejected above” was a dependent clause that qualified (and thus limited) the scope of the exclusion. But such a reading is rendered patently unreasonable when the actual language of the Court of Appeals opinion is considered as a whole. It reads, “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.” CP 314. The

⁷ Correctly cited at 141 P.3d 1.

addition of the phrase “without consideration of the CR 11(a) sanctions rejected above” only accentuates (it does not qualify) the first part of the sentence, which explicitly limits any further proceedings to a consideration of possible sanctions based upon CR 26(g) and CR 56(g).

B. The trial court erred by assuming jurisdiction over the case upon remand.

As previously noted, in the opinion deciding the first appeal of this case, this Court directed that a “new judge” would resolve any remaining issues. Although the opinion precedes that comment with the observation that the trial judge who imposed the sanctions had retired, there is an additional implication that the lack of adequate findings for an award of sanctions under CR 26 and CR 56 might have resulted from the absence of evidence to support such findings rather than simple oversight: “[W]e 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 (emphasis added). The Court of Appeals anticipated that a new judge, looking at the case with fresh eyes, might recognize that there was nothing left of the case that required “further proceedings.”

Contrary to her later opinion reimposing CR 11 sanctions, when Judge Baker refused Mitchell’s request that she recuse herself she

recognized that “the CR 11 sanctions were reversed on appeal.” CP 703. She also acknowledged that satisfying her obligations to avoid prejudice against and an appearance of fairness towards Mitchell she would need to “‘change gears’ and consider only the remaining sanctions issues on remand.” CP 703-04. This obligation was not fulfilled. Consequently, the decision of the trial judge to resume control over the case, far from promoting judicial economy, had just the opposite effect, resuscitating a controversy that, if it followed the path directed by the Court of Appeals, might very well have ceased altogether.

C. The trial court failed to satisfy the *Burnet* standards for the imposition of sanctions

1. The trial court failed to enter findings that would permit appellate review

Despite the Court of Appeals having made clear (CP 314) that the original findings failed to satisfy *Burnet*, the findings upon remand are similarly deficient. On the one hand, “a trial court has broad discretion as to the choice of sanctions for violation of a discovery order.” *Burnet*, 131 Wn.2d at 494, 933 P.2d at 1040. On the other hand, the trial court’s choice of sanctions must be accompanied by adequate findings that permit meaningful appellate review of whether the trial court properly exercised its discretion. *Id.* Moreover, the *Burnet* court relied upon the general

principle enunciated in *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), which identified the “guiding principles” of discovery sanctions: “the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery; the purpose of sanctions generally are to deter, to punish, to compensate, to educate, and to ensure that the wrongdoer does not profit from the wrong.” *Burnet*, 131 Wn.2d at 495-6, 933 P.2d at 1041.

Despite the voluminous findings of fact and conclusions of law, there is very little by way of concrete findings that connect actual “wrongdoing” with evidence that the wrongdoer’s conduct either connected directly to the need for any particular compensatory sanction or was “willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial.” *Burnet*, 131 Wn.2d at 494, 933 P.2d at 1040. Instead, the trial court’s findings recite a mish-mash of strategic arguments and disputes between the plaintiff and FMS (all routine and expected advocacy), inadvertent mistakes resulting in no harm to the defendants, and legal positions taken that were either withdrawn or failed to persuade the trial court of their merits. All rely on one logical error: because the trial court saw the entire case as frivolous, every suggestion of a settlement alternative became to the trial court “extortion” and every attempt at routine discovery

and every discussion of how to proceed with discovery became an abuse which the trial court explained could only have been put forth with ill will since the Roses ultimately lost the case. This logic would mean any zealous advocacy would become sanctionable if a case is ultimately lost (ironically, encouraging “scorched earth” tactics), which is precisely the “fee shifting” use for which sanctions should not and cannot be used.

Because of the clear mandate from the Washington Supreme Court that “requests for sanctions should not turn into satellite litigation or become a ‘cottage industry’ for lawyers,” *Fisons*, 122 Wn.2d at 356, 858 P.2d at 1085, a trial court must identify with specificity the behavior that justifies sanctions and why the amount imposed is proportionate to the wrongdoer’s conduct. *Burnet v. Spokane Ambulance*. The trial court’s failure to include such findings, noted in this Court’s previous opinion, and perpetuated in the proceedings upon remand, prevent the imposition of any sanctions on this record.

A related principle is found in the requirement that in awarding fees, a trial court must segregate the time that is attributable to that aspect of the case that justifies a fee award from time spent by the attorney on an aspect of the case that does not justify a fee award. *Manna Funding, LLC v. Kittitas County*, 173 Wn.App. 879, 295 P.3d 1197 (Div. 3 2013); *Mayer v. City of Seattle*, 102 Wn.App. 66, 79-80, 10 P.3d 408 (Div. 1 2000): “If

attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues." In this case it is impossible from the trial court's findings of facts to distinguish the time that FMS' lawyers would have spent on this case regardless of the alleged violations of CR 26 and CR 56. Instead, the trial court explicitly combined those alleged violations with an award of CR 11 sanctions. Even if the record supported an award of CR 26 and CR 56 sanctions—a claim Mitchell vigorously disputes—there is no basis on this record to sustain an award because of the failure of both FMS' counsel and the trial court to perform the required segregation.

