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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 32284-0-III

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

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

Plaintiffs,

and

ROBERT W. MITCHELL,

Appellant,

v.

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

Respondent.

BRIEF OF RESPONDENT
FMS, INC. d/b/a OKLAHOMA FMS, INC.

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I. STATEMENT OF THE CASE

This is the second appeal from the trial court's discretionary rulings imposing sanctions. Fundamentally, Judge Baker's rulings can be affirmed on any basis supported by the record.¹ Here, the record justifies the sanctions on each of the enumerated basis. As there is no reversible error, the trial court's rulings should be affirmed.

Attorney Robert W. Mitchell's second appeal arises from the trial court's reinstatement of sanctions against him for his actions in the underlying matter. In his first appeal², this Court remanded to the trial court for further proceedings because the initial findings of fact and conclusions of law authored by the trial court were insufficient to meaningfully review them as required in *Burnet*.³ This Court also reversed the trial court's decision awarding sanctions pursuant to CR 11(a), finding that Mr. Mitchell's initial filing of the lawsuit was not in violation of that rule.

¹See *LaMon v. Butler*, 112 Wn.2d 193, 200, 770 P.2d 1027 (1989).

²For the purpose of continuity, Respondent adopts Appellant's nomenclature for the first appeal in this matter, "Rose I" No. 30380-2-III.

³*Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). As discussed further below, Respondent disputes the applicability of *Burnet* to the present matter.

Having recently retired from the bench, Judge Baker agreed to temporarily preside over this matter on remand in order to promote judicial efficiency. Further briefing from both sides and oral argument occurred and Judge Baker, after due consideration, entered more comprehensive findings of fact and conclusions of law than were entered the first time. Judge Baker also issued a renewed order for sanctions against Mr. Mitchell.

Mr. Mitchell now appeals both the re-imposition of sanctions against him and Judge Baker's refusal to recuse herself from re-hearing the motion for sanctions. Neither is viable.

In support of her 37 page order imposing sanctions, Judge Baker again noted a deliberate and systematic pattern of sanctionable misconduct by Mr. Mitchell in all aspects of the case as he sought to "litigate this case in perpetuity."⁴ The specific acts of Mr. Mitchell in violation of the various rules are set out both in FMS' Response brief in Rose I and in Judge Baker's renewed order for sanctions presently on appeal. It suffices to say that there is ample evidence on appeal to uphold the trial court's

⁴CP 664

order of sanctions against Mr. Mitchell.⁵

Judge Baker presided over this matter and deemed Mr. Mitchell's actions in her court to be sanctionable. This Court previously reviewed all of the records in the first appeal and remanded the matter for further findings of fact and conclusions of law. Notably, Rose I did not hold that Mr. Mitchell's conduct precluded sanctions. Thus, Judge Baker again properly reviewed the material on file and again deemed Mr. Mitchell's actions to be sanctionable.

We are now here for the fourth judicial review of Mr. Mitchell's abhorrent conduct, and so far no court has ruled that Mr. Mitchell's actions are not sanctionable under the Court Rules. Mr. Mitchell is apparently hopeful a fifth judicial review on remand from this Court will finally side with him. However, no remand is necessary or required under the law. Judge Baker's order should be upheld, and FMS requests an award of its fees and costs on the present appeal pursuant to RAP 18.9(a), CR 11(a), CR 26(g), and/or CR 56(g).

II. ARGUMENT

A. **Standard of review on order for sanctions.**

⁵See CP 1-9; CP 10-290; CP 448-463; and CP 464-511.

The trial court's imposition of sanctions, whether under CR 11, CR 26(g), CR 56(g), or the court's inherent power to control the litigation, is reviewed for abuse of discretion.⁶ A judge abuses his or her discretion when no reasonable judge would have reached the same conclusion.⁷ Furthermore, "[a] trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law."⁸ The bar for reversal is set fairly high. Judge Baker did not have an erroneous view of the law. Her discretionary rulings were not manifestly unreasonable or based on untenable grounds. Instead, they were fully justified by the conduct that took place before her and in her courtroom. Accordingly, sanctions should be affirmed.

