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**COURT OF APPEALS
DIVISION III**

STATE OF WASHINGTON

Spokane County Cause No. 16401072-7

AARON L. LOWE, Trustee and Beneficiary of the
Donald E. Lowe Trust, and
ROBERT E. KOVACEVICH

Petitioners/Appellants,

v.

LONNIE D. LOWE, Individually and as
Personal Representative of the Estate of
Betty L. Lowe, Deceased,

Respondent/Appellee.

**REPLY BRIEF OF PETITIONERS AND APPELLANTS, AARON L.
LOWE AND ROBERT E. KOVACEVICH**

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I. INTRODUCTION

DISAGREEMENT WITH INTRODUCTION OF LONNIE LOWE

Lonnie Lowe's introduction at page 1 argues that Aaron Lowe and Robert E. Kovacevich, pro se litigants, merely repackaged the claims in the underlying and linked Appeal No. 355691, now pending. The argument is specious for many reasons. Among the reasons is that by asserting CR 11, Lonnie Lowe in effect created a third party claim and added a party by adding Kovacevich into the case as a third party. It convoluted the case. CR 11 introduced a burden of proof on Lonnie Lowe to prove facts and law to support the assertion, issues that were not present in the linked appeal. It also resulted in the action of Lonnie Lowe attacking the messenger thereby depriving Aaron Lowe of his chosen advocate, an activity that is normally an actionable tort. See *Calbom v. Knudtson*, 65 Wn.2d 157, 162, 396 P.2d. 148 (1964).

Lonnie Lowe's introduction also asserts that there are no bases for reversal. Bases for reversal are summarized as follows: Lonnie Lowe, at page 22 of his brief admits that no prior notice was given to Aaron Lowe, but that the motion itself

was notice. No prior notice of any kind was given to Kovacevich. Notice could have been given when the suit was filed. *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994) holds “without such notice, CR 11 sanctions are unwarranted.” *Id.* at 198. *Biggs* at f .2 at 198 adopts the federal Advisory Committee’s recommendation that “counsel should be expected to give informal notice to the other party, whether in person or by telephone call or letter, of a potential violation before proceeding to prepare and serve a (CR 11) Motion.” Here, no motion was served. The allegation was imbedded in a motion to dismiss and not before the motion was filed. “[S]ince without prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper. See *Bryant v. Joseph Tree*, 119 Wn.2d 210, 228, 829 P.2d 1009 (Anderson, J. Concurring in part, dissenting in part). Prompt notice of the possibility of sanction fulfills the primary purpose of the rule, which is to deter the litigation abuses.” *Biggs v. Vail*, 124 Wn.2d at 198. Here, no opportunity to mitigate was given. The motion was combined with the motion to dismiss.

CP 596-613. The complaint in this case was filed July 26, 2016. CP 10-22. The pleading to dismiss was not only insufficient but was filed eight months (CP 24-218) after the complaint was filed. The long delay when informal notice could have been given is grounds to deny the award. “Prompt notice” must be given. *North Coast Elec. Co. v. Selig*, 136 Wn.App. 636, 650, 151 P.3d 211 (2007). “If the sanction of fee shifting is to be awarded, there must be advance notice of that consequence. Here, that did not happen. Consequently, it would be improper to shift fees and costs in this circumstance.” *Willner v. Vertical Reality*, 192 A.3d 1011 (N.J. 2018).

Lonnie Lowe, in his introduction, ignores the Introduction of Petitioners in their opening brief that apportionment should have occurred. Both have to proceed pro se. Kovacevich could not be sanctioned under RCW 4.84.185 as he was not a party to the case. *Biggs v. Vail*, 199 Wn.2d 129, 137, 830 P.2d 350 (1992); *Havsy v. Flynn*, 88 Wn.App. 514, 521, 945 P.2d 221 (1997). The statute does not require that a client, here Aaron Lowe, make a reasonable inquiry. Aaron Lowe “laid the facts fully and fairly” to