2. FMS had advance notice and demanded that Mitchell obtain the Kohl's records; no sanction beyond striking the evidence is justified by the evidence for Mitchell's failure to strictly comply with the advance notice requirement of CR 45.

More than half of the sanctions award (\$38,099.23 of the total judgment of \$ 66,399.93) is based upon Judge Baker's finding that Mitchell violated CR 45 by failing to serve opposing counsel with a copy of the subpoena addressed to Kohl's (the original creditor resulting in FMS' debt collection efforts). On the one hand, it is unnecessary to consider the merits of this aspect of the case, because (as the previous

section of this brief points out) Judge Baker's award of sanctions failed to provide adequate factual findings, and failed to segregate the sanctionable conduct from the rest of the litigation. Further, there was no harm because although CR 45 was not strictly complied with by providing a copy of the subpoena before it went to Kohl's, FMS had specific advance notice of the request, had insisted that Mitchell obtain the records, and when the records turned out to be in the Roses' favor FMS successfully had them stricken from consideration by the court.

First, Mitchell was surprised that FMS did not already possess the records from Kohl's, since presumably FMS based its debt collection efforts upon such records. Second, as a related matter, FMS not only knew that Mitchell would be obtaining the records from Kohl's, but it summarized in an email to Mitchell that they had agreed that Mitchell would "submit paperwork to Kohl's" to obtain records. CP 433.

Robert:

I am writing just to confirm the agreements reached during our CR 26(i) conference earlier today. **The only direct supplementation that plaintiffs agreed to and need to make are:** (1) identify their telephone carriers so that defendant can subpoena the pertinent records, and (2) **submit paperwork to Kohl's and/or chase [sic] to obtain records on the debt at issue to produce to defendant.**

...

Steven A. Stolle

CP 433 (November 9, 2010 email from Stolle to Mitchell, emphasis added).

Thus, while Mitchell still was required by CR 45 to send FMS a copy of the subpoena he intended to serve on Kohl's, the ordinary purpose of the notice requirement – so that the opposing party has an opportunity to limit the scope of the request or oppose it altogether – had already been satisfied. Third, Mitchell sent the subpoena to Kohl's legal department. While in some cases the failure to serve a CR 45 subpoena (without notice to the other party) might be an opportunity for gaining an advantage over an unsophisticated witness, here Mitchell went out of his way to insure that Kohl's was able to prevent any disclosure that might be objectionable. Finally, Mitchell gained no advantage from the failure to comply, and FMS suffered no prejudice. Ordinarily, a failure to comply with CR 45 means the subpoena is unenforceable, or perhaps the evidence obtained is stricken and cannot be used. By failing to notify FMS pursuant to CR 45, Mitchell and his clients were unable to use the documents because Judge Baker ruled them inadmissible—the sanction imposed by refusal to consider the records which would have helped the Roses' case was adequate if any sanction was needed.

Thus, over half of the sanctions imposed by Judge Baker not only lacked supporting findings in the record, but were wildly disproportionate to any conceivable basis for awarding sanctions under CR 26.

D. It is time for this “satellite litigation” to end. The judgment below should be reversed with an instruction to dismiss with prejudice.

The last remaining issue is whether this case should be remanded (yet again) for further consideration, or dismissed outright. The previous opinion was careful to state that it was *permissible*, but certainly not *required*, to consider sanctions under CR 26 and CR 56. Given the fact that FMS has failed on two occasions to provide the Court with adequate findings to justify an award of sanctions under CR 26 or CR 56, and that it invited the trial court impermissibly to reintroduce sanctions based upon CR 11, yet another remand would violate the fundamental principle of the civil rules, as enunciated in *Burnet*:

The dissent concludes that the sanction imposed by the trial court was appropriate, preferring to interpret the civil rules for superior court in a way that facilitates what it describes as the "case management powers of the trial courts." Dissenting op. at 1048. While we are not unmindful of the need for efficiency in the administration of justice, our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action.

This case arose from the plaintiff’s claim that FMS’ violation of state and federal debt collection practices statutes justified damages of \$4,000. The sanctions litigation arising from that underlying claim has now dwarfed the amount at stake in the original controversy. Two appeals and

one remand later, the parties have expended far more in litigation costs with no end in sight.

If this case is remanded (yet again), Mitchell would be entitled to seek sanctions based upon the lack of merit in the CR 26 claims brought against him. Just as the CR 26 and CR 37 permit an award of sanctions to a party who must resort to the court's help to obtain discovery (or freedom from discovery), a party who successfully defends itself from a motion to compel (or prevent) discovery is entitled to sanctions: "If the motion [for a discovery order] is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." CR 37(a)(4). Two preceding motions for sanctions, and two subsequent appeals proceedings, necessitating Mitchell's expenditure of attorney's fees, would justify a trial court upon remand to award Mitchell substantial sums to compensate for the unjust motions practice to which he has been subjected. However, in the interests of ending this "satellite litigation," and with the acknowledgement that further proceedings on remand would tax both counsel and court (to the benefit of no client), Mitchell would agree to a

dismissal of the controversy with prejudice. FMS is entitled to no more, having failed in two previous attempts to present adequate findings upon which any award could be justified.