Under Washington law, there is a strong presumption in favor of the trial court's findings, and the party claiming error has the burden of showing the trial court's findings are not supported by substantial

⁶See *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993).

⁷*Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989).

⁸*Fisons* at 339 (citations omitted).

evidence.⁹ Unchallenged factual findings are considered verities on appeal and are treated as the established facts of the case.¹⁰ Similarly, unchallenged conclusions of law are treated as the law of the case.¹¹ Each of those propositions seriously undercuts appellant's position.

Mr. Mitchell has failed to meet his burden of showing the trial court's findings of fact are unsupported by substantial evidence. His arguments in his appendix amount to an attempt to encourage this Court to substitute its findings for those of the trial court simply because Mr. Mitchell disagrees with the findings. Moreover, Mr. Mitchell is asking this Court to employ the wrong standard for review. Mr. Mitchell apparently wants this Court to review the findings of fact *de novo* rather than review Judge Baker's ruling for abuse of discretion. Mr. Mitchell's differences in opinion and rhetorical arguments are not sufficient to reverse a trial court's findings of fact under the correct standard of review for sanctions – abuse of discretion.

⁹*Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

¹⁰*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).

¹¹*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).

Applying the proper standard of review to a particular appeal serves to implement important judicial policies. One of those judicial policies requires or, at least, encourages the judicial official in the best position to make a given decision to make that decision.¹² In the instant case, the best positioned judicial officer to make this decision was Judge Baker.

For this Court's convenience, FMS will address Mr. Mitchell's arguments in the order raised in his opening brief, notwithstanding the fact that this Court can affirm Judge Baker on any basis supported by the record.

B. CR 11 applies to "Every pleading, motion and legal memorandum . . ."

Appellant encourages this Court to read the phrase "without consideration of the CR 11(a) sanctions rejected above . . ." ¹³ in Rose I without the qualifying word "above". Mr. Mitchell finds it difficult to imagine reading the word "above" into this Court's previous opinion. But the basis for Judge Baker's opinion on remand was not based solely upon one sentence in this Court's mandate. Indeed, Judge Baker read the entire

¹²*Amy v. Kmart of Wash. LLC*, 153 Wn. App. 846, 855, 223 P.3d 1247 (2009).

¹³See Brief of Appellant at page 4.

opinion of this Court, in which this Court spent several pages discussing the CR 11 sanctions imposed by Judge Baker upon Mr. Mitchell for what Judge Baker deemed to be a frivolous filing of the complaint in the first place. Rose I held that “Mr. Mitchell had a good faith basis under CR 11(a) to believe he was justified in bringing suit to protect his clients.”¹⁴ This Court did not, however, discuss or opine whether CR 11 could be applied as a basis for sanctions applicable to other documents filed by Mr. Mitchell in the underlying matter. While Mr. Mitchell would have this Court interpret Rose I as a blanket prohibition on all CR 11 sanctions based upon a single sentence, and preferably without the qualifying word “above,” that is not what this Court stated in Rose I.

On its face, CR 11(a) imposes upon attorneys certain ongoing enumerated duties. CR 11(a) does not limit those duties solely to the filing of initial complaints, and neither did this Court. CR 11(a) specifically references “[e]very pleading, motion, and legal memorandum.” This Court only held that Mr. Mitchell did not violate CR 11(a) when he filed *the underlying suit*; Rose I was completely silent as to the imposition, or possible imposition, of sanctions under CR 11(a) for any

¹⁴Rose I at page 9.

or all of the other voluminous pleadings, motions, and legal memoranda filed by Mr. Mitchell in the lawsuit.

Judge Baker's interpretation of Rose I is correct. "The [prior opinion] makes no mention of the separate bases for CR 11 sanctions . . ."¹⁵ Judge Baker levied appropriate sanctions against Mr. Mitchell for violations of CR 11(a) in items separate and apart from the filing of the civil complaint by itself. Those additional enumerated sanctions were well within Judge Baker's considerable discretion.

