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**COURT OF APPEALS
DIVISION III**

STATE OF WASHINGTON

Spokane County Cause No. 16401072-7

AARON L. LOWE, Son of Decedent 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.

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

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I. INTRODUCTION

Orwick v. Fox, 65 Wn.App. 71, 828 P.2d 12 (1992) holds that where both attorney and client are charged with a single payment of attorney's fees without allocation, a separate procedure is necessary. Thus, apportionment should have been applied. *In re Marriage of Wixom and Wixom*, 182 Wn.App. 881, 899-900, 332 P.3d 1063 (2014) prohibits the representation. The resulting conflict requires that Aaron L. Lowe be separated from his chosen attorney in this case. Both are proceeding pro se.

STATEMENT OF THE CASE

The Trial Court separated the case into two parts. A decision on No. 355691 was to be submitted first. The two briefs filed herein and in 2 Wn.App.2d 1017 (2018) by Appellant prove debatable issues. The other briefs are incorporated herein.

STATEMENT OF FACTS

Aaron L. Lowe and Lonnie D. Lowe are brothers. CP 11,12. Their father, Donald E. Lowe, died April 16, 2003.

Donald E. Lowe wrote a holograph document before his death (CP 2,22). It states:

Dear Boys,
Larry, Aaron & Lon

I just wanted to write down some of my thoughts about after I'm gone.

I have asked Aaron to take responsibility in looking after your mother. It may be necessary to sell what ever he can to care for her. After she is gone, I want everything else divided between you boys or sold and the money divided between you.

I told Mike that he could live in the Napa house as long as he takes care of Kelsey.

My life was awfully short & I didn't do much.

You are three of the finest boys anyone could have & I'm so proud of you. I hope you can get along with each other.

Love dad
Don Lowe

The Complaint sought to establish the trust as a valid trust and reclaim assets for the trust from Lonnie D. Lowe who purposely concealed them from the probate attorney in Donald E. Lowe's Estate. CP 12, 13. The gold and silver was never probated. CP 15. Since a trust takes precedence over a will,

there would have never been any of the assets in the estate of Donald E. Lowe. CP 18.

Aaron L. Lowe asserts that the document created an express valid trust within RCW § 11.02.005(10) being a trust effective on death of the trustor. CP 11. Aaron L. Lowe, as trustee, sought the property that was not inventoried in Donald E. Lowe's Estate to be turned over to him, as Trustee of the express trust, so that he could distribute it. CP 18. Aaron had no knowledge of Donald E. Lowe's handwritten document until August of 2013. CP 17. The assets must be turned over as trust assets. CP 19. Lonnie D. Lowe must turn them over, or if he no longer has them, Aaron L. Lowe, as Trustee, must recover a fair market value judgment against Lonnie D. Lowe, as this was the intent of the Trust. CP 12. Defendant Lonnie D. Lowe moved to dismiss the Complaint, CP 596-613, on the basis of res judicata and claim preclusion. The Motion also requested sanctions. CP 611. The Motion claimed that the probates were closed. It did not allege that the Trust does not have to be probated. Aaron L. Lowe submitted a detailed Declaration in Opposition to the Motion to Dismiss. CP 614-

619. He declared in detail the several meetings he had with Kovacevich to discuss the Trust, the non probate of a trust and its revocability. Aaron also personally researched the issue at the Gonzaga Law Library. CP 616-617. “We also discussed the fact that the trust has never been part of the litigation in my mother’s Estate.” CP 617. Additionally, he filed a CR 56(f) declaration indicating when he first knew of the Trust. CP 17, 632, 660. The Joint Motion for Evidentiary Hearing of December 29, 2017 (CP 691-694) raised the notice issue and the CR 56(f) issue. It was denied. CP 696-697. (Order Granting Motion will be submitted pursuant to RAP 9.6. It is attached as Appendix 1). CP 632-634. Kovacevich submitted a detailed declaration (CP 620-631) completely disputing that any ruling in the Betty L. Lowe Estate would apply to “any aspect of the trust”. CP 621. He indicates his research that amounted to a 1½ inch thick pile of his notes. CP 624. He also filed a second declaration on his background and experience. CP 639-647. The trial court never reviewed the declarations and did not find any facts referencing the declarations. It only concluded that both “failed to make a reasonable inquiry.” CP

666. No facts were included in the Trial Court’s Ruling as to why a reasonable inquiry was not undertaken. The Court granted the motion on July 11, 2017, (Appendix 2 to this brief. It will be added pursuant to RAP 9.6) stating that *In re Estate of Lowe*, 191 Wn.App. 216, 361 P.3d 789 (2015) “supports claim preclusion and issue preclusion.” CP 659. That decision was based on the denial to reopen the probate estate. CP 55-71. Findings were entered on November 6, 2017. CP 648-654. The Order was also entered on November 9, 2017. CP 655-657. Judgment was entered on January 16, 2018. CP 701-703, 704-706. The Notice of Appeal was filed January 23, 2018. CP 698-706.

STATEMENT OF ISSUES

ONE

The Respondent, Lonnie D. Lowe, did not sustain his burden to prove sanctions under either or both CR 11 or RCW § 4.84.185.

TWO

The Petition sought to determine validity of the handwritten document. This cause of action was never

determined in any prior proceeding. The Trial Court never made any inquiry into the three declarations of both appellants and never found any facts supporting its conclusion.

THREE

The attempt to file the Second Amended Complaint of August 13, 2013 (CP 55-71) in the Betty L. Lowe case never raised the trust issue as a determinable issue. It was denied and cannot be res judicata as the issue only requested reopening Donald E. Lowe's probate Estate. A trust is self proven and passes assets on death without any authentication or court action. The Trust terms are carefully defined. RCW § 11.02.005(4) and (11) define executor and personal representative; (15), (18) and (19) define settlor, trustee and incorporates 11.98 RCW. Ch. 11.98 applies only to trusts, not wills. It contains § 11.98.110 defining trust creation, including oral trusts, RCW § 11.98.014. RCW § 11.02.005(10) defines a revocable inter vivos trust. RCW §§ 11.11.007 and 11.02.005(10) apply to Donald E. Lowe's assets at the time of his death. The trust law is separate from wills and probate.

FOUR

The Trial Court failed to conduct the two prong inquiry required of CR 11. It must find that the complaint lacks a factual or legal basis *and* that the attorneys failed to conduct a reasonable inquiry into the factual and legal basis of the claim. *Bryant v. Joseph Tree Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). The Trial Court never reviewed the Appellant's trial declarations proving reasonable inquiry as required by *Bryant v. Joseph Tree, Inc., id.* at 219. It never found any facts supporting a lack of reasonable inquiry. It did not determine whether the Petition was objectively baseless and did not review the evidence to find any facts that the attorneys did not conduct a reasonable inquiry. These are indispensable prongs required to find a CR 11 sanction.

FIVE

The Opinion in *Matter of Estate of Lowe*, 2 Wn.App.2d 1017 (2018) proved a debatable non-frivolous issue.

SIX

Since both Appellants are attorneys admitted in Washington, they could rely on each other's inquiry into whether there was a reasonable and competent inquiry.

SEVEN

The Appellants were never given adequate notice of CR 11 sanctions.

EIGHT

Since Aaron L. Lowe brought suit here as trustee to claim trust assets and in the prior suit he sought residuary will assets as a beneficiary of a will in probate, there is a difference in quality that defeats res judicata. *Fortson-Kemmerer v. Allstate Insurance Company*, 198 Wn.App. 387, 405, 393 P.3d 849 (2017) requires that all four "identities" be proven. *Id.* at 393. Aaron L. Lowe, as Trustee, was in a different posture than a will beneficiary. The identity of quality was not the same.

NINE

The amount awarded as sanctions was prohibited fee shifting.

TEN

The Trial Court erred in striking the CR 59(f) Declaration.

ELEVEN

The successive and new trust enactments increasing the benefits and creating will substitutes with sparse precedent prohibit CR 11. See RCW § 11.97.010, requiring trust provisions to control over trust statutes and RCW § 11.104A.030(a) and (e) adopting the Business Judgment Rule to a personal award of attorney's fees.

TWELVE

The peculiar facts, new statutes on trusts and lack of applicable case law amount to a first impression case, thereby prohibiting sanctions.