VII. 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, or in the alternative, to dismiss Judge Baker's sanctions award and remand for new consideration of any motions for sanctions by both parties with specific instruction for assignment to a new judge.

Submitted this 30th day of January, 2015.

ALBRECHT LAW PLLC

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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 January 30, 2015, I served the document to which this is annexed pursuant to written stipulation between the parties as follows:

Email to:

rmartens@martenslegal.com
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jmatthews@martenslegal.com
mmorgan@martenslegal.com

Prepaid first class U.S. Mail to:

Richard L. Martens
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Signed on January 30, 2015 at Spokane, Washington.


Melanie A. Evans

APPENDIX RESPONDING TO THE TRIAL JUDGE’S FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Findings of Fact / Conclusions of Law		Errors of law and fact
FOF #1	The court’s explanation of the term “bullying” (CP 711-12)	<p>This is not a finding of fact, but an attempt to explain the use of the term “bullying”; characteristically, it contains a conclusion without supporting facts.</p> <p>Moreover, the trial judge describes as “bullying” or “extortion” the plaintiff’s attempt to recover damages from the defendant by filing a cause of action and then proposing settlement terms. Because of the appeals court’s finding that the underlying litigation <i>did</i> have merit sufficient to withstand a motion for CR 11 sanctions, there is no evidence to support a finding of bad faith. (CP 89 – 100, and 304 – 315).</p>
FOF #2	Several pleadings were stricken as having been untimely filed (CP 712-13)	The mere fact that a pleading is untimely, and therefore stricken, does not establish that the pleading was made in bad faith. The court made no relevant findings to support a finding of bad faith.
FOF #3	One of the declarations filed in response to the motion for sanctions was untimely. (CP 713)	As with the previous finding, there is no finding relating to the reason that the declaration was untimely, nor was there any finding relating to the harm resulting from the untimely filing.
FOF #4	The defendants are entitled to an award of fees for all of the filings relating to the motion for sanctions. (CP 713)	Disguised as a finding of fact, this is a conclusion of law that does not relate any alleged wrongdoing on Mitchell’s part to any resulting damage suffered by opposing counsel.
FOF #5	Mitchell violated CR 45(b)(2) by serving a subpoena without serving a copy on opposing	Mitchell concedes that a copy of the Kohls subpoena was not served on opposing counsel, and thus CR 45(b)(2) was violated. However, the findings fail to include

Findings of Fact / Conclusions of Law	Errors of law and fact
<p>counsel. (CP 713)</p>	<p>undisputed evidence that opposing counsel was not only aware that Mitchell planned to obtain the documents from Kohls directly, but in fact had <i>suggested</i> that Mitchell do so.</p> <p>Steven Stolle stated: “Mr. Mitchell never informed defense counsel of any efforts to obtain records from Kohl's...” CP 130, 620, 661, 709 (Second Supplemental Declaration of Steven Stolle in Support of Defendant, FMS, Inc., d/b/a OKLAHOMA FMS, INC.’s Motion for Sanctions” found in the <i>old</i> CP’s at 785). This directly contradicts Mr. Stolle’s email confirming he had demanded Mitchell obtain the records and that Mitchell had agreed to do so. CP 433, 396, 413, 433).</p> <p>Nevertheless, Stolle misrepresented these facts to the court:</p> <p>At the hearing, Mr. Mitchell represented in open court that he had served Kohl's with a subpoena "months ago" when, in fact, he had served the improper subpoena on or about January 10, 2011, less than five weeks before the hearing.</p> <p>Further, according to the verbatim transcript, Mr. Mitchell actually said:</p> <p>I submitted two separate letters, Kohl's didn't respond, Kohl's finally responded state - or excuse me, I sent a -I then sent a subpoena, because they wouldn't send me the documents. They responded with a letter stating they needed \$25.00. That's been at least a month ago. (CP 396 – 397).</p> <p>Stolle admitted the earlier misrepresentation in his last Reply Brief: “Mr. Mitchell’s</p>

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		<p>second correction, about the timing of his subpoena to Kohl's, is well-taken. The verbatim transcript of proceedings does not say "months ago" as provided in FMS's proposed order, but "over a month ago" as quoted in Mr. Mitchell's brief." (CP 450).</p> <p>Consequently, there is no evidence that a technical violation of CR 45(b)(2) resulted in material harm to the party seeking sanctions.</p>
FOF #6	<p>Defendant is entitled to an award of fees for the violation of CR 45(b)(2), including the cost of filing any pleadings "in reliance on materials" obtained as a result of the subpoena. (CP 714)</p>	<p>Again, the court enters a conclusion of law disguised as a finding of fact, and fails to point to any evidence that compliance with CR 45(b)(2) would have avoided the subsequent pleadings.</p>
CR 26(g) Findings		
FOF #7	<p>Mitchell "promulgated unreasonably burdensome and unnecessary discovery to Defendant in a bad faith effort to harass and bully Defendant into a settlement" (CP 714)</p>	<p>Again, disguised as a finding of fact, the trial court makes a conclusory statement unsupported by any evidence of bad faith or improper behavior. More importantly, the discovery was actually pattern discovery that falls far short of being improper. (CP 585 – 603).</p>
FOF #7a	<p>Mitchell attempted to depose a 30(b)(6) witness in Spokane rather than in Tulsa, Oklahoma, where the witness resided. (CP 714-15)</p>	<p>In some cases it is appropriate to hold a deposition elsewhere than where the witness resides. In any event, the request to depose a witness (represented by counsel) at a place other than the witness' residence – a request that was eventually withdrawn -- is hardly "bullying" or "bad faith".</p>
FOF #7b	<p>Mitchell submitted requests for admission that were burdensome</p>	<p>The appropriate response to a burdensome discovery request is timely objection; the court imputes an improper motive without</p>