Kovacevich. In *Estate of Blas Through Chargualaf v. Winkler*, 792 F.2d 858 (9th Cir. 1986) the court held that the motion to reconsider was valid, as among other arguments, the attorney argued that “sanctions should be assessed against the attorney and not the plaintiff.” The client was not at fault. *Id.* at 861. *Orwick .v Fox*, 65 Wn.App. 71, 828 P.2d 12 (1992) required allocation and liability to be several, not joint. *Id.* at 92. Lonnie Lowe argues at pages 18 and 19 of his brief that “a court must inquire whether a reasonable attorney in like circumstances would believe his or her actions are factually or legally justified” and that the statements made by Aaron Lowe and Robert E. Kovacevich were subjective, not objective, as to adequate research. The burden of proof to prove CR 11 is on the movant, here Lonnie Lowe. “The burden is on the moving party to justify the request for sanctions.” *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994). Lonnie Lowe did not prove inadequate research. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 226, 829 P.2d 1099 (1992) in the concurrence and dissent of Anderson J. notes “Judges are both umpires and advocates.” Aaron Lowe requested and paid for a jury. CP 23.

Allard v. Pacific National Bank, 99 Wn.2d 394, 663 P.2d 4 (1983) held that “Where the beneficiaries seek recovery for themselves the action is considered legal in nature.” *Id.* at 400. (Citing the right to trial by jury Wash.Const.art 1 § 21. *Id.* at 399). Application for sanctions here is a jury question. No finding was made that Aaron Lowe, as a client, but an attorney admitted to this Court, is bound by CR 11. *Just Dirt v. Knight Excavating*, 138 Wn.App. 409, 157 P.3d 431 (2007) rejected an award based on a fee shifting mechanism “CR 11 is not a fee shifting mechanism.” *Id.* at 418. *Just Dirt* reversed a decision that did not limit the award “to an amount reasonably explained in responding to specific sanctionable conduct.” *Id.* at 419. Each pro se litigant’s liability must be reviewed individually. Since the issue is factual, it should have been submitted to the jury.

II. SUMMARY OF ADDITIONAL ARGUMENTS REBUTTING THE ARGUMENT THAT NO BASIS FOR REVERSAL EXISTS

Among other reasons the case must be reversed are:

1. Aaron Lowe sought to obtain his father’s handwritten instruction to Aaron to hold his father’s assets

after his father died to support his mother for life and that the assets be distributed on the mother's death. If proven, the Trust would prevail over both his parent's probates. No prior adjudication determined whether the hand written document was a trust preempting the wills. Declaratory judgment of the handwritten document is a first impression issue. *Grandview Homeowners Ass'n v. Kuehner*, 177 Wn.App. 543, 557-8, 312 P.3d 702 (2013); *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011).

2. *Seattle First National Bank v. Kawachi*, 91 Wn.2d 223, 588 P.2d 725 (1978) requires actual litigation. *Spokane Valley Fire Department*, 159 Wn.2d 858, 409 P.3d 160 (2018) requires that the seminal issues be actually litigated. These cases are reviewed further in succeeding pages. The handwritten document fits within the definition of a trust. RCW § 11.98.011 provides that a trust is created if the trustee has capacity, indicates an intention to create a trust, and the trust has beneficiaries. If it is a trust, it is a non probate asset. RCW § 11.02.005 (10) defines a non probate asset to include a "trust of which a person is grantor and that becomes effective

only on the person's death." RCW § 11.11.020 requires that to pass non probate assets by will there must be a specific reference. Neither the will of Donald Lowe or Betty Lowe referred to non probate assets. *Mearns v. Scharbach*, 103 Wn.App. 498, 12 P.3d 1048 (2000) holds that RCW § 11.07.010, a statute that defines "(iii) a trust of which the person is grantor and that becomes effective or irrevocable only on the person's death" is automatic. *Id.* at 502. The same reasoning applies to RCW 11.11.020. The actual probate was closed. (*Id.* at 503) Since the "estate is unlikely to pursue an impairment of contract claim." *Id.* at 512. A third party standing existed to file a separate declaratory judgment action. [T]he Legislature determined that these instruments be treated like wills." *Id.* at 508. "RCW 11.07.010 serves a legitimate public purpose by applying will revocation principles to non probate assets . . . and automatic revocation mechanism." *Id.* at 514. This case alone establishes an independent action that cannot be res judicata to probate actions. *Estate of Cordero*, 127 Wn. App. 783, 113 P.3d 16 (2005); *Estate of Burks v. Kidd*, 124 Wn.App. 327, 100 P.3d 328 (2004); and *Estate of Furst*,

113 Wn.App. 839, 55 P.3d 664 (2002) all hold that a trust preempts a will. These seminal issues were never addressed in any of the prior litigation for the reason that trusts are automatic and do not have to be probated.