THIRTEEN

The denial of the Second Supplemental Complaint in the Betty L. Lowe litigation, CP 55-71, did not apply to the Trust as the Trust validity was never the subject to be determined by the pleading. *Seattle-First National Bank v. Kawachi*, 91 Wn.2d 223, 225-28, 588 P.2d 725 (1978) and *Fortson-Kemmerer v.*

Allstate Ins. Co., 198 Wn.App. 387, 394, 393 P.3d 849 (2017) sustain this conclusion.

FOURTEEN

The Trust was a legal document that was to contain Donald E. Lowe's property. RCW §§ 11.11.020(2), 11.11.007 and 11.02.005, et seq., apply. It takes precedence over a will. Therefore, the assets to be part of the Trust prevent later inclusion of the assets in the probate. The Trial Court never recognized this principle.

FIFTEEN

The statute of limitations does not apply to a trustee seeking assets fraudulently omitted by a beneficiary.

SIXTEEN

Since the handwriting of Donald E. Lowe sought to be determined as a trust was never determined, it was not res judicata.

SEVENTEEN

A revocable living trust is a separate document passing assets of the trustor outside of the will of decedent Donald E. Lowe. It avoided probate.

EIGHTEEN

The petition filed on this case was not frivolous and filed with reasonable inquiry. No sanctions apply.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ONE

The reliance on res judicata by the denial of the Second Amended and Supplemental Petition, dated August 23, 2013, (CP 55-71) never contained any cause of action to establish the validity of the document Donald E. Lowe wrote in his own handwriting. The mention of the trust was unnecessary for any decision requested in the pleading of August 23, 2013. The document was referenced only to reflect intent that the will be construed to give the residuary to Aaron L. Lowe. The handwritten document was never defined as a revocable inter vivos trust. It was not an ultimate fact necessary to be determined to prove that Aaron L. Lowe was the residuary beneficiary of Donald E. Lowe's Estate. *Seattle-First National Bank v. Kawachi*, 91 Wn.2d 223, 229, 588 P.2d 725 (1978) confines res judicata to ultimate facts directly at issue. Even if an issue is considered, a final decision must be made for res

judicata to apply. *Ofuasia v. Smurr*, 198 Wn.App. 133, 142, 392 P.3d 1148 (2017) rejects res judicata where an issue was considered, but no final decision was made. The trust validity was never directly at issue. At most, it was an evidentiary fact. The Second Amended and Supplemental Petition was denied. There was never a final judgment on the trust validity or what assets it contained.

TWO

Fortson-Kemmerer v. Allstate Insurance Company, 198 Wn.App. 387, 393 P.3d 849 (2017), at 393, reviews the four “identities” needed to prove res judicata. The fourth identity is quality of persons. At page 404-405, the case holds that the same person can bring a suit personally, but if the same person can bring a claim in a representative capacity that may be subject to severance, res judicata is defeated. Aaron L. Lowe, as trustee, sought assets for the trust corpus and as an individual beneficiary sought probate assets from a probate. The identity and claims are a “different posture” and not identical. *Id.* at 395. One claim involved a trust; the other a will and probate. A trust holds non probate assets. To

ascertain creditors, a trust may commence a separate action. RCW § 11.42.010. An entirely different proceeding can be commenced. Ch. 11.42. There is complete severance of proceedings. At this phase of the case, the attorneys only have to prove a right to argue the trust issue, even if they do not prevail. At the least, trust law separation is a debatable issue.

THREE

The laws of Washington provide that a revocable living trust need not be probated. All the prior proceedings involve the probate of Donald E. Lowe or his spouse Betty L. Lowe. Applying res judicata to a pleading denied in the Estate of Betty L. Lowe attempted to reopen the earlier omitted probate asset of a large amount of gold and silver. The Court attributed res judicata on pleadings to the wrong probate. Donald E. Lowe's probate omitted the asset.

FOUR

The substantial revisions trust laws contain RCW § 11.11.020(2). It does not allow a non probate asset to be inherited by a residuary will devisee or legatee. The petition here sought the erroneous or fraudulent retention and thereby

a return of a non probate asset to the Trust. It sought to establish the validity of the holographic writing. RCW § 11.11.007 allows the petition. It allows suits to reclaim non probate assets from will beneficiaries. The cause of action is separate and was never determined or pled in any prior proceeding. It is respectfully submitted that the Trial Court was exasperated by the reading of 600 pages that pertained only to probate that it did not consider or address the revocable inter vivos trust issue.

FIVE

The Trial Court procedure in this case was erroneous in granting a summary judgment when the three Declarations of Appellants (CP 614-619, 620-631 and 639-647) contained facts establishing reasonable review. A CR 11 violation is denied if the review is reasonable.

SIX

The Trial Court's erroneous application of CR 59(f), by striking the declaration and denying an evidentiary hearing, was not within the jurisdiction of the rule. It only allows a continuance or depositions. It was material as no in-court

hearings ever took place in this case. CR 11 also requires proof of improper purpose, harassment or unnecessary delay. The court also did not inquire into the attorney's lack of prior sanctions or review the 1½ inch file of notes established by declarations. Rule 11 requires this prong be reviewed. The court did not review the facts to determine reasons. Aaron L. Lowe was never present nor requested to be present for inquiry into his research into the law. He was never in court in this case.

SEVEN

The reason for res judicata is to avoid repetitious litigation. The decision on res judicata in this case was based on total lack of litigation to determine where the substantial assets of Donald E. Lowe belonged, whether in the Trust or inventoried in his probate.

EIGHT

The prior decision in the earlier case distinguished a contrary case that would have changed the result in this case. This alone established a non frivolous petition.

II. ARGUMENT

A. Standard of Review

The threshold standard of review for a CR 11 review is for abuse of discretion. See, *Washington State Physicians Insurance Exchange & Association v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). In this case, there was no trial. The case on res judicata was heard on a motion to dismiss or summary judgment. *Storti v. University of Washington*, 181 Wn.2d 28, 330 P.3d 159 (2014) states that summary judgment requires “viewing the facts in the light most favorable to the nonmoving party.” *Id.* at 35. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218, 829 P.2d 1099 (1992) states “We therefore assume, without deciding, that the proper standard of review is abuse of discretion.” Footnote 2, at page 218, contains an amicus argument that the sanctions should be reviewed de novo. Neither Aaron L. Lowe or Robert E. Kovacevich were live witnesses. Appellate review on a motion to dismiss or summary judgment is de novo. *Schibel v. Eymann*, 189 Wn.2d 93, 98, 399 P.3d 1129 (Wash. 2017). There can be no dispute

of material fact. However, all doubts should be resolved in favor of the sanctioned party. *Streater v. White*, 26 Wn.App. 430, 434-5, 613 P.2d 187 (1980). The burden is on the movant to establish CR 11 sanctions. *Building Industry Ass'n of Washington v. McCarthy*, 152 Wn.App. 720, 745, 218 P.3d 196 (2009). *Smith v. Our Lady of the Lake Hospital, Inc.*, 960 F.2d 439, 444, (5th Cir. 1992) held that an erroneous view of the law mitigated against sanctions. The case also reviews the duty of reasonable inquiry. Appellant, in a Motion for Evidentiary Hearing (CP 691-694), dated December 29, 2017, sought factual information on dispute of material facts but was denied. The issue is material. The Trial Court never heard the live testimony of Aaron L. Lowe and Kovacevich was only in Court once at the pretrial. All of the presentation was in the pleadings filed. The Appellant Court has all materials before it in the same manner as the trial court. The review should be de novo.

B. The Opinion in Matter of Estate of Lowe, 2 Wn.App.2d 1017 (2018) Establishes a Debatable Issue.

In *Matter of Estate of Lowe*, 2 Wn.App.2d 1017 (2018), establishes an issue that is non frivolous.¹ The reason is that the findings of fact on CR 11 and RCW § 4.84.185 in this case relied on the *Betty Lowe* case, No. 11-4-01394-6, CP 818-820. In *Matter of Estate of Lowe*, 2 Wn.App.2d 1017 (2018), at *5, relied on the *Betty Lowe* trial, in 191 Wn.App.216, 361 P.3d 789 (2015). The Court at 2 Wn.App.2d, *5, f. 2, cited a contrary case, *in re Estate of Heater*, 24 Or.App. 777, 547 P.2d 636, 637 (1976) that denied res judicata probate matters. *Heater* did not apply res judicata or law of the case. “We are not here concerned with the effect of a prior proceeding upon a subsequent proceeding - all rulings in question were rendered in a single probate proceeding. Res judicata is not applicable in this situation.” *Ibid.* at 637. Like *Heater*, objections were raised in the *Betty Lowe* final account. “The objections raised the same issues that had been aired during the hearing to remove the personal representative.” *Id.* at 636.