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	and repetitious. (CP 715)	supporting evidence.
FOF #7c	Mitchell sought discovery of policies and procedures that defendant considered confidential and proprietary. (CP 716)	<p>Again, the mere request for evidence that may be subject to a protective order is not in itself bad faith conduct, unless additional evidence supports such a finding – and in this finding the court merely assumes bad faith rather than making a finding of fact based upon competent evidence.</p> <p>The trial court further concludes that Mitchell’s ultimate agreement to a protective order was a sign that Mitchell “did not consider the documents necessary to his case.” Rather than supporting a finding of bad faith, Mitchell’s willingness to compromise with defendant is a sign of appropriate and normal behavior during discovery.</p>
FOF #8	Mitchell did not produce his clients at the time requested by opposing counsel. (CP 717)	<p>The scheduling of depositions at the mutual convenience of the parties and the witnesses is left to the professional courtesy of the parties, subject to review by a court for abuse. No motion to compel was ever filed, and no court order was ever entered until <i>after</i> the case had been dismissed on the merits.</p> <p>In fact, FMS never submitted any deponent for any deposition, and the only mistake, if any, made by Mitchell was not following up with a motion to compel the CR 30(b)(6) deposition of FMS.</p> <p>On the other hand, FMS and was able to take Mr. Rose’s deposition within roughly <i>two weeks</i> of FMS’ first request and FMS was provided a similarly prompt date for Mrs. Rose’s deposition, though FMS chose not to</p>

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		<p>follow through with actually taking the deposition of Mrs. Rose. The only intransigent party in this exchange was FMS, as the timeline at CP 412 shows FMS received the deposition dates it sought promptly upon their being requested.</p> <p>If all it takes to show that discovery requests are sanctionable is to show that FMS refused to answer, but the Roses then failed to follow through on a motion compelling answers, then nearly every civil lawsuit will justify personal sanctions, and the same sanctions are justified against FMS's counsel for attempting to take Mrs. Rose's deposition and then failing to follow through.</p>
FOF #9	<p>Mitchell signed discovery responses that stated certain documents had not been retained; later in their depositions clients stated that the documents did exist. (CP 717-19)</p>	<p>An attorney signing responses to discovery requests is entitled to rely upon the information given <i>at the time</i> by the clients. The fact that the clients later identify a response as inaccurate does not establish that the lawyer signed the discovery requests in bad faith.</p>
FOF #10	<p>Other discovery responses were “improper and intentionally misleading, if not outright false.” (CP 719)</p>	<p>After a discovery conference, Mitchell withdrew an initial claim of privilege for some discovery materials. Again, the mere assertion of a privilege – even if ultimately withdrawn or compromised – does not constitute bad faith. Rather, it reflects the realities of compromise on discovery disputes made with a practical eye toward the size of the dispute, as is <i>required</i> by the discovery rules. If this justifies sanctions, then FMS is also liable for sanctions for asserting the nearly identical objections. (CP 585 – 603) (FMS boilerplate objections refusing to answer the Roses’ discovery).</p>

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FOF #11	Mitchell falsely asserted that the plaintiffs sustained damages. (CP 719-20)	As a matter of law, plaintiff under the statute is entitled to statutory damages as well as to emotional distress damages; even if plaintiff did not sustain pecuniary damages the claim was not false. <i>See</i> 15 U.S.C. §1692k. Moreover, the damages articulated in Plaintiffs’ original complaint are supported by <i>Sign-O-Lite Signs v. DeLaurenti Florists</i> , 64 Wn. App. 553, 825 P.2d 714 (1992). <i>Panag v. Farmers Ins. Co. of Washington</i> , 204 P.3d 885 (Wash. 2009).
FOF #12	Mitchell asserted damages for the purpose of obstructing opposing counsel’s discovery. (CP 720)	The findings are conclusory and do not rest upon competent evidence. <i>See</i> above cases.
FOF #13	Mitchell’s clients had no damages. (CP 720)	<i>See</i> the response to FOF #11: Plaintiff was entitled to assert both statutory damages and emotional damages, and the dispute over pecuniary damages was not made in bad faith. <i>Supra</i> .
CR 56(g) Findings		
FOF #14	Mitchell filed a joint declaration by his clients that made false statements. (CP 720-21)	There is no evidence, and no finding of fact, that Mitchell either knew or should have known, of alleged factual discrepancies in the clients’ declaration.
FOF #15	Mitchell “certainly knew or should have known” that certain claims in the clients’ declaration were false. (CP 721)	No evidence is cited to support the finding that Mitchell knew or should have known his clients’ statement was inaccurate
FOF #16	Mitchell filed a motion for reconsideration based on newly discovered evidence, but failed to serve the motion on opposing counsel. (CP 721-22)	Mitchell has evidence that the motion was duly sent by mail, but in any event there is no showing of any harm suffered by opposing counsel as a result of the delivery failure
FOF	Mitchell represented that his	The Roses submitted declarations that they