Mr. Mitchell bases nearly his entire appeal on the unsupported "implication" that Judge Baker wilfully ignored this Court and, instead, awarded CR 11 sanctions for filing a frivolous lawsuit. This proposition, however, is not true. This Court has already determined, and Judge Baker acknowledged in accordance with the mandate, that the filing of the lawsuit was not frivolous. Nevertheless, this Court's narrow holding in Rose I does not mean all of Mr. Mitchell's other filings in this matter passed muster under CR 11. Indeed, they did not.

As admitted in Mr. Mitchell's Appellant's Brief, on remand Judge Baker provided 37 pages of documentation supporting the sanctions

¹⁵CP 686.

against Mr. Mitchell. The trial court's order sets forth each of the specific acts of Mr. Mitchell for which it imposed sanctions, including the following: preparing and signing false and misleading discovery responses; promulgating discovery for improper purposes; deliberate misrepresentations in briefings, declarations and even in verbal statements made in open court; and filing multiple untimely and improper supplemental declarations. Mr. Mitchell's conduct, at best, was unconscionable, and CR 11 sanctions were clearly justified by the record.

The CR 11(a) sanctions presently on appeal are unrelated to the filing of the initial lawsuit and are entirely based on Mr. Mitchell's other conduct in this matter, all of which were articulated by Judge Baker in her order and supported by substantial evidence in the record.

C. **Judge Baker was entitled to hear this case on remand and did not violate the Court of Appeals' earlier ruling.**

The Legislature has addressed situations that can arise after a superior court judge retires. Washington law contemplates the very situation presented here where a judge retires before a case is completely resolved. "[I]f a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore

without any written agreement.”¹⁶ Judge Baker was statutorily entitled to continue to hear this case if she so desired. Mr. Mitchell’s argument that Rose I specifically prohibited her from hearing this case on remand is unsupported by the prior opinion, the law, or even the argument in the prior appeal. Again, Mr. Mitchell would like to reduce Rose I to only one or two sentences, without regard for the opinion as a whole. However, taking only this narrow view, without regard to the greater context, is improper.

Like the standard of review when imposing sanctions, a trial judge’s failure to recuse herself or himself is reviewed for abuse of discretion.¹⁷ A party has the option of moving to recuse a judge pursuant to RCW 4.12.040 and .050. If, however, the party moves to recuse a particular judge after that judge has already made a ruling, the moving party must “demonstrate prejudice on the judge’s part.”¹⁸ Prejudice is not presumed.¹⁹ Mr. Mitchell has not demonstrated any prejudice on Judge Baker’s part, and Judge Baker did not abuse her discretion when she

¹⁶RCW 2.08.180

¹⁷*In re Marriage of Farr*, 87 Wn. App. 177, 188, 940 P.2d 679 (1997).

¹⁸*Id.* at 188.

¹⁹*Rich v. Starczewski*, 29 Wn. App. 244, 246, 628 P.2d 831 (1981).

denied Mr. Mitchell's motion for recusal.

Furthermore, this Court in *Rose I* never took up the issue of whether Judge Baker should hear this matter on remand or not. This Court's denial of the appellant's motion to recall the mandate – discussed below – indicates she could.

Mr. Mitchell's footnote on page 23 of his opening brief in *Rose I* is hardly a call for remand to a separate judge. It is clearly a reference to a case supporting Mr. Mitchell's contention that the allegedly inadequate proposed order was the responsibility of FMS, in addition to being the responsibility of Judge Baker. Additionally, Mr. Mitchell's reference to the oral argument in *Rose I* is not concrete. At that oral argument, this Court asked counsel for Appellant whether or not Judge Baker was still on the bench, to which counsel for Appellant indicated that he did not think the case could be remanded to Judge Baker because she had retired. Despite the statement, counsel was wrong given that RCW 2.08.180 specifically contemplates and allows for the procedure. Such a suggestion does not make an argument, and this Court unequivocally did not preclude Judge Baker from hearing this matter on remand following *Rose I*.