¹ It is presumed that G.R. 14.1 does not apply as the *Heater* case citation flags *Estate of Lowe*, 2 Wn.App.2d 1017 (2018).

The Appellate Court rejected res judicata and heard the issue that the personal representative failed to include additional assets in the probate estate. Res judicata did not apply. The citation to *Heater* carries a flag stating “disagreed with by *Matter of Estate of Lowe*, Wn.App. Div. 3, January 23, 2018.” The basis for the findings of fact here was the Second Amended and Supplemental Petition. CP 55-71. The pleading only sought reopening of Donald E. Lowe’s probate. It never sought any ultimate decision on the validity or what should be included as trust corpus. Prior proceedings all involved the wills which must be authenticated by probate proceedings. The trust avoids probate. *In the Matter of the Estate of Fields*, 2017 WL 5504969 (S.C. Alaska 2017) (unpublished) the identical issue argued by attorneys here was sustained by the Alaska Supreme Court. The case may be cited if a party believes it has “persuasive value”. (Alaska Appellate Rule 214(d)). In the case, the will referenced the residue, it would be placed into a trust but the trust was not finalized. The court ordered an express trust be formed. *Id.* at *1. A person named

Charles was the personal representative. *Ibid.* at *1. He argued that “[T]he Washington property belonged to the trust and was therefore not subject to the probate proceeding.” *Id.* at *4. The court held “Once the property was transferred from Fields’s children to the express trust pursuant to the constructive trust order, it became the property of the trust, not the estate. The superior court therefore did not err in excluding the Washington property from the estate inventory.” *Id.* at *5. This is the relief Aaron L. Lowe seeks in the first phase of this case. Like *Grider v. Cavazos*, 911 F.2d 1158 (5th Cir. 1990) the sanctions rest on a “sandy jurisprudential foundation,” *id.* at 1163, and requires reversal of the summary judgment. *Id.* at 1165. It was “The result of stacking one inapposite citation upon another until, in the aggregate, they take on the appearance of valid precedent.” *Id.* at 1164. Additionally, *In re Peterson’s Estate*, 12 Wn.2d 686, 123 P.2d 733 (1942) also expresses the same probate theory “As a result of this peculiar status of the courts in probate proceedings, if it becomes apparent during the course of administration that

a mistake has been made at some earlier stage, the court should immediately take steps to remedy the situation insofar as possible.” *Id.* at 722-723. *Heater* applies. The trust inclusion of assets in Donald E. Lowe’s probate should be noted in the action still pending in the Spokane County Superior Court. No. 3-4-01223-0. *Fields* clearly establishes a debatable non frivolous issue upon which reasonable minds might differ. This case alone is sufficient to deny the application of RCW § 4.84.185 and CR 11.

C. The Award in this Case Amounts to Prohibited Fee Shifting.

Biggs v. Vail, 124 Wn.2d 193, 876 P.2d 448 (1994) cites *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992), at page 201, stating “Bryant makes clear that CR 11 sanctions should be limited to the minimum necessary, and should not be used as a fee-shifting mechanism.” The case also denied appellate fees. *Biggs v. Vail, supra* at 197 states: “CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings.” The 1993

amendment to the advisory committee notes states that the purpose of sanctions is to “deter rather than compensate.” *Sanctions under Rule 11*, Jenner & Block, 2010, Committee Notes, p. 587, (Google, current). The money should also be paid into court. See *Divane v. Krull Elec. Co., Inc.*, 200 F.3d 1020, 1030 (7th Cir. 1999). The case was reversed and sent back as the trial court awarded all the fees. The court should not have awarded blanket fees. See, e.g., Jenner & Block, *Sanctions Under Rule 11, supra*, at page 130, states “The 1993 Amendment discourages monetary awards as sanctions on the ground that fee awards create a financial incentive to file Rule 11 motions.” *Bench - Bar Proposal to Revise Civil Procedure Rule 11*, 137 F.R.D. 159 (1991) notes that changing “from fee shifting to deterrence would decrease satellite litigation, see G. Vario, *Rule 11, A Critical Analysis*, 118 F.R.D. 189, 233 (1988). A major purpose of this change is to reduce the elements of lawyers fighting with each other for personal gain.” *Id.* at 168. The cited article, at 118 F.R.D. 189, concludes that “Rule 11 is being used disproportionately against plaintiffs.” *Id.* at 200.

“Of course, it is impossible to determine how many meritorious cases have not been brought or will not be brought because of fears about Rule 11.” *Ibid.* at 200. “CR 11 was modeled after the Federal Rules of Civil Procedure (Rule 11).” *Biggs v. Vail*, 124 Wn.2d 193, 196, 876 P.2d 448 (1994).

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) states “It is now clear that the central purpose of Rule 11 is to deter baseless filings.” Although the Rule must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, *ibid.*, any interpretation must give effect to the Rule's central goal of deterrence. The Court applied a “deferential” standard of review of CR 11 cases, stating “A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Id.* at 405. Here, the issue is purely one of law: i.e. does the irrevocable trust preempt a will?

D. The Court Did Not Review the Declarations Proving a Reasonable Inquiry.

In order to impose a CR 11 penalty the court must determine whether the complaint is legally baseless and the attorney has conducted a reasonable and competent inquiry. *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002). *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 220 also contains the reason that this case must be reversed, “If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a *reasonable* inquiry into the factual and legal basis for the claim.” The two attorneys in this case filed three declarations, CP 614-619, CP 620-631 and CP 639-647. The Petition was never discussed by the lower court to determine its validity under trust law. The three declarations were never reviewed to determine if the review was reasonable. The court ignored both prongs of CR 11 and never made the findings of fact required to apply CR 11. CP 659. The case should be reversed as the necessary procedure for CR 11 never took place. *Skimming v. Boxer*, 119 Wn.App. 748, 82 P.3d 707 (2004) states that if issues in the complaint are

“weakest . . . The issues were, at least, then debatable on balance.” *Id.* at 756. “The threshold for imposition of these sanctions is high.” *Id.* at 755. (Citing f. 4 and the American Rule.) “And so the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success.” *Ibid.* at 755. *In re Estate of Stein*, 78 Wn.App. 251, 896 P.2d 740 (1995) admitted a second will to probate even though years had passed in the probate. The court stated “First, the Supreme Court of Washington has held that a court of probate has inherent authority at *any time*, while an estate is still open, to admit to probate a later will than that being probated. Second, determination of the decedent’s wishes is the overriding factor in Washington probate proceedings.” *Id.* at 259. The court ordered assets to be sorted out according to probates in Washington or Oregon. The same result should have occurred here. If the record is not clear on the review of the reason the sanctions were granted, the decision must be vacated. *Truesdell v. Southern California Permanente Medical Group*, 293 F.3d 1146, 1154 (9th Cir. 2002) rejected sanctions

where the complaint did not reflect the facts necessary to prove sanctions. In *O'Hagin's Inc. v. UBS AG*, 2017 WL 2992445 *4 (U.S.D.C. Cal. 2017) sanctions were rejected on the first prong. Here the complaint was not baseless. CP 10-22. The trial court never reviewed it. It concluded that the issue was determined by earlier litigation. The trust issue was never determined.

E. The Trial Court Failed to Follow the Requirements to Assess Sanctions Under CR 11. No Advance Notice was given. No Allocation was made.