Findings of Fact / Conclusions of Law		Errors of law and fact
#17	clients had moved, when in fact he knew or should have known that they had not. (CP 722)	informed Mitchell that the Kohl's billing statements were most likely thrown out. Greg Rose stated at his deposition that his wife keeps those kinds of records, so the questions about their location should be directed to his wife. FMS mischaracterized this statement to be an affirmative statement that Mrs. Rose did in fact retain these specific documents. The Roses later found the documents in a box in their garage. Mitchell passed along what he had been told based on a mistaken belief that a "box in the garage" meant something stored in a box in connection with moving. (CP 402).
FOF #18	Mitchell filed a motion and response that relied upon documents improperly obtained from Kohl's, and thus were in bad faith. (722-23)	As discussed in the response to FOF #6, opposing counsel suffered no prejudice from the oversight of failing to serve a copy of the subpoena on opposing counsel; thus, the time expended in responding to the motion was not subject to recovery of sanctions
FOF #19	Mitchell made "deliberately false and misleading" representations concerning the existence of a Professional Limited Liability Corporation (PLLC), which Mitchell alleged should be the only entity subject to sanctions. (CP 723)	The statements were made by Mitchell's mistaken belief that his PLLC was active and current. They had no bearing on the outcome of the case and are a red herring. CP 634 states: "...entity was dissolved in 2008, that Mr. Mitchell's representations about the existence of the law firm of "Robert Mitchell, Attorney at Law, PLLC," were deliberately false and misleading in an attempt to convince this Court to limit Defendant's ability to enforce an award of monetary sanctions to a non-existent business entity, and not Mr. Mitchell, who operates his law practice as a sole

Findings of Fact / Conclusions of Law		Errors of law and fact
		<p>proprietor...”</p> <p>Neither of the highlighted areas are true. The PLLC was never “dissolved.” Mitchell simply overlooked the renewal of the PLLC, which legally does not equate to “dissolution.”</p>
FOF #20	Opposing counsel incurred expense in responding to the claim that the PLLC, and not Mitchell personally, should be held liable for any sanctions. (723-24)	There is no finding with respect to the amount of time expended in responding to Mitchell’s claim.
FOF #21	“Substantially all of the filings in this case” from February 2011 until the notice of appeal were necessitated by “Mr. Mitchell’s pattern of violations of CR 26(g) and CR 56(g). These were either in furtherance of or caused in whole or in substantial part by Mr. Mitchell’s CR 11 violations completely unrelated to the issue of whether the complaint in this case was frivolous.” (724-25)	This finding impermissibly relies upon alleged violations of CR 11, which was explicitly excluded from any award following remand.
FOF #22	Mitchell falsely represented that he was representing his clients <i>pro bono</i> . (CP 725)	Washington’s RPC’s require contingency contracts to be in writing. Rose testified at his deposition that there was no written fee agreement between him and his counsel. (CP 66). Mr. Rose stated at his deposition that he has not paid his attorney for the other case Mitchell was handling for the Roses. (CP 66). Mr. Mitchell stated that he was doing the case <i>pro bono</i> . (CP 66). The record contains absolutely no evidence whatsoever to contradict this state. However, Stolle stated: “That’s not <i>pro bono</i> . So this thing about being <i>pro bono</i> , I think it’s complete

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		nonsense. It's not supported by anything. And the idea that the \$5,000.00 would have gone to the Roses, that's poppycock.” (CP 68). Judge Baker held that it was a contingency contract without any supporting evidence, and what evidence exists contradicts this legal conclusion.
FOF #23	Of the total of 349.2 hours billed on this matter, Counsel sought sanctions for 200.8 hours “as a direct and proximate result of Mr. Mitchell’s violations of CR 26(g) and CR 56(g). These reduced fees are also separately requested for the CR 11 sanctions to be awarded in this Order that are separate and apart from the sanctions under CR 11 that were reversed by Division III . . .” (725)	The trial court impermissibly bases its award on a finding that CR 11 was violated, a result clearly forbidden by the appellate court’s opinion regarding the procedure on remand. (CP 89 – 100, and 304 – 315).
FOF #23a	The hours for which sanctions are sought “are directly related to the Civil Rule violations this Court concludes have been established.” (CP 725-26)	This finding is vague and lacks the specificity necessary to justify an award of sanctions. It also fails to distinguish which sanctions are related to which violation of which civil rule.
FOF #23b	Attorney Stolle carefully allocated the time he and others spent on the sanctionable conduct. (CP 726)	The trial court has not segregated the time attributable to alleged violations of CR 11, making the calculation of hours unsupported by the record.
FOF #23c	Mitchell does not challenge Stolle’s careful allocation. (CP 726)	It is the appellate court that required a separation of hours attributable to violations of Rule 26 and Rule 56, an allocation that neither Stolle nor the trial court performed.
FOF	The factual statements in Stolle’s	Judge Baker wholesale adopted, without exercising the necessary judicial discretion,