3. Aaron Lowe was not in bad faith as he relied on Kovacevich. “ When an action is frivolous, RCW 4.84.185 authorizes the superior court to award the prevailing party reasonable expenses, including attorney fees. . . .A law suit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law.” *Granville Condominium Home Owners Assn. v. Kuehner*, 177 Wn.App. 543, 556, 312 P.3d 702 (2013). Since Aaron Lowe was a Trustee, the Court did not have discretion to dismiss the case as the Business Judgment Rule of RCW 11.104A.030 (a) and (e) both applied.

4. Findings of fact must be based on evidence that furnishes proof. Here, the proof of the second prong necessary to sustain CR 11 (the attorney signing the complaint must fail to conduct a reasonable inquiry, See *Bryant v. Joseph Tree*, 119 Wn.2d at 220) was never considered or if considered, was

inadequate to prove insufficient research. No hearing was held on which to base any fact of CR 11. There was no preponderance because there was no evidence. Conclusions are not facts. A reading of Lonnie Lowe's summary of facts and law at 9 and 10 of his brief recites only conclusions, no facts. Conclusions are derived by reasoning from facts. The trial court failed to include anything but a conclusory statement. It did not specify with particularity the facts or reasons why the conduct was sanctionable or why the declarations (CP 632-634; 620-621; 639-647), one by Aaron Lowe and two by Robert E. Kovacevich, were not reasonable. The findings must be explicit. See *Bryant v. Joseph Tree Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099; *North Coast Elec. Co. v. Selig*, 136 Wn.App. 636, 649, 151 P.3d 211 (2007); *Stiles v. Kearney*, 168 Wn.App. 250, 262, 277 P.3d 9 (2012). Lonnie Lowe argues at pages 18 and 19 of his brief that "a court must inquire whether a reasonable attorney in like circumstances would believe his or her actions are factually or legally justified". Lonnie Lowe noted Aaron Lowe and Kovacevich's research was "not reasonably analyzed". Lonnie Lowe at pages 9 and 10 sets forth the

findings stating they were explicit. They were not findings, only conclusions that the research was inadequate. Proof to prove CR 11 is on the movant, here Lonnie Lowe. “The burden is on the moving party to justify the request for sanctions.” “The filing must show that the author failed to do reasonable pre-filing research regarding the filing’s basis.” *In re Kelly and Moesslang*, 170 Wn.App. 722, 740, 287 P.3d 12 (2012). *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994). This type of argument was rejected in *Deutsche Bank National Trust Co. v. Homar*, 80 N.Y.S.3d 409 (N.Y. 2018). The court rejected sanctions where the movant was “merely pointing to gaps in the plaintiff’s case.” *Id.* at 524. If the attorney proves a legal basis for recovery, the fact of dismissal is not dispositive. *Roeber v. Dowty Aerospace Yakima*, 116 Wn.App. 127, 64 P.3d 691 (2003). Providing legal authority for recovery defeats sanctions. *Id.* at 142.

5. CR 11 requires proof that the declaratory judgment was (1) not grounded in law or fact (2) is not warranted by existing laws or a good faith argument for altering existing law (3) that the pleading was interposed for an improper purpose

to harass, cause unnecessary delay or needless increase in the cost of litigation. To impose CR 11 fees, the court must also determine “both that (1) the claim was without a factual or legal basis and (2) the attorney who signed the filing failed to perform a reasonable investigation into the claim’s factual and legal basis.” *Ames v. Pierce County*, 194 Wn.App. 93, 120, 374 P.3d 228 (2016).

6. “The trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success.” *MacDonald v. Korum Ford*, 80 Wn.App. 877, 884, 912 P.2d 1052 (1996).

7. The award must be made as a deterrent to future conduct. *Biggs v. Vail*, 124 Wn.2d 193, 199, 876 P.2d 448 (1994).

8. No monetary award need be made if future conduct is limited. The least severe sanction necessary to deter future conduct is to be applied. *Biggs v. Vail*, 124 Wn.2d 193, 197, 201, 876 P.2d 448 (1994).