Counsel has to be warned in advance of sanctionable conduct. See, *Rounseville v. Zahl*, 13 F.3d 625, 632 (2nd Cir. 1994); *Securities Industry Ass'n v. Clarke*, 898 F.2d 318, 322 (2nd Cir. 1990); *Sanko Steamship Co. v. Galin*, 835 F.2d 51, 52-53 (2nd Cir. 1987). The record in the case proves that the notice was not given. The Respondent's attorney, Greg Devlin, raised it only in his Affidavit, not before. The Notice was not sufficient. CR 11 was amended to make sanctions permissive, not mandatory. *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994) states: "CR 11 was modeled after the Federal Rule of

Civil Procedure (Rule 11), and federal decisions interpreting Rule 11 often provide guidance in interpreting our own rule.” “Courts should employ an objective standard in evaluating an attorney’s conduct, and the appropriate level of pre-filing investigation is to be tested by ‘inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted.’” *Ibid.* at 197. “In deciding upon a sanction, the trial court should impose the least severe sanction necessary to carry out the purpose of the rule.” *Ibid.* at 197. “. . .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.” “Without such notice, CR 11 sanctions are unwarranted.” *Id.* at 198. In this case, no advance notice was given. This alone is a reason for reversal. *Biggs v. Vail, supra*, cites *Matter of Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986), *amended* 803 F.2d 1085 (1986), Mandamus granted sub nom, *Brown v. Baden*, 815 F.2d 575; *Real v. Yagman*, 484 U.S. 963, 108 S.Ct. 450, 98 L.Ed.2d 390 (1987). *Yagman* rejects “lump-

sum sanctions award.” *Id.* at 1184. *Orwick v. Fox*, 65 Wn.App. 71, 828 P.2d 12 (1992) holds where both the attorney and the client are assessed, a separate allocation proceeding “so that neither appellant shall be charged for the fees incurred as a result of the time necessary to respond to the issues raised by the other appellant” the amount cannot exceed the total. *Id.* at 92. *In re Marriage of Wixom and Wixom*, 190 Wn.App. 719, 728-9, 360 P.3d 960 (2015). “We are mindful that not every attorney who files appeals is an appellate expert and we are concerned that there not be a chilling effect on the right to appeal by too vigorous an application of sanctions.” *Id.* at 90. One rational argument defeats sanctions. *Ibid.* at 90 and f. 11. *Bill of Rights Legal Foundation v. Evergreen State College*, 44 Wn.App. 690, 696-97, 723 P.2d 483 (1986) denied sanctions when the issue was “debatable”. *Green River Community College, Dist. No.10 v. Higher Education Personnel Bd.*, 107 Wn.2d 427, 443, 730 P.2d 653 (1986) rejected sanctions where the issue was “debatable” and “reasonable minds might differ.” *Dave Johnson Ins., Inc. v. Wright*, 167 Wn.App. 758, 275 P.3d

339 (2012) rejected attorney’s fees based on the American Rule. There was a “reasonable possibility of reversal” *Id.* at 787. RCW § 4.84.185 allows assessment of sanctions against a party. It does not apply to the attorney representing the party, including Kovacevich. *Havsy v. Flynn*, 88 Wn.App. 514, 521, 945 P.2d 221 (1997). *Watson v. Maier*, 64 Wn.App. 889, 896, 827 P.2d 311 (1992) states: “But a trial court is not required to impose sanctions for every violation of CR 11.” *Protect the Peninsula’s Future v. City of Port Angeles*, 175 Wn.App. 201, 214, 304 P.3d 914 (2013). “All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant.” *Id.* at 214. “The trial court did not find whether Kailin’s complaint lacked a sufficient factual basis.” *Id.* at 219. *Granville Condominium Homeowners Ass’n. v. Kuehner*, 177 Wn.App. 543, 557-8, 312 P.3d 702 (2013) rejects sanctions where “There is a paucity of Washington law,” even if the argument was “incorrect.” *Id.* at 557.

F. The Rejection of Aaron L. Lowe’s CR 56(f) Declaration is a Material Error.

Aaron L. Lowe (CP 632-634) requested a continuance on the basis that “many of the documents in the case by the defendant contain facts not on personal knowledge. It is still a mystery who drafted the Motion to Strike and presented it for signature. (See Appendix 2 attached). It was never served on Petitioner or his counsel. Even if it had, CR 56(f) does not give the court jurisdiction to strike the motion. The court can only “refuse the application for judgment or may order a continuance.” The court did neither. The striking of the motion is material as the declarations supporting the summary judgment contradicts the findings. CP 632-634, 617-618, 639-647. This is a material omission as the result could result in striking Respondent’s documents not authenticated. They were relied on in the order granting the summary judgment. The hearsay Affidavits of Greg Devlin are sufficient grounds to grant a reversal. *MRC Receivables Corp. v. Zion*, 152 Wn.App. 625, 631, f 9, 218 P.3d 621 (2009). Affidavits in support of summary judgment must be made on personal knowledge. *Klossner v. San Juan County*, 93 Wn.2d 42, 605 P.2d 330

(1980) “They were not made on personal knowledge nor did they affirmatively show that the affiant was competent to testify to the matters stated therein.” *Id.* at 45.

G. The Trial Court did not Determine Whether a Reasonable Inquiry of the Facts or Law was made.

In determining to assess CR 11 against an attorney “both CR 11's purpose of deterring baseless suits claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992) “If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim.”

A lawsuit is frivolous pursuant to RCW § 4.84.185 “if it cannot be supported by any rational argument based in fact or law.” *Dave Johnson Ins., Inc. v. Wright*, 167 Wn.App. 758, 785, 275 P.3d 339 (2012). In the *Johnson* case the court imposed a constructive trust and unjust enrichment. *Id.* at 775.

Creative theories, although not plausible, are sufficient to defeat a CR 11 attack. *F.D.I.C. v. Maxxam, Inc.*, 523 F.3d 566, 580, (5th Cir. 2008). “Novelty” issues will defeat sanctions. *Moorman v. Walker*, 54 Wn.App. 461, 467, 773 P.2d 887 (1989).

In re Elliott’s Estate, 22 Wn.2d 334, 156 P.2d 427 (1945) states “It is not their rights which are taken away, but the right of the testator to have his will carried out.” *Id.* at 351. A court must make a specific finding of bad faith to impose CR 11 sanctions. *Cakebread v. Berkeley Millwork and Furniture Co., Inc.*, 218 F.Supp.3d 1040, (D.C. Cal. 2016). “A district court must make a specific finding of ‘bad faith.’” *Id.* at 1046. The burden is on the movant to establish CR 11 sanctions. *Building Industry Ass’n of Washington v. McCarthy*, 152 Wn.App. 720, 745, 218 P.3d 196 (2009) denied sanctions where the issues were “debatable.”

H. Both Appellants were Practicing State of Washington Attorneys. They had an Additional Right to Rely on Each Other.

Kovacevich submitted two Declarations. CP 620. He indicated he had a 1½ inch pile of law notes. CP 624. Aaron

L. Lowe's declaration states that he reviewed the issue "several times" with Kovacevich and also researched the issue independently at the law library. CP 617-618. He also has no personal recollection that the validity of the trust was "requested or ruled on." CP 618. The lower court never cited any facts to support findings that the review was unreasonable. The burden is on the party asserting sanctions. *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 498 (1994). The burden is on the movant. *Id.* at 202. "Explicit findings" must be made that "the claim is not grounded in fact or law and that the attorney failed to make reasonable inquiry." *Id.* at 201. In *Smith v. Our Lady of the Lake Hospital*, 960 F.2d 439 (5th Cir. 1992) held "First, an attorney receiving a case from another attorney is entitled to place some reliance upon that attorney's investigation." *Id.* at 446. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 875 (5th Cir, 1988) states: "[W]hether the signing attorney accepted the case from another member of the bar" is a factor in CR 11 Cases. Logic would indicate that Aaron L. Lowe would rely more on Kovacevich. On the other

hand, if Aaron L. Lowe's research and memory indicated that the Trust had been litigated, Kovacevich would not have a reason to proceed.

I. The Same Judge who Ruled Against Appellants also Determined CR 11 and RCW § 4.84.185.

The Trial Judge had just ruled that the Appellants were wrong and dismissed the case. Petitioner requested a jury and paid the jury fee. CP 23. The main issue was the handwritten trust, written by Donald E. Lowe, a non lawyer. The jury never heard the case. The judge never heard any live testimony. The determination of sanctions does not start on the proverbial clean slate. What is frivolous is not well defined. It can be in the "eye of the beholder." In determining CR 11 and RCW § 4.84.185 fees, an objective standard must be used. *Ahmad v. Town of Springdale*, 178 Wn.App. 333, 314 P.3d 729 (2013) denied fees stating "Since discretion assumes that two decision makers may reach a different outcome, the Court of Appeals and trial court remain free to decide differently as to whether the same claims are frivolous." *Id.* at 345. The sanction was denied. The *Ahmad* court relied on *Ermine v. City of Spokane*,

143 Wn.2d 636, 650, 23 P.3d 492 (2001) where cases cited differed on whether nominal fees or no fees should be awarded. The court quoted a case stating fees are not “a relief act for lawyers.” *Id.* at 648. The theory applies here.