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#23d	declarations are true. (CP 726-27)	everything FMS' counsel submitted, despite the obvious (some admitted) misstatements: e.g., that FMS had "no notice" that Mitchell would seek the records from Kohl's and that Mitchell made a false statement about the timing of the request.
FOF #24	Stolle's hourly rate of \$168 should be increased to \$200. (CP 727)	Stolle's actual billing rate should be the lodestar amount; In Washington, adjustments to the lodestar product are reserved for 'rare' occasions. <i>Berryman v. Metcalf</i> , 177 Wn.App. 644, 665, 312 P.3d 745, 758 (Div. 1 2013). None of the fee was contingent.
FOF #24a	The \$168 hourly rate was a discounted contract "insurance" rate, but a reasonable rate would be \$200 per hour. (CP 727)	"[A]n attorney is ordinarily entitled to recover only the reasonable fees actually charged to the client, not the fees the attorney wishes he or she might have charged." <i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640, 704, 935 P.2d 555, 588 (1997).
FOF #24b	The court would be required to use a downward multiplier in light of the Court of Appeals ruling. (CP 727-28)	The court still used an upward multiplier; it only used a slightly smaller multiplier than the one applied in the original ruling.
FOF #24c	Mitchell's hourly rate was \$200, and the time spent in consultation with Mr. Martens was reasonable. (CP 728)	Mitchell's hourly rate would be relevant only to the calculation of a multiplier – not to the setting of the initial lodestar hourly rate.
FOF #24d	An hourly rate of \$210 per hour should be the basis of the lodestar calculation. (CP 728-29)	The trial court improperly confuses the calculation of the lodestar amount – the actual hours spent, multiplied by the actual hourly rate charged by the attorney – with the justification for a multiplier from the lodestar amount.
FOF #24e	The hourly rate for paralegal time (\$68) was reasonable. (CP 729)	The court makes no finding as to which hours expended by the paralegals was necessitated by any alleged violation of CR

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		26 or CR 56.
FOF #25	Defense counsel spent 21.9 hours in responding to Mitchell's discovery requests. (CP 729)	As noted previously, Mitchell had good faith reasons for requesting discovery, and the award of the entire 21.9 hours fails to segregate the recoverable amount from what is not recoverable. <i>Manna Funding, LLC v. Kittitas County</i> , 173 Wn.App. 879, 295 P.3d 1197 (Div. 3 2013).
FOF #26	Defense counsel incurred 10.5 hours in paralegal time responding to Mitchell's discovery requests. (CP 729)	As in the response to FOF #25, the finding fails to segregate the recoverable amount from what would have been expended anyway.
FOF #27	Defense counsel incurred 21 hours because of Mitchell's inadequate response to discovery requests. (CP 729-30)	As noted in response to FOF #10, Mitchell properly objected to some material as privileged, and the failure to distinguish the alleged discovery abuse from legitimate assertion of his client's interests renders this finding inadequate for an award of sanctions.
FOF #28	Defense counsel incurred 8 hours of paralegal time responding to Mitchell's discovery requests. (CP 730)	Again, there is no segregation of recoverable paralegal time from what would otherwise have been incurred.
FOF #29	Defense counsel incurred \$827.34 in out-of-pocket costs and expenses. (CP 730)	Defense counsel would have incurred travel and other costs regardless of any alleged violations of CR 26 or CR 56; these costs are not recoverable as a legitimate sanction.
FOF #30	Defense counsel spent 156.5 hours as a result of Mitchell's violation of CR 45(b)(2). (CP 730)	Not only did the appeals court limit the consideration of sanctions on remand to alleged violations of Rule 26 and Rule 56, but the entire award of 156 hours is premised on the Mitchell's failure to provide a copy of a witness subpoena to opposing counsel – an oversight that resulted in no demonstrated prejudice to opposing counsel, as explained

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		in the response to FOF #5.
FOF #31	Defense counsel incurred 53.8 hours of paralegal time responding to the motion for sanctions. (CP 730)	Since the gist of the motion for sanctions below was the alleged violation of CR 11, which was reversed on appeal, any award of paralegal time would require segregation of the CR 26 and CR 56 claims, which is lacking from this finding.
FOF #32	Defense counsel incurred \$1,575.83 in costs related to the motion for sanctions. (CP 731)	See the response to FOF #30.
FOF #33	Defense counsel incurred 1.4 hours responding to Mitchell's motion for reconsideration. (CP 731)	There is no basis for alleging any violation of CR 26 or CR 56 to justify this award of sanctions.
FOF #34	Defense counsel incurred 2.2 hours of paralegal time responding to Mitchell's motion for reconsideration. (CP 731)	See the response to FOF #33.
FOF #35	Defense counsel incurred \$53.16 in costs responding to Mitchell's motion for reconsideration. (CP 732)	See the response to FOF #33.
FOF #36	Defense counsel incurred 58 hours in preparing the motion for sanctions upon remand. (CP 732)	Further proceedings on remand were necessitated by the inadequate findings prepared by defense and counsel and entered by the trial court; none of the hours incurred by defense counsel in preparing for remand were necessitated by any bad faith conduct by Mitchell and thus it was error for the trial court to award sanctions for this aspect of the case.
FOF #37	12.2 hours of paralegal time was expended in preparing for the	See the response to FOF #36.