II. ARGUMENT

Biggs v. Vail, 119 Wash.2d 129, 830 P.2d 350 (1994) held that the failure to make explicit findings that the claim was not grounded in fact or law. *Id.* at 201. Since Biggs was no longer practicing law “his exit alone from the legal profession alone may be enough to deter any future abuse.” *Biggs*, 124 Wn.2d at 202 n. 3. Both attorneys had practiced for many years. Kovacevich has litigated cases from before 1963. See *U.S. v. Michaelson*, 313 F.2d 668 (9th Cir. 1963). Deterrence at the start of a practice would be more necessary than after 55 years. The issues are different between the two pro se appellants. The time spent would be different. If Aaron Lowe is not within CR 11, deterrent is not a factor.

In *Mearns v. Scharbach*, 103 Wn.App. 498, 12 P.3d 1048 (2000) this court denied normal attorney’s fees in a case in which the children sought a “declaration of rights on legal relations with respect to ‘non probate assets.’” noting that the issue was a “difficult question.” *Id.* at 514-515. Lonnie Lowe argues that the actions were not separable but fails to dispute the amended opening brief pages 18, 19, 35-48. See *Fuentes*

v. Zaragoza, 555 S.W.3d 141, 175 (C.A. Texas 2018). At a sanctions hearing credibility and demeanor can be observed.

Response to Prior Action

Lonnie Lowe, at page 6 references *in re Estate of Lowe* and notes that “Aaron Lowe moved to file a second amended and supplemental petition, which more specifically alleged that the estate of Donald Lowe was erroneously distributed to Lonnie Lowe. The trial court denied that motion.” The motion sought to reopen the probate estate of Donald Lowe. (See CP 71-87; and 701-703). The second supplemental complaint states “Donald E. Lowe’s will was admitted to probate on October 27, 2003 in Spokane County file number 03-4-01223-0. CP 73.” The allegations were to construe Donald E. Lowe’s will. CP 15-22. No allegations were made about Donald E. Lowe’s trust for the reason that the trust is not probated. If any party wanted to determine whether the trust received the gold and silver RCW § 11.11.007 confers a completely different action. This is what was sought by Aaron Lowe in the linked case. The request which was denied was to reopen the probate. There was no action pending regarding the trust as

it is not probated. It passes assets free of trust. *Estate of Furst*, 113 Wn.App. 839, 55 P.3d 664 (2002) states “A general residuary gift is ineffective to dispose of non probate assets passing outside a will.” *Id.* at 842. RCW 11.11.020(2) is clear and unequivocal “a general residuary gift in an owner’s will or a will making general disposition of all the owner’s property, does not entitle the devisees or legatees to receive the non probate assets of the owner.” Neither Donald Lowe’s probate or Betty Lowe’s probate reviewed the cases or statutes. *In re Estate of Cordero*, 127 Wn.App. 783, 113 P.3d 16 (2005) is also determinative. Two probates were allowed. The first probate probated a later will executed in 1997. A month later a new probate was started by a niece on an earlier will executed in 1998. Ultimately the court decided that the 1998 will, even though it had contrary language, did not control the joint account. RCW § 11.11.020(4). Here, Aaron Lowe relies on RCW § 11.11.020(2), a provision in the same statute specifically enacted to apply to disposition of non probate assets. Aaron Lowe’s case is even stronger than *Cordero*. Donald Lowe’s will named Aaron to be the residuary beneficiary

of Don's Estate. See CP 14. Betty Lowe's estate could not inherit a non inventoried asset from the probate of her deceased husband. *Estate of Burks v. Kidd*, 124 Wn.App. 327, 100 P.3d 328 (2004) applied the intent statute, RCW § 11.12.230 to non probate assets and held "we conclude that Burk's will did not meet the statutory requirements to change her designated beneficiaries." *Id.* at 333. The court relied on RCW § 11.11.020. The case also denied attorney's fees as the case involved "difficult questions" of wills and non probate assets. *Ibid.* at 333. *Mearns v. Scharbach*, 103 Wn.App. 498, 12 P.3d 1048 (2000) also considered probate v. non probate application, stating that the issue was a "difficult question" and denied attorney fees. *Id.* at 515. In light of the above cases it was an abuse of discretion to hold the suit has "absolutely no chance of success." *Skimming v. Boxer*, 119 Wn.App. 748, 755, 55 P.3d 664 (2002). "A court abuses its discretion when it bases its decision on unreasonable or untenable grounds." *Modumetal v. Xtalic Corporation*, __Wn.App.__, 425 P.3d 871, 883 (2018) (quoting from *Clarke v. Office of Attorney General*,