J. There is no Identity or Quality. Lack of Same Identity Defeats Sanctions.

The Second Amended and Supplemental Petition filed in the Betty L. Lowe Estate, on August 23, 2013, CP 71-87, was not filed by Aaron L. Lowe as Trustee. The Kovacevich Declaration, at CP 621-622, declares that the Trust has never been adjudicated, which is undisputed. The Declaration raises a genuine issue of material fact. CP 635-638. RCW § 11.02.005(18) defines trustee as one who is acting as trustee “of a trust to which Chapter 11.98 applies.” The Donald E. Lowe Trust meets the definition of RCW § 11.98.011. The word “trustee” must be used to avoid personal liability as a trustee. See RCW § 11.98.110(2). It was used by Aaron L. Lowe in the Petition. CP 10-22. A trustee has the same insulation from liability as a corporate officer. The Second Amended and Supplemental Petition was filed by Aaron L. Lowe as the son of

decedent. It sought to invalidate the declaration of intestacy for the reason that Aaron was personally named as residuary devisee. See CP 628. It states: “personal representative” not trustee. RCW § 11.02.005(4) defines executor as one appointed by will. Will is defined at (20). (11) defines personal representative. (15) defines settlor as meaning trustor. (19) defines trustor as one who contributes property to a trust. A revocable trust is defined at (10). *Fortson-Kemmerer v. Allstate Insurance Co.*, 198 Wn.App 387, 393 P.3d 849 (2017), a Division 3 first impression case holds that the same person can have two different causes of action in different capacities. In the case, the father brought suit as guardian ad litem for his daughter’s damages. As guardian ad litem, he brought an uninsured motorists action claim. “Thereafter he brought his own action.” *Id.* at 404. “A single lawsuit that combines UIM and bad faith claims places the insurer, both pretrial and at trial, in two different legal postures with prejudicial consequences.” *Id.* at 389. The court reversed the case and held that there was a difference in quality, so res judicata did

not apply. *Id.* at 406-7. The four concurrences required for res judicata did not apply. So it is for this case. Aaron L. Lowe, in the Second Amended and Supplemental Complaint, CP 55-71, requested distribution on the basis of a residuary legatee of Don's will. In this case, he requested the property to put in the Trust. He brought the action as an individual. In the request to be residuary beneficiary, he wanted the residue as trustee, two different causes of action were brought by Aaron, in different capacities; they were in different "postures" in the same theory as *Fortson-Kemmerer, supra* at 395. Lowe, as Trustee, sought to fund the trust. As an individual, he sought to be residuary beneficiary of Donald's will. Two different identities were required and a part of a probate was sought by Aaron as an individual. As a trustee, he wanted at least half of the property of Donald E. Lowe to pass outside and to supercede the will. The identity was not in the same posture and could be severed. CR 42(b) allows claims to be separated. This alone creates a non-frivolous issue. *Stevens County v. Futurewise*, 146 Wn.App. 493, 192 P.3d 1 (2008) requires that

in order to establish res judicata, the same “quality” of persons must be identical. *Id.* at 503. In *Mun Lim v. Precision Risk Management, Inc.*, 2012 WL 5511677 (W.D.Wn. 2012), the issue of owners of a corporation and the corporation were the same for purposes of res judicata. *4. The court held the interests were the same. Here, Aaron L. Lowe has immunity from judgment as a trustee under RCW § 11.98.110(2). As a beneficiary in a probate, he has no immunity. The interests are not the same. Res judicata does not apply. The request for relief was never litigated. RCW § 2.08.010 only allows jurisdiction over “all matters of probate”. A will must be filed 30 days from date of death. RCW § 11.20.010. Normally, a trust is effective without court adjudication. A will has to be admitted to probate. See *In re Elliott’s Estate*, 22 Wn.2d 334, 351, 156 P.2d 427 (1945) “to give effect to a testator’s will the instrument must, of course, first be admitted to probate.” *Seattle-First National Bank v. Kawachi*, 91 Wn.2d 223, 228-9, 558 P.2d 725 (1978) applies. To be res judicata the quality of the person must be the same. *Id.* at 223.

K. Aaron L. Lowe is Entitled to the Protections of CR 11.

Aaron L. Lowe is a practicing attorney in the state of Washington. He verified the Petition. He also undertook independent research. He was the client, not the attorney in the Trial Court. However, the purpose of CR 11 is to deter baseless filings. As an attorney, the sanction, if upheld, would deter him in his law practice.

L. The Trust is a Will Substitute. It Takes the Assets as it is Irrevocable on Death and Leaves Nothing to the Probate Estate. RCW § 11.11.007 Allows a Separate Cause of Action in Trust v. Will Beneficiary Disputes.

RCW § 11.98.011(1)(a)(b)(c) lists the requirements for trust creation. It only requires capacity to create a trust, intention and beneficiaries. RCW § 11.02.005(10) defines a non-probate asset as a written instrument passing an interest “if possession has been postponed until the death of the person, trust of which the person is grantor and that becomes effective or irrevocable only upon the person’s death.” RCW § 11.11.007 applies the non-probate assets to controversies between beneficiaries of a trust and testamentary beneficiaries.

Manary v. Anderson, 176 Wn.2d 342, 292 P.3d 96 (2013) contains the answer to this case and requires a reversal. The issue was whether the later will contained sufficient terminology to control the ownership of the asset. The court held the exception to the rule applied. However, here the exception does not apply. The court stated the rule: “A will generally disposing of ‘all of the owner’s property’ or making a ‘general residuary gift’ does not entitle the devisees or legatees to receive an owner’s non probate assets. RCW 11.11.020(2)” *Id.* at 356. “(2) 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 non probate assets of the owner.” The statute, RCW § 11.11.020(2) is clear. The “plain language” cannot be evaded. See *Carranza v. Dovex Fruit Company*, 190 Wn.2d 612, 615, 416 P.3d 1205 (2018). RCW has been reenacted in 2018, Ch 22 (H.B. 2368 Sec 6. RCW 11.02.050 Section 15 is now Section 10. The text that applies here is unchanged. RCW § 11.11.020(2) is unchanged. *Estate of Burks v. Kidd*, 124 Wn.App. 327, 100 P.3d 328 (2004)

holds the same. The assets were non probate assets. “A ‘general residuary gift’ does not entitle the devisees or legatees to the owner’s non probate assets. RCW 11.11.002(2).” *Id.* at 331. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992) cites and quotes from *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363-64 (9th Cir. 1090). The quote includes “recognition of new rights”. The request for evidentiary hearing (CP 691-694), dated December 29, 2017, raised the issues and pointed out that no early warnings were made. Plaintiff’s Motion for New Trial of November 17, 2017 (CP 658-690 at 660) raised these issues and cited *Storti v. University of Washington*, 181 Wn.2d 28, 40, 330 P.3d 159 (2014) requiring identical causes of action. *Grange Insurance v. Roberts*, 179 Wn.App. 739, 751 f. 4, 320 P.3d 77 (2013). *State v. Williams*, 132 Wn.2d 248, 253-54, 937 P.2d 1052 (1997) states: “It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit” (quoting from *Ashe v. Swenson*, 397 U.S.

436, 445-446, 90 S.Ct. 1189, 1195, 25 L.Ed 469 (1970). Collateral estoppel must not be applied to work an injustice. “The question is always whether the party to be estopped has a full and fair opportunity to litigate the issue. *State Farm Mut. Auto Ins. Co v. Avery*, 114 Wn.App. 299, 304, 57 P.3d 300 (2002).” *Shandola v. Henry*, 198 Wn.App. 889, 902, 396 P.3d 395 (2017) was cited at CP 849. The Court’s order denying the motion for new trial, dated January 16, 2018 (CP 701-703) never addressed the issue of the Trust prevailing over the probate. *Storti v. University of Washington, supra*, at 40, states “most relevant here, res judicata applies only where the current and prior case involve identical causes of action.” Identical means “alike in every way”. Ch 11.11 contains 11.11.007 establishing ownership rights between testamentary beneficiaries and non probate assets. Obviously, two causes of action are needed to allow recovery of trust assets wrongfully included in probate. Wills and trusts are not the same. *C.I.R. v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948) notes that res judicata is a judicial doctrine and “the general

rule of res judicata applies to repetitious suits involving the same cause of action.” *Id.* at 597. In *In re Estate of Cordero*, 127 Wn.App. 783, 789, 113 P.3d 16 (Div.1, 2005), holds that a living trust supercedes a will and conveys the property according to the trust, not the will. *In re Estate of Furst*, 113 Wn.App. 839, 55 P.3d 664 (Div. 1, 2002) upheld a revocable living trust “But the will at issue did not purport to revoke the trust.” *Id.* at 843. The term superwill is used. See Cynthia J. Artura, *Superwill to the Rescue? How Washington’s Statute Falls Short of Being a Hero in the Field of Trust and Probate Law*, 74 Wn.L.Rev. 799 (1999). The article states “Presently, every state recognizes the inherent validity of will substitutes as a means to dispose of assets at death. While there are many different types of will substitutes, they all share a common legal characteristic -- the assets disposed of by a will substitute do not become part of the testator’s probate estate.” *Id.* at 804-5. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv.L.Rev. 1108 (1984) states: “The law of wills and the rules of descent no longer

govern succession to most of the property of most decedents.”