More importantly, on November 22, 2013, Mr. Mitchell filed a

motion to recall the mandate in which he asked this Court to rule that the trial court was not in compliance with Mr. Mitchell's interpretation of this Court's decision that Judge Baker should recuse herself. This Court denied that motion on November 26, 2013. Apparently unsatisfied with this Court's ruling, Mr. Mitchell makes the same argument again. Other than his interpretation of this Court's prior order in this matter, Mr. Mitchell cites to no authority in his appeal calling for the recusal of Judge Baker. This Court is entitled to presume there is none.²⁰ His appeal on this issue should be denied.

D. Burnet should have no applicability to the current appeal.

Mr. Mitchell relies heavily on the *Burnet* case for his position that the sanctions in the present case are not appropriate. Mr. Mitchell claims that the trial court failed to identify any "willful or deliberate conduct" on Mr. Mitchell's part, any "substantial prejudice" on FMS' part, or to contemplate whether a lesser sanction would have sufficed.²¹ These are, essentially, two of the three parts to the so-called "*Burnet* test". The

²⁰*House v. Estate of McCamey*, 162 Wn. App. 483, 264 P.3d 253 (2011) citing *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 883, 167 P.2d 610 (2007).

²¹See Brief of Appellant at page 15.

Supreme Court in *Burnet*, relying on prior cases, held that: (1) when a trial court imposes one of the harsher remedies under CR 37(b), it must (2) be apparent from the record that the trial court explicitly considered a lesser sanction, and it must (3) show whether the trial court found willfulness of the violator and substantial prejudice to the other party.

However, *Burnet* is distinguishable from the present case. Nine years after *Burnet*, the Washington Supreme Court in *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006) discussed at great length the difference between the sanctions applicable under CR 37 and the mandatory discovery sanctions pursuant to CR 26(g). In *Sto*²², the Supreme Court upheld the trial court's imposition of substantial sanctions for discovery violations and held "nothing in *Burnet* suggests that trial courts must go through the *Burnet* factors every time they impose sanctions for discovery abuses. Nor does *Burnet* indicate that a monetary compensatory award should be treated as "one of the harsher remedies allowable under CR 37(b)."²³ Significantly, in *Sto*, the findings of fact and conclusions of law upheld by the Supreme Court were considerably

²²Responded will refer to *Mayer v. Sto Industries, Inc.* as "*Sto*" because another case, referred to as "*Mayer*," is cited and discussed below.

²³Quoting *Snedigar v. Hodderson*, 53 Wn. App. 476 at 487, 768 P.2d 1 (1989).

less detailed than Judge Baker's order in the present case. In *Sto*, the Court quoted the section of the judgment reflecting compensation for the discovery violations as follows:

As a discovery sanction, the Court awards the Mayers the \$468,147.29 spent on the first trial and interest on that amount of \$276,732.75 for the four years and three hundred and thirty-eight days between July 25, 1997 [the date *Sto* entered judgment in its favor following the first trial] and June 28, 2002, the date on which the parties mutually agreed that this judgment should be entered. This sanction serves only to compensate the Mayers for the wasted effort from the first trial.²⁴

Here, Judge Baker properly awarded FMS compensatory sanctions for FMS' wasted effort addressing Mr. Mitchell's sanctionable conduct as he followed through on his threat to litigate this matter into perpetuity.

The seminal case for guidance on the imposition of discovery sanctions pursuant to CR 26(g) is *Wash. State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). Notably, in *Fisons*, the Supreme Court chided the trial court for *failing* to award sanctions. In *Fisons*, the trial court refused to award discovery sanctions for reasons sounding dangerously similar, if not identical, to Mr. Mitchell's argument.

²⁴*Mayer v. Sto Industries, Inc.*, *supra*, at 691.