133 Wn.App. 767, 777, 138 P.3d 144 (2006)). An abuse of discretion occurs if the choices are outside the range of acceptable choices or if the factual findings are unsupported by the record. See *Gosney v. Fireman's Fund Ins. Co.*, 3 Wn.App.2d 828, 880, 419 P.3d 447 (2018). *Sprague v. Spokane Valley Fire Department*, 189 Wn.2d 858, 409 P.3d 160 (2018) in reviewing res judicata states: "In addition, the issues must have been actually litigated and necessarily decided in the first proceeding." *Id.* at 899 citing *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 858 (1987) stating "In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action." The *Furst* case, 113 Wn.App. 839, 55 P.3d 664 (2002) should be enough to deny the sanctions sought. Aaron Lowe, like Rosemary Sunderland, should have as trustee received the non probate assets. *Furst* and other cases cited above, plus RCW 11.11.020(2) and 11.07.010(5)(a)(iii) dictate, at the very least, a chance of success. See *Eckstrom v Hansen*, 4 Wn.App.2d 584, 588, 422 P.3d 926 (2018). "The requirements

of collateral estoppel are (1) the identical issue was decided in the prior action.” Collateral estoppel did not apply between an estate dispute and a divorce action. *Ibid.* at 588. Lonnie Lowe ignores Aaron Lowe’s and Kovacevich’s arguments at page 6, 12 and 35-48 of their Opening Brief. They cite *Fortson-Kemmerer v. Allstate Insurance Company*, 198 Wn.App. 387, 393 P.3d 849 (2017). The case presents a debatable issue. Aaron Lowe did not file the Betty Lowe case as trustee. *Fortson-Kemmersen id.* at 404 unequivocally holds that for res judicata to apply, the party even though the same person must have the same quality. *Id.* at 403. “Mr. Flesscher brought a first action as guardian ad litem for his daughter. Thereafter, he brought his own action.” *Id.* at 404. The Chapter is 11.11 “Testamentary Disposition of Non Probate Assets Act”. RCW 11.11.020(2) obviously is contained within Chapter 11.11 to dispose of non probate assets under a will, a general residuary clause in a will is not enough. RCW § 11.11.010(7)(a) refers to § 11.02.005 to define non probate assets. RCW § 11.02.005(10) defines non probate asset to include “trust of

which the person is grantor and that becomes effective or irrevocable only on the person's death." RCW § 11.98.011 provides that a trust is created by an intention, a definite beneficiary now or in the future; the grantor is not the sole beneficiary and the trustee has duties to perform. It defies logic to hold that reliance on these statutes have absolutely no chance of proving the trust. Lonnie Lowe argues the holding at page 3 but ignores that the findings were in the wrong probate and never mentioned the trust statutes. Additionally, reopening Donald Lowe's probate would not automatically resolve the issue. RCW 11.11.007 would have to be pled and the trust reviewed. *Seattle-First National Bank v. Kawachi*, 91 Wn.2d 223, 588 P.2d 725 (1978) cites the Restatement of Judgment 68 and concludes "a judgment on one cause of action is not conclusive in a subsequent action on a different cause of action not actually litigated and determined in the first cause of action." *Id.* at 228.

An Evidentiary Hearing is Necessary

At page 20 of his brief, Lonnie Lowe argues without a case on the issue, that no evidentiary hearing was necessary. The Code of Judicial Conduct, Rule 2.11(A)(6)(c) requires that a judge shall disqualify himself or herself if the judge was a material witness. *Bryant v. Joseph Tree*, 119 Wn.2d 210, 829 P.2d 1099 (1992) states that “judges are both umpires and advocates”. Anderson J. concurrence in part, dissent in part. *Id.* at 226. Fundamental fairness requires an evidentiary hearing.