Id. at 1108. The findings of fact entered stated “by Order of the Court dated October 27, 2003, Donald E. Lowe’s residuary estate was to be distributed to his intestate heirs.” CP 648-654. The finding of the trial court was that “the issues presented in the instant case are identical to the issues presented in his prior lawsuit in the Estate of Betty Lowe.” (Findings attached as Appendix 3, page 10. Findings will be submitted pursuant to RAP 9.6). They were far from identical. Washington’s statutes provide for a method to settle creditor’s claims against assets passing without probate. Ch. 11.42. The statute provides for a notice agent. RCW § 11.42.010. In 2002, the Washington Principal and Income Act was enacted. It gives a trustee discretionary power to exercise discretion “even if the exercise or the power produces a different result from a result required or permitted by this chapter.” RCW § 11.104A.010(2). The enactment contained the “Business Judgment Rule,” RCW § 11.104A.030(a), denying court interference with a trustee’s discretionary act. It is the same

or similar to the liability of a corporate director. See *McCormick v. Dunn and Black*, 140 Wn.App. 673, 895, 167 P.3d 610 (2007). When normal attorney's fees are requested, RCW § 11.98.110, rejects personal trustee liability on contract if the trustee uses the title trustee. Aaron L. Lowe brought the action using the word trustee. If a tort, he must be "guilty of personal fault" when attorney's fees are requested from a trustee. RCW § 11.104A.030(e) requires a beneficiary. Here, Lonnie D. Lowe and the Trial Court never established "that the fiduciary did not exercise its discretion in good faith with honest judgment." RCW § 11.97.010, the trust provision superiority over statutes, applies to RCW § 11.104A by specific reference. The Court should have but did not examine the Declarations by Aaron Lowe and Kovacevich. Very few, if any, state of Washington cases construe Ch. 11.104A. *Vaughn v. Montague*, 924 F.Supp.2d 1256 (U.S.D.C. Wn. 2013) construes RCW § 11.97.010 and holds that the court should not "second guess" the trustee's discretion. *Id.* at 1265. In *Montague*, the court held there was no bad faith and granted the summary

judgment. *McCormick v. Dunn and Black*, *supra* at 896, also held that the issue was factual and held no breach of fiduciary duty. The application of these laws are first impression issues, including the definition of fiduciary discretion that are certainly arguable and not identical. RCW § 11.02.005(10), as amended includes an asset transferred on death by a “conveyance if possession has been postponed until death of the person, trust of which the person is grantor and that becomes irrevocable only upon the person’s death.” RCW § 11.02.005(18) defines a trustee as one who is “acting as a trustee of a trust to which Chapter 11.98 RCW applies.” The rules of descent did not apply for the reason that Donald E. Lowe’s revocable trust did not have to apply the rules of descent. It should also be noted that the gold and silver was never probated in Donald E. Lowe’s probate. The trust here is within RCW § 11.98.008 as it was a disposition clearly stating it would take effect “after I’m gone”. It also met the requirements of RCW §§ 11.98.008 and .011, as Donald E. Lowe’s handwriting references, “everything else” and “it may be necessary to sell.” RCW § 11.11.020(2) states

that a general residuary gift in a will does not convey the non probate assets to the residuary legatee under the will. There are no cases construing the last three statutes mentioned above. It is submitted to this Court that the Trial Court was wrong in applying CR 11(b) as it does not apply to “establishment of new law.” RCW § 4.84.185 awards fees if the action was frivolous. “A frivolous action is one that cannot be supported by any rational argument on the law or facts.” *Goldmark v. McKenna*, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011) denies sanctions where there is a good faith argument of statutory and constitutional argument. The Wash.Const.Art. IV, § 6, only grants jurisdiction of probates, trusts are not included. The lawsuit must be “so totally devoid of merit that there is no reasonable possibility of reversal.” *Davis v. Cox*, 183 Wn.2d 269, 292, 351 P.3d 862 (2015) (internal quotes omitted). The Court did not want to reopen Donald E. Lowe’s probate estate. It did not deny application of the trust. If the estate was reopened the trust issue would not in any event be presented. The trust avoids probate and collects the assets so

there is nothing to be included in the probate. The appeal in *Matter of Estate of Lowe*, 2 Wn.App. 2d 1017, 2018 WL 526720 (2018) repeatedly discusses reopening of the probates as res judicata. A trust is not probated; closure of a probate of a will does not affect a trust. Where an appeal presents one arguably meritorious issue, the appeal will not be considered frivolous. *Schmerer v. Darcy*, 80 Wn.App. 499, 510, 910 P.2d 498 (1996). *In re Estate of Lowe*, 191 Wn.App. 216, 361 P.3d 789 (2015), references Donald's will and probate. *Id.* at 223. The trust preempts the will. Since the trust was to contain at least half of Don's assets, they passed to Aaron L. Lowe as Trustee automatically without any probate. Therefore the probate Estate had nothing to probate. No statute of limitations applied. The Complaint sought to validate the trust and claim the assets that had been omitted by fraud. The trust theory is entirely plausible.

M. The Issue of a Holographic Trust Written Entirely in the Handwriting was First Impression. No Sanctions can be Awarded in a First Impression Case.

Jeckle v. Crotty, 120 Wn.App. 374, 85 P.3d 931 (2004) rejected sanctions under RCW § 4.84.185 “because the case presented an issue of first impression.” *Id.* at 387. *Granville Condominium Homeowners Ass’n. v. Kuehner*, 177 Wn.App. 543, 312 P.3d 702 (2013) holds that the issue was “first impression.” *Id.* at 558. Sanctions were denied for this reason. The *Jeckle* case provides a good guide for all determinations, both trial and appeal. It states:

(4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; [and] (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and is so totally devoid of merit that there was no reasonable possibility of reversal. *Id.* at 388-9.

Olson v. City of Bellevue, 93 Wn.App. 154, 968 P.2d 894 (1998) rejects CR 11 sanctions because “This is a case of first impression that presents debatable issues of substantial public importance.” *Id.* at 166. *Cary v. Allstate Insurance Company*, 78 Wn.App. 434, 897 P.2d 409 (1995) repeats the same, citing *Moorman v. Walker*, 54 Wn.App. 461, 466, 773 P.2d 887 (1989) a case also noting the “novelty” of the claim and “a growing number of law review articles” on the subject involved. If an

estate is under \$2 million, no state inheritance tax form needs to be filed. As a result, trusts that need no probate are increasing in popularity.

III. CONCLUSION

The sanctions imposed on Appellants are not supported by facts or law. The case must be reversed and removed to the Trial Court. In the event the trial court decision is changed, attorney's fees are requested. RAP 18.1.

DATED this 27th day of August, 2018.

s/ Aaron L. Lowe

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Trustee/Beneficiary
Plaintiff/Appellant
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CERTIFICATE OF SERVICE

This is to certify that on August 27, 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 27th day of August, 2018.

s/Robert E. Kovacevich
ROBERT E. KOVACEVICH
pro se

APPENDIX 1

CN: 201604010727

SN: 49

PC: 1

FILED
AUG 17 2017
Timothy W. Fitzgerald SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

Aaron L. Lowe and Donald E Lowe Estate)	CASE NO. <u>2016-04-01072-7</u>
Plaintiff(s))	
vs.)	ORDER GRANTING MOTION TO STRIKE
)	
Betty L Lowe Estate and Lonnie Lowe)	
Defendant(s))	

I. BASIS

By letter ruling dated July 11, 2017 (Clerk's Document 41, hereafter "CD") the Court provided for a presentment process and opportunity for written objection to its ruling. In addition to responding to the order as requested by the Court, plaintiffs submitted the CR 56(f) Declaration of Aaron L. Lowe. (CD 43). Defendants objected to Aaron L. Lowe's Declaration, as it was submitted after the Court's decision had been made on plaintiff's motion to dismiss/summary judgment. Defendants' moved to strike the declaration.