Namely (1) there was no finding of intentional misconduct,²⁵ (2) the non-offending party never brought a motion to compel the sought after discovery, (3) the conduct of the sanctionable attorney constituted “zealous advocacy” rather than sanctionable conduct,²⁶ and (4) reasonable minds could differ as to the whether or not a discovery abuse had taken place. The Supreme Court in *Fisons* dismissed the logic of the trial court and held that: (1) intent need not be shown before sanctions are mandated, (2) a motion to compel is not a prerequisite to a sanctions motion, (3) conduct of the offending party is to be measured against the spirit, intent, and purpose of the rules, not against the standard of practice of the local bar, and (4) the burden on the non-offending party is categorically not to a degree to which reasonable minds would not differ – as such a burden is too high.²⁷ Thus, in contrast with *Fisons*, the factors set forth in *Burnet* related only to the harshest sanctions available under CR 37 – namely, the dismissal of a cause of action, defense, or witness from trial. Yet, when applying the factors set out in *Fisons*, the factors for sanctions under CR

²⁵See Brief of Appellant at page 15, and *Fisons* at 344.

²⁶See Brief of Appellant at page 16, and *Fisons* at 344-345.

²⁷See *Fisons*, *supra* at 345.

26(g), this Court must uphold the trial court's order imposing sanctions against Mr. Mitchell.

E. **Segregation is not necessary when the conduct so permeates the entire case.**

In the Supreme Court's decision to uphold the sanctions in *Sto*, it is important to recognize the absence of any requirement for the segregation of fees for portions of the case which were related to the discovery violations. Contrary to Mr. Mitchell's contention, the trial court is not required to segregate those portions of the case that were the result of his sanctionable conduct and those that were not.

Mr. Mitchell cites two cases, *Manna* and *Mayer*, for his contention that segregation is necessary.²⁸ Yet, both cases are readily distinguishable from the facts of this case. In *Mayer*, Division I ruled that the trial court must segregate fees spent litigating the claims sounding in statutes which allow for fee-shifting to the prevailing party. In the case of *Mayer*, the appellate court ruled that fee-shifting was only contemplated under the Model Toxics Control Act (MTCA) claim brought by the plaintiff. The MTCA provides for recovery of reasonable attorney fees to a prevailing

²⁸*Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 295 P.3d 1197 (2013), review denied, (2013), and *Mayer v. City of Seattle*, 102 Wn. App. 66, 10 P.3d 408 (2000).

party in a private cause of action.²⁹ *Manna* relates to segregation of fees awarded to the defendant as the prevailing party on plaintiff's claims under RCW 64.40.020. The appellate courts in both *Manna* and *Mayer* were dealing with the issue of numerous discrete claims brought by plaintiffs and the varying degree of success of each party in relation to those discrete claims. In both *Manna* and *Mayer* there was a very clear distinction between which claims allowed for the recovery of fees and which did not. No such distinction can be drawn in the present case because Mr. Mitchell's actions affected the entire process of litigation in this case. Charitably speaking, he fouled the Stevens County courtroom.

Also noteworthy, is the order forming the basis for review in *Manna*. In *Manna*, the trial court's award of fees was the following paragraph:

"Kittitas County, as the prevailing party under RCW 64.40.020, is awarded judgment for \$21,496.50 in attorney fees. The request for costs is denied because the costs requested do not qualify as court costs."³⁰

Based in part upon the brevity of the court's ruling, the appellate court in *Manna* remanded for proper findings of fact and conclusions of

²⁹RCW 70.105D.080.

³⁰*Manna, supra.*

law. By contrast, in the present case, Judge Baker has now provided 37 pages of facts and conclusions from which this Court can meaningfully review and conclude that Mr. Mitchell's systematic efforts to litigate this case into perpetuity were sanctionable.

Even if *Mayer* and *Manna* were not wholly distinguishable on their facts and the applicable laws, the Supreme Court in *Hume*³¹ held that where "the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there *need not be* segregation of attorney fees."³² (Emphasis added.) Nevertheless, in the present case, Judge Baker did, indeed, segregate out and eliminate the sanctions related to the filing of the initial complaint, and she ruled that Mr. Mitchell's other sanctionable conduct resulted in nearly all of the remaining work on the case.

F. **Mr. Mitchell's improper subpoena to Kohl's is not on appeal.**

While Mr. Mitchell complains about sanctions awarded for his failure to properly serve a subpoena on Kohl's,³³ this argument is not

³¹See *Hume v. American Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994).