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	hearing on remand. (CP 732)	
FOF #38	Defense counsel expended 20 hours in responding to additional motions relating to the proceedings upon remand. (CP 732-33)	See the response to FOF #36.
FOF #39	Mitchell is entitled to \$1,158.49 as an offset to any sanctions award. (CP 733)	Mitchell agrees.
CONCLUSIONS OF LAW		
COL #1	The court may revisit previously entered findings of fact and conclusions of law. (CP 733)	Mitchell agrees, but only to the extent that the court follows the appeals court mandate, which the trial court clearly did not.
COL #2	The court's previous rulings concerning the timeliness of pleadings are still valid. (CP 733-34)	Mitchell does not contest the rulings on the timeliness of pleadings; however, none of the failures ascribed to Mitchell constitute violations of CR 26 or CR 56, as required by the Court of Appeals' mandate.
COL #3	Mitchell did not appeal the Court's ruling striking pleadings pursuant to CR 45(b)(2). The Court of Appeals did not limit the trial court's authority to award CR 11 sanctions for aspects of the case other than the filing of the initial complaint. (CP 734)	Any rulings concerning CR 45(b)(2) lie outside the scope of the proceedings authorized by the Court of Appeals upon remand. The trial court's choice of awarding CR 11 sanctions is in clear violation of the Court of Appeals' mandate.
CR 26(g) Violations		
COL	Mitchell noted a CR 30(b)(6)	The cases cited by the court do not support

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#4	deposition in Spokane rather than in the witness' home state of Oklahoma, contrary to Washington authority. (CP 735)	<i>an award of sanctions</i> for the request. As noted previously, convenience of counsel or the parties may in some circumstances make a different location desirable. In any event, all that the federal cases show is that, <i>if contested</i> , a deposition <i>typically</i> will be preferable at the corporate headquarters. None of the cited cases imposed sanctions for <i>requesting</i> that the deposition be taken at a different location. Indeed, in the <i>Salter</i> case cited by the trial judge, the appellate court noted that there may be "peculiar circumstances that would justify [plaintiff's] request to depose" the witness at a different location. <i>Salter v. Upjohn Co.</i> , 593 F.2d 649, 652 (5 th Cir. 1979). Again, there is no legal authority for imposing sanctions merely for <i>requesting</i> a different location.
COL #5	Mitchell did not withdraw his request for a CR 30(b)(6) deposition in Spokane until opposing counsel refused to do so absent a court order; plaintiff's settlement offer of \$5,000 was made to "harass and/or bully Defendant into paying a settlement, . . ." (CP 735-36)	It is not a violation of CR 26 to make requests of opposing counsel. The juxtaposition of a settlement offer does not constitute evidence of bad faith.
COL #6	Mitchell's CR 30(b)(6) notice violated CR 26(g) and requires an award of sanctions. (CP 736)	As noted in the response to COL #4, there is no authority for awarding sanctions merely for <i>requesting</i> a CR 30(b)(6) deposition at a location other than corporate headquarters.
COL #7	Mitchell's burdensome and repetitious discovery requests justify CR 26(g) sanctions. (CP 736)	The proper remedy for burdensome or repetitious discovery requests is to object to the same or seek a protective order; there is no authority for sanctioning a discovery request simply because the opposing party

Findings of Fact / Conclusions of Law		Errors of law and fact
		(successfully) objects to it.
COL #8	Mitchell’s attempt to obtain discovery of proprietary information justifies CR 26(g) sanctions. (CP 736)	See the response to COL #7: A party may object to discovery of proprietary information, but it is not a violation of CR 26 to <i>seek</i> such information.
COL #9	Mitchell violated CR 26(g) as detailed in FOF #7.d. (CP 736)	There is no Finding of Fact #7.d.
COL #10	Defendant is entitled to fees and costs responding to Mitchell’s discovery requests based on CR 26(g) and “this Court’s inherent authority to control the litigation.” (CP 736)	This conclusion is vague as to CR 26 and includes a reference to CR 11 sanctions previously excluded for consideration upon remand. (CP 89 – 100, and 304 – 315).
COL #11	Mitchell’s refusal to allow the scheduling of his clients’ depositions on the same day (or consecutive days) violated CR 26(g), justifying sanctions. (CP 736)	Defense counsel never sought an order compelling the discovery he sought, and ultimately agreed to the schedule proposed by Mitchell; CR 26(g) does not permit an award of sanctions under such circumstances.
COL #12	Mitchell provided misleading answers concerning documents requested by defense counsel. (CP 736-37)	Mitchell relied upon the statements of his clients, which turned out to be erroneous; there is no finding (at least, none supported by competent evidence) that he knew or should have known that his clients were mistaken.
COL #13	CR 26(g) was violated because Mitchell failed to respond accurately to discovery that would have revealed that “even assuming liability, plaintiffs had no actual damages.” (CP 737)	As detailed in the response to FOF #11, plaintiffs were entitled to statutory damages and emotional distress damages, even if they suffered no pecuniary damages. Thus, the conclusion is erroneous that Mitchell misrepresented the evidence or that defense counsel incurred unnecessary costs as a result.
COL	The trial court is justified in	The trial court erroneously includes