The CR 56(f) Motion was Wrongly Decided

At page 25, Lonnie Lowe’s brief indicates in a footnote that the court “sua sponte” drafted the order. Striking the CR 56(f) Motion. (See Appendix 1 to Amended Opening Brief). A copy was never sent to Aaron Lowe’s counsel. Lonnie Lowe also incorrectly argues that the motion requires the movant to show “what evidence would have been obtained”. 56(f) only requires that the party cannot present “facts essential to justify the party’s opposition. The motion stated that many of the

documents submitted by Lonnie Lowe were not on personal knowledge. Aaron Lowe had a right to find out what documents were authentic. The order striking the pleading was not within the rule as the court could only refuse the summary judgment or “order a continuance.” A court, if it issued the mysterious order, must follow its own rules. See *Ballard v. C.I.R.*, 544 U.S. 40, 125 S.Ct. 1270, 161 L.Ed.2d 227 (2005) “the Tax Court, like all other decision making tribunals, is obligated to follow its own rules.” *Id.* at 59. The issue is material as unauthenticated materials were attached to pleadings. The motion sought to find out why Lonnie Lowe hid the trust from Aaron Lowe. The request was at the heart of the case and would add to the facts of the declaratory judgment action. CP 54-56.

The Probate Estate of Don Lowe Does Not Apply to Trusts

The provisions of RCW 11.42.010 allowing clearance of trust creditors on assets passing without probate could have been filed by Aaron Lowe as Trustee. Ch. 11.42 is one of the

many statutes that apply to will substitutes as the prime reason for will substitutes are to avoid probate including the preservation of privacy. RCW § 11.98.011(1)(a), (b), (c) do not require admission of the trust to a court. A trust does not have to be witnessed. It only requires capacity, intention and beneficiaries.

The Business Judgment Rule Rejects Sanctions in this Case

Washington courts have not construed the Business Judgment Rule as it applies to trusts. Lowe and Kovacevich's Opening Brief at 44-48 cite RCW 11.104A.030 that applies the Business Judgment Rule. Lonnie Lowe's brief never mentions these statutes and issues. These issues and what research occurred must be heard in a factual hearing. *Zimmerman v. W8less Products*, 160 Wn.App. 678, 697, 248 P.3d 601 (2011) and *Deutche Bank Nat'l Trust v. Homar*, 80 N.Y.S.3d 409, 524, (N.Y. 2018).

The Appeal is Not Frivolous

Moorman v. Walker, 54 Wn.App. 461, 773 P.2d 887 (1989) states "cases of first impression that present debatable

issues of substantial public importance are not frivolous.” *Id.* at 466. *Granville Condominium Homeowner Ass’n v. Kuehner*, 177 Wn.App. 543, 557, 312 P.3d 702 (2013) denied sanctions where the case was first impression. *Id.* at 508. The case was not “totally devoid of merit that there was no reasonable possibility of reversal.” *Ibid.* at 588. In *Lee v. Kennard*, 176 Wn.App. 678, 310 P.3d 845 (2013) the court denied to find the appellants frivolous as a whole as the appeal was not in bad faith. *Id.* at 693.

Difficult questions concerning probate and non probate assets result in denial of appellate fees. *Mearns v. Scharbach*, 103 Wn.App. 498, 12 P.3d 1048 (2000) alone establishes the merit. It states “acknowledging the importance of non probate instruments in estate planning the Legislature determined that these instrumentals should be treated like wills.” *Id.* at 508. The case allowed an independent declaratory judgment action to declare rights to a non probate asset. *Id.* at 514. *Estate of Burks v. Kidd*, 124 Wn.App. 327, 100 P.3d 328 (2004) and *Building Industry Ass’n of Washington v. McCarthy*, 152

Wn.App. 720, 745, 218 P.3d 196 (2009) apply. All doubts as to whether an appeal is frivolous “should be resolved in favor of the Appellant.” *Herrera v. Villaneda*, 3 Wn.App.2d 483, 493, 416 P.3d 733 (2018). The appeal must be totally devoid of merit. *Hanna v. Margitan*, 193 Wn.App. 596, 615 (2016).

III. CONCLUSION

This case must be reversed as the procedural and substantive requirements of 4.84.185 and CR 11 are not met.

DATED this 26th day of October, 2018.

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CERTIFICATE OF SERVICE

This is to certify that on October 26, 2018, the Opening Brief of Petitioner and Appellants, was served on Counsel for Respondent/Appellee via the Washington State Appellate Court's Secure Portal Electronic Filing system.

DATED this 26th day of October, 2018.

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