³²*Id.*

³³See Brief of Appellant at page 17.

properly before this Court on appeal, and it should be wholly disregarded. On July 11, 2011, Judge Baker deemed the documents recovered from Kohl's inadmissible due to Mr. Mitchell's improper service and that the documents were not properly accompanied by a declaration of a records custodian authenticating them.³⁴ This Court may recall that the July 11, 2011, letter order of Judge Baker formed the basis for the last appeal in this case, not the order on appeal in the present action.

Even if Mr. Mitchell's abusive use of subpoenas is at issue in the present appeal, it is worth pointing out that the subpoena that Mr. Mitchell attempts to put into question was issued *after* his clients' claim had been dismissed on summary judgment. The Roses' claims were dismissed on November 30, 2010, leaving only FMS' counterclaim against the Roses' for filing of a frivolous lawsuit. Kohl's did not receive the subpoena that Mr. Mitchell attempts to make at issue until January 10, 2011.³⁵ The email from former counsel for FMS, cited by Mr. Mitchell, was sent on November 9, 2010, *prior* to the resolution of the Roses' claims on summary judgment. As this Court can see from the email in question, the

³⁴CP 75.

³⁵See Brief of Appellant Appendix at page 2.

records Mr. Mitchell proposed to subpoena from Kohl's were "records on the debt at issue"³⁶ and had nothing to do with FMS' counterclaim against the Roses for bringing this lawsuit in bad faith. Simply put, there was absolutely no good faith basis or legitimate reason for issuing a subpoena to Kohl's after his clients' claim had been dismissed; it was simply an effort to harass and needlessly increase the cost of litigation to FMS.

Assuming *arguendo* the propriety of the subpoena to Kohl's is properly before this Court, Mr. Mitchell cites to no authority for his proposition that "no sanction beyond striking the evidence is justified by the evidence for [Mr.] Mitchell's failure to strictly comply . . . with CR 45."³⁷ In fact, Mr. Mitchell supports his contention by arguing (1) that he was surprised FMS did not know about the subpoena; (2) that FMS knew or should have known that a subpoena would be sent without complying with the notice requirement or the Civil Rules because FMS asked for it; and (3) that Kohl's has a legal department. None of these excuse Mr. Mitchell's failure to comply with the notice requirement of CR 45, and none of these support his need to subpoena records related to the debt at

³⁶See Brief of Appellant at page 18, or CP 433.

³⁷See Brief of Appellant at page 17.

issue when his client's claims had already been dismissed on summary judgment. Consistent with Judge Baker's order, Mr. Mitchell's abusive use of subpoena power was purely for the purpose of litigating this matter into perpetuity as he had threatened to do.

G. Labeling Findings or Conclusions either way.

In Mr. Mitchell's appendix³⁸ to his appeal, his only complaint about many of the findings of facts or conclusions of law is that they are mislabeled. That makes little or no difference. Even if semantically correct (which it is not), it is an empty argument that does not meet Mr. Mitchell's burden of proving insufficient evidence for sanctions. "A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law. The corollary must also follow; a finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact."³⁹ In short, it makes no difference what Judge Baker called them; there is more than sufficient evidence in the record to support the findings and facts and conclusions of law, regardless of what they are titled.

³⁸An appendix is not the proper way to brief, contest, or argue the validity of a trial court's findings of fact and conclusions of law. See RAP 10.3(a) and *Diversified Wood Recycling v. Johnson*, 161 Wn. App. 859, 251 P.3d 293 (2011) citing *Kaplan v. NW Mut. Life Ins. Co.*, 115 Wn. App. 791, 801 n.5, 65 P.3d 16 (2003).

³⁹*Willener v. Sweeting*, 107 Wn.2d 388, 730 P.2d 45 (1986) citing *Woodruff v. McClellan*, 95 Wn.2d 394, 622 P.2d 1268 (1980). (internal citations omitted)

H. There is a very easy way to end this “satellite litigation”.

On this, Mr. Mitchell’s second appeal, he complains that this matter has gone on too long. FMS agrees. Yet, such a complaint was never on Mr. Mitchell’s mind when he threatened to use the legal process to “litigate this case in perpetuity.”⁴⁰ It was not on his mind when he followed through by filing numerous and untimely declarations with the trial court. It was not on his mind when he subpoenaed irrelevant material from Kohl’s after his clients’ case had been dismissed on summary judgment. Reduced to its core, the argument is a day late and a dollar short.