Findings of Fact / Conclusions of Law		Errors of law and fact
#14	awarding sanctions based upon CR 26(g) as well as “this Court’s inherent authority to control the litigation.” (CP 737)	sanctions for conduct other than alleged violations of CR 26 and CR 56.
CR 56(g)		
COL #15	The joint declaration of his clients filed by Mitchell paints a false picture, in violation of CR 56(g) and CR 11. (CP 737)	The trial court erroneously included CR 11 sanctions, contrary to the mandate of the Court of Appeals. (CP 89 – 100, and 304 – 315).
COL #16	Mitchell’s failure to serve defense counsel with a copy of the motion for reconsideration violated both CR 11 and CR 56. (738)	The trial court erroneously included CR 11 sanctions, contrary to the mandate of the Court of Appeals. (CP 89 – 100, and 304 – 315).
COL #17	Mitchell’s representation that his clients had moved justifies CR 11 sanctions. (CP 738)	The trial court erroneously included CR 11 sanctions, contrary to the mandate of the Court of Appeals. (CP 89 – 100, and 304 – 315).
COL #18	Mitchell’s submission of material previously ruled inadmissible justifies sanctions under CR 11. (CP 738-39)	The trial court erroneously included CR 11 sanctions, contrary to the mandate of the Court of Appeals. (CP 89 – 100, and 304 – 315).
Conclusions as to Other Conduct		
COL #19	Mitchell’s false statements of fact regarding his nonexistent PLLC justifies sanctions under CR 11. (CP 739)	The trial court erroneously included CR 11 sanctions, contrary to the mandate of the Court of Appeals. (CP 89 – 100, and 304 – 315).
COL #20	Mitchell’s false claim that he represented his clients <i>pro bono</i> justifies sanctions under CR 11. (CP 739)	The trial court erroneously included CR 11 sanctions, contrary to the mandate of the Court of Appeals. (CP 89 – 100, and 304 – 315).
COL	Defense costs incurred from	The trial court erroneously failed to

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#21	February 2011 to the filing of the Notice of Appeal were a result of Mitchell’s violations of CR 26(g) and CR 56(g) as well as “this Court’s inherent authority to control the litigation.” (CP 739)	segregate the actual costs resulting from the alleged violations of CR 26 and CR 56 from those defense costs that would have been incurred anyway; moreover, the inclusion of CR 11 sanctions (phrased as “this Court’s inherent authority to control the litigation”) is contrary to the mandate of the Court of Appeals.
Lodestar Calculation		
COL #22	Counsel’s fee request is “in accordance with the holdings” in previous cases, and are reasonable. (CP 739-40)	Contrary to <i>Manna Funding, LLC v. Kittitas County</i> , 173 Wn. App. 879, 295 P.3d 1197 (Div. 3 2013), the trial court failed to segregate the hours resulting from alleged violations of CR 26 and CR 56 from the hours that are not recoverable as sanctions.
COL #23	Although the trial court’s original multiplier (increasing the hourly rate from \$168—the rate actually charged—to \$250) was unreasonable in light of <i>Berryman v. Metcalf</i> , an increase in the hourly rate from \$168 to \$210 is justified because defense counsel was unable to pursue more profitable hourly work. (CP 740-41)	Defense counsel’s actual hourly rate (\$168) is the basis of the lodestar amount; the trial court misunderstands the role of a multiplier (which may be added to the overall fee) from the use of a lodestar amount (which is either the actual rate charged or else a reasonable rate) when no actual billing occurred; “[O]utside of the civil rights context, courts applying the lodestar method should apply contemporaneous rates actually employed, . . .” <i>Miller v. Farmer Bros. Co.</i> , 136 Wn. App. 650, 667, 150 P.3d 598, 606-7 (Div. 1 2007).
COL #24	Mitchell’s discovery requests justify sanctions under CR 26(g) as well as “the Court’s inherent authority to control the litigation.” (CP 741)	This conclusion of law is based upon an erroneous application of CR 11. (CP 89 – 100, and 304 – 315).
COL #25	Mitchell’s answers to defendant’s discovery requests justify an	This conclusion of law is based upon an erroneous application of CR 11. (CP 89 –

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	award of attorneys' fees, paralegal fees, and costs based on "the Court's inherent authority to control the litigation." (CP 741)	100, and 304 – 315).
COL #26	Mitchell's filing of numerous supplemental pleadings in violation of CR 6 and LCR 6 justify sanctions, along with "the Court's inherent authority to control the litigation." (CP 741-42)	This award violates the Court of Appeals direction upon remand to consider only alleged violations of CR 26 and CR 56. (CP 89 – 100, and 304 – 315).
COL #27	Mitchell's failures with respect to the motion for reconsideration justifies additional sanctions. (CP 742)	This award violates the Court of Appeals direction upon remand to consider only alleged violations of CR 26 and CR 56. (CP 89 – 100, and 304 – 315).
COL #28	Defense counsel is entitled to sanctions based upon the cost of preparing the motion for sanctions upon remand. (CP 742)	As noted in the response to FOF #36, the further proceedings upon remand were necessitated by the failure of both defense counsel and the trial court to prepare adequate findings of fact and conclusions of law in the initial proceeding. It is inappropriate to charge Mitchell for the time spent remedying the mistakes of defense counsel and the trial court.
COL #29	Mitchell is entitled to an offset of \$1,158.49 for his success in the previous appeal. (CP 742)	Mitchell agrees.