II. FINDINGS

The Declaration of Aaron L. Lowe was submitted too late to be considered.

III. ORDER

IT IS ORDERED THAT defendants' motion to strike the belated Declaration of Aaron L. Lowe (CD 43) is granted and the declaration is hereby stricken.

DATED this 16th day of August, 2017



 RAYMOND F. CLARY
 SUPERIOR COURT JUDGE

ORDER

Page 1 of 1

AWW

APPENDIX 2

SPOKANE COUNTY SUPERIOR COURT

RAYMOND F. CLARY
JUDGE
DEPARTMENT 3

FILED

JUL 11 2017

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SPOKANE COUNTY COURTHOUSE
1116 W. BROADWAY, SPOKANE, WASHINGTON 99260-0350
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SPOKANE COUNTY COURTHOUSE

CN: 201604010727

SN: 41

PC: 3

July 10, 2017

Greg Devlin
Attorney at Law
601 W. Riverside, Suite 1900
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Robert Kovacevich
Attorney at Law
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Spokane, Washington 99201

In Re: *Lowe v. Lowe*, No. 16-4-01072-7
Court's Letter Ruling on Defense Motion to Dismiss

Dear Counsel,

Please accept this letter as the Court's ruling on Defendant Lonnie Lowe's motion to dismiss. (Clerk's Document 25, hereafter abbreviated "CD"). For clarity, Mr. Lonnie Lowe is hereafter sometimes referred to as "Lonnie" and Mr. Aaron Lowe is hereafter sometimes referred to as "Aaron." A hearing was held on April 21, 2017. Lonnie's motion is based on claim preclusion, issue preclusion and the statutes of limitations. *Id.* He also requests sanctions and attorneys' fees based on frivolity and CR 11. *Id.*

The essence of Lonnie's theory is that Aaron's rights to silver and gold accumulated by Lonnie and Aaron's father were determined in a 2003 probate, a 2013 bench trial, and review of the trial court's decision by the court of appeals. *Compare* Complaint, (CD 2) with *In re Estate of Lowe*, 191 Wn. App. 216 (2015).

Aaron's primary theory is that the 2003 probate and the trial in *Estate of Lowe* did not probate or adjudicate whether a heartfelt handwritten letter from Aaron and Lonnie's father was in fact and in equity a trust document which should have resulted in Aaron receiving his father's accumulation of gold and silver, among other relief.

Court's Letter Ruling on Defense Motion to Dismiss
Page 1 of 3

After review of over six-hundred pages of documents,¹ this Court finds that there is no genuine issue of material fact that *In Re Estate of Lowe* supports claim preclusion and issue preclusion and therefore Defendant Lonnie Lowe's motion to dismiss must be granted. Under CR 12(c) the Court treated Lonnie's motion as one for summary judgment under CR 56, given the submission of documents outside the pleadings.

Counsel for Lonnie shall please prepare an order granting summary judgment in conformity with CR 56(h) and provide the proposed order to Counsel for Aaron. Presentment on summary judgment is set for July 28, 2017 at 9:00 a.m., without oral argument. If Counsel for Aaron takes issue with a term of the proposed order on summary judgment, he shall submit a memorandum setting out the specific issue or term, any authority supporting the objection and proposed alternate language. Upon receipt, Counsel for Lonnie Lowe may respond in a similar manner.

The Court finds that the proceedings before Judge Maryann Moreno which underlie *In re Estate of Lowe* and the decision in *Estate of Lowe* support sanctions in the form of recovery of reasonable attorneys' fees but reserves its final decision on this pending receipt of proposed findings of fact and conclusions of law and an order on CR 11 and/or frivolity. Lonnie must submit the proposed findings of fact, conclusions of law and order within 15 days from the date on which the Court enters the order on summary judgement. Aaron shall have 12 days from service and filing of the proposed CR 11 and/or frivolity findings, conclusions and order to respond. There will be no oral argument unless the Court determines it is necessary after receipt of the requested documents.

Attorneys' fees will be awarded under the lodestar method and a determination of reasonableness. *See, e.g., Mahler v. Szucs*, 135 Wn.2d 398, 433-35 (1998) (description of lodestar); *Bowers v. Transamerica Ins. Co.*, 100 Wn.2d. 581, 597 (1983) (description of reasonable fees). Counsel for Lonnie shall provide separate proposed findings of fact, conclusions of law and a proposed order for the reasonableness of the award of attorneys' fees within 15 days of receipt of Aaron's response to the proposed order for a determination of

¹ The Court reviewed over 633 pages of documents and exhibits. They included: Complaint, 13 pages - (CD 2), Defendant's Motion to Dismiss, 18 pages - (CD 25), Affidavit of Attorney Devlin, 195 pages - (CD 21), Exhibit 2: Estate of Donald Lowe, 66 pages - (CD 22), Exhibit 3: Estate of Betty Lowe, 203, pages - (CD 23), Exhibit 24: A. Lowe v. L. Lowe, 108 pages - (CD 24), Plaintiff's Response to Defendant's Motion to Dismiss, 6 pages - (CD 28), Declaration of Aaron Lowe in Opposition to Defendant's Motion to Dismiss, 6 pages - (CD 29), Declaration of Attorney Robert Kovacevich in Opposition to Defendant's Motion to Dismiss, 12 pages - (CD 30), Defendant's Reply in Support of Motion to Dismiss and Sanctions, 6 pages - (CD 31), and numerous cases.

frivolity and/or violation of CR 11. *Mahler*, 135 Wn.2d. at 435 (findings and conclusions on fees are mandatory). Aaron shall submit any response to the proposed award of reasonable attorneys' fees within 12 days of receipt of Lonnie's proposed fee award. The Court will decide the fee award without oral argument, absent a future request for oral argument by the Court.

Sincerely,


Raymond F. Clary
Judge

APPENDIX 3

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CN: 201604010727
SN: 61
PC: 16

FILED
NOV 06 2017
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

AARON L. LOWE, Trustee and Beneficiary
of the Donald E. Lowe Trust, Personal
Representative,

Plaintiff,

No. 16401072-7

vs.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
[PROPOSED]**

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

Defendant.

The parties appeared before the Court for a hearing on April 21, 2017, on Defendant's Motion to Dismiss and for Sanctions. Plaintiff was represented by Robert E. Kovacevich. Defendant was represented by Greg M. Devlin of Winston & Cashatt, Lawyers. The Court issued a letter ruling on July 11, 2017, which ruled that the Defendant's Motion would be converted to one under CR 56(f), that the Plaintiff's case would be dismissed in full and with prejudice, and that the Plaintiff's past and present litigation supported sanctions in the form of recovery of reasonable attorneys' fees, but that the Court would reserve its final decision on

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
~~[PROPOSED]~~
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AWW

1 sanctions pending receipt of proposed findings of fact and conclusions of law and an order on
2 CR 11 and/or frivolity. The Court's July 11 letter ruling is fully incorporated herein.

3 The Court entered an Order on Summary Judgment, reflecting its July 11 letter ruling,
4 which was filed August 17, 2017. The August 17 Order is fully incorporated herein. The
5 August 17 Order granted Defendant's Motion to Dismiss and for Sanctions, converted
6 Defendant's motion to one for summary judgment; dismissed Plaintiff's claims in their entirety
7 and with prejudice, and stated that the Court "will make an award of fees and sanctions in a
8 separate ruling, subject to findings of fact and conclusions of law to be submitted."
9

10 The Court now enters its findings and conclusions on sanctions and frivolity, in
11 conjunction with a separate order of this same date granting sanctions under CR 11 and RCW
12 4.84.185.
13

14 FINDINGS OF FACT

15 The Court hereby finds the following facts from the presentation of the evidence:

16 Background

17 1. Betty L. Lowe and Donald E. Lowe resided in Spokane County, Washington,
18 and were husband and wife. They were the parents of three living children, Larry Lowe, Aaron
19 Lowe, and Lonnie Lowe. They were also the parents of a now-deceased daughter, Rodonna
20 Lowe.
21

22 2. Donald Lowe collected silver and coins over the years, accumulating silver bars
23 and bags of silver coins.
24

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
[PROPOSED]
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1 3. Donald Lowe and a friend, Donald Poindexter, hid silver bars and coins in the
2 bottom of the fireplace foundation in the basement of the family home. Donald Lowe also
3 secreted the coins in various hiding places throughout the family home.

4 4. Donald Lowe's silver bars and coins have been a central focus of multiple
5 lawsuits by Aaron Lowe against his brother Lonnie.

6
7 **Estate of Donald Lowe (Spokane County Superior Court Cause No. 03-4-01223-0)**

8 5. Donald Lowe died on April 16, 2003, and a copy of his Will dated March 31,
9 1995, was admitted to probate in Spokane County Superior Court on October 27, 2003.

10 6. Aaron Lowe, Denise Lowe, and Lonnie Lowe each filed with the court a
11 Declination to Serve as Personal Representative of the Will of Donald Lowe. In addition,
12 Aaron Lowe filed an Affidavit nominating his mother, Betty Lowe, to serve as Personal
13 Representative of the Estate of Donald Lowe.

14 7. By court order, Betty Lowe was appointed as Administrator of Donald Lowe's
15 Estate to serve without bond and with nonintervention powers.

16 8. Donald Lowe's Will made specific bequests of musical instruments to his
17 children and other family members. His residuary estate was left to the "Personal
18 Representative." Donald Lowe's Will made no mention of the precious metals.

19 9. Donald Lowe's Will did not give a definitive direction as to the distribution of
20 his residuary estate. By court order dated October 27, 2003, Donald Lowe's residuary estate
21 was to be distributed to his intestate heirs in accordance with the provisions of RCW 11.04.015.
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FINDINGS OF FACT AND
CONCLUSIONS OF LAW
[PROPOSED]
PAGE 3

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1 10. Betty Lowe was the sole intestate heir of Donald Lowe's residuary estate and
2 was entitled to inherit all of Donald Lowe's property.

3 11. Probate of Donald Lowe's Will was closed on April 15, 2004 by the filing of a
4 Declaration of Completion of Probate, pursuant to the laws of intestacy, by Betty Lowe.
5

6 12. Neither Aaron Lowe nor any other person objected to or challenged the
7 Declaration of Completion of Probate within the 30-day limitations period.

8 13. Donald Lowe wrote a pre-death, undated, handwritten note to his sons regarding
9 his wishes, but it was not a testamentary document.

10 **Estate of Betty Lowe (Spokane County Superior Court Cause No. 11-4-01394-6)**

11 14. After her husband's death, Betty Lowe executed a Last Will and Testament and
12 a Durable Power of Attorney on September 15, 2003. She named Lonnie Lowe as her Personal
13 Representative and attorney-in-fact respectively.
14

15 15. Betty Lowe also executed Written Instructions for Distribution of Tangible
16 Personal Property on September 3, 2007 and September 11, 2007.

17 16. The September 11, 2007 Instructions, prepared by Betty Lowe's attorney Robert
18 Lamp, formalized the September 3, 2007 Instructions and authorized Lonnie Lowe, in part, to
19 "distribute as he shall determine or to retain for himself" the silver coins and bars.
20

21 17. Betty Lowe died testate in Spokane County, Washington, on October 1, 2011,
22 and her Last Will and Testament was admitted to probate on October 28, 2011.

23 18. Lonnie Lowe was appointed as Personal Representative of the Last Will and
24 Testament of Betty Lowe, to serve without bond and nonintervention powers.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
[PROPOSED]
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1 19. Aaron Lowe filed a Summons and a Verified Petition for Will Contest and other
2 causes of action against Respondent Lonnie Lowe, individually, and as Personal Representative
3 of the Estate of Betty Lowe, deceased on February 22, 2012.

4 20. Aaron Lowe was represented by Mr. Robert Kovacevich, and has been
5 represented by Mr. Kovacevich in all proceedings relevant to the present action since the
6 February 22, 2012 filing. As indicated by his signature and law firm logo, Mr. Kovacevich has
7 prepared and signed virtually all of the filings in each of these proceedings.

8 21. Aaron Lowe claimed that property in Donald Lowe's estate should have gone to
9 Aaron Lowe instead of Betty Lowe.

10 22. Aaron Lowe filed an Amended Petition on November 2, 2012.

11 23. Lonnie Lowe denied Petitioner's assertions in his Answer to the Amended and
12 Supplemental Petition filed January 15, 2013, and asserted certain affirmative defenses
13 including failure to state a claim, frivolousness, and violations of CR 11.

14 24. Aaron moved to file a Second Amended and Supplemental Petition on August
15 23, 2013. The Second Amended and Supplemental Petition, as well as the attendant motion for
16 leave to file and memorandum in support, were prepared and signed by Mr. Kovacevich, and
17 were not signed or verified by Aaron Lowe.

18 25. Among other things, the Second Amended and Supplemental Petition sought
19 "[a] determination to subtract assets Betty L. Lowe received from the Estate of Donald E.
20 Lowe..." and "[a] declaratory judgment listing all assets that should have been distributed to
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FINDINGS OF FACT AND
CONCLUSIONS OF LAW
[PROPOSED]
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1 Aaron L. Lowe as beneficiary of the Estate of Donald E. Lowe.” The trial court denied the
2 motion as an untimely challenge to the distribution of the Estate of Donald Lowe.

3 26. A four-day bench trial in the matter was held commencing on September 16,
4 2013, before Judge Maryann Moreno.

5 27. In its Findings and Conclusions entered May 30, 2014, the trial court found that
6 probate of Donald Lowe’s Will was closed on April 15, 2004, and concluded that there was no
7 basis in law or fact to reopen the Estate of Donald Lowe, which issue had previously been
8 denied by the Court.
9

10 28. Final judgment was entered against Aaron Lowe in this case on May 30, 2014,
11 in the amount of \$46,376.00, which represented attorney fees incurred in the matter.
12

13 **Aaron Lowe’s First Appeal in the Estate of Betty Lowe**

14 29. Aaron Lowe filed a Notice of Appeal of this decision on January 7, 2014, and an
15 Amended Notice of Appeal on September 17, 2014, which was prepared and signed by Mr.
16 Kovacevich. The appeal argued about the distribution of Donald Lowe’s Estate at length.

17 30. On November 10, 2015, the Court of Appeals issued its opinion regarding the
18 Estate of Betty Lowe matter, finding that Aaron was not entitled to any of the relief he sought.
19 In re Estate of Lowe, 191 Wn. App. 216, 361 P.3d 789 (2015). The Court of Appeals
20 specifically held that Judge Moreno properly exercised her discretion in denying Aaron’s
21 motion for leave to file his Second Amended and Supplemental Petition, in which Aaron
22 attempted to add untimely and futile claims related to the Estate of Donald Lowe.
23
24

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
[PROPOSED]
PAGE 6

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1 31. On December 8, 2015, Aaron filed a Petition for Review in the Supreme Court
2 of Washington, which was prepared and signed by Mr. Kovacevich. The Petition for Review
3 was denied on April 27, 2016, and mandate issued on June 10, 2016.
4

5 **Aaron's Second Attempt to Re-Litigate the Estate of Donald Lowe**

6 32. On September 9, 2014, while his first appeal in the Estate of Betty Lowe was
7 pending and more than a decade after his father's death, Aaron Lowe filed a petition in the
8 Estate of Donald Lowe, seeking to reopen the Estate and redistribute its assets.

9 33. On September 26, 2014, the Presiding Department of this Court entered an order
10 directing that Aaron Lowe's petition be preassigned to Judge Moreno for disposition.

11 34. Aaron Lowe filed an affidavit of prejudice against Judge Moreno on June 6,
12 2016.

13 35. Aaron Lowe filed an Amended Petition to Reopen the Estate of Donald Lowe on
14 June 16, 2016. The Amended Petition was prepared and signed by Mr. Kovacevich, and was
15 verified by Aaron Lowe. Among other theories and facts that had been litigated in the Estate of
16 Betty Lowe, the Amended Petition alleged the existence of a "trust" by Donald Lowe.
17

18 36. Aaron Lowe has let the action lie dormant for more than a year. It is apparent
19 that his reason for doing so is that the matter was preassigned to Judge Moreno, who has
20 already adjudicated the same issues raised in Aaron's Amended Petition and denied Aaron the
21 relief he again seeks.
22

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW
[PROPOSED]
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1 **Aaron Lowe's Second Appeal in the Estate of Betty Lowe**

2 37. Judge Moreno entered an order directing the disbursement of funds in the Estate
3 of Betty Lowe on June 17, 2016. A final report and petition for decree of dissolution was filed
4 in the matter on August 4, 2016.

5
6 38. On August 15, 2016, Aaron Lowe filed a Motion to Continue Final Report and
7 Petition for