Mr. Mitchell has no one to blame but himself for his sanctionable conduct and the length of this litigation. Mr. Mitchell, as it has been determined, set out to litigate this matter into perpetuity specifically to run up the legal expenses of FMS, and he now, ironically, complains about how well he has succeeded. If there is any error at all, it was self-invited.⁴¹

I. This Court should award respondent’s attorney fees incurred on this appeal.

⁴⁰CP 664.

⁴¹See *Angelo Property Co. LP v. Hafiz*, 167 Wn. App. 789, 823, 274 P.3d 1075 (2012).

RAP 18.9(a) allows for “terms or compensatory damages” against a party “who uses these rules for the purposes of delay” or “files a frivolous appeal.” “An appeal is frivolous when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal.”⁴² In this case, Mr. Mitchell had no reasonable possibility of obtaining a reversal of the trial court based on the record on appeal. Thus, his appeal is frivolous and FMS should be awarded its fees and costs.

Moreover, Mr. Mitchell threatened to “litigate this case in perpetuity.”⁴³ Even if the Court finds that this appeal was not frivolous under RAP 18.9, this Court can still award FMS its fees and costs on appeal because Mr. Mitchell utilized this appeal, like his incessant filings in the trial court, simply to delay the inevitable.

Finally, the Court may allow attorneys fees pursuant to RAP 18.1(a), “if applicable law grants to a party the right to recover reasonable attorney fees or expenses on review.” This Court considered this very

⁴²*Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012), citing *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987).

⁴³CP 664

issue not too long ago in *Washington Motorsports*.⁴⁴ In that case, like this one, counsel appealed the trial court's imposition of monetary sanctions for violations of CR 26(g). This Court affirmed the trial court sanctions and granted respondent attorney fees on appeal pursuant to CR 26(g), "which provide that an appropriate sanction may include an order to pay reasonable expenses incurred because of the violation, including a reasonable attorney fee."⁴⁵

As this appeal is frivolous and attorney fees are permitted under RAP 18.9(a), CR 11, CR 26(g), and CR 56(g), respondent FMS respectfully requests that this Court award it attorneys' fees and costs incurred on this appeal.

III. CONCLUSION

For the foregoing reasons, respondent FMS respectfully requests this Court affirm the trial court's \$65,241.44 award of sanctions against appellant Robert Mitchell, and grant FMS its fees and costs on this appeal.

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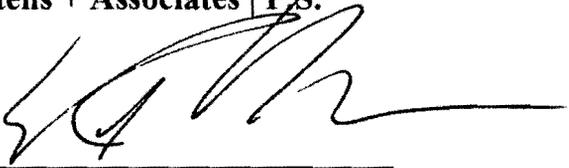
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⁴⁴*Wash. Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 282 P.3d 1107 (2012)

⁴⁵*Id.* at 5.

RESPECTFULLY SUBMITTED this 27th day of February 2015.

Martens + Associates | P.S.

By 

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Attorneys for Respondent FMS, Inc. d/b/a

Oklahoma FMS, Inc.

CERTIFICATE OF SERVICE

I certify that on the day and date indicated below, I caused to be filed and served the foregoing, including Appendix 1-9, on behalf of Respondent FMS, Inc. d/b/a Oklahoma FMS, Inc. on the following counsel as indicated below.

Counsel for Appellant

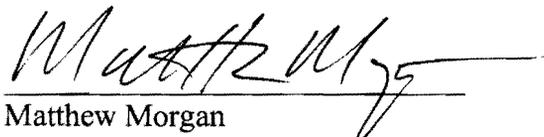
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- Overnight Delivery
- E-mail

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

SIGNED THIS 27th day of February, 2015, at Seattle, Washington.


Matthew Morgan
Paralegal for Martens + Associates | P.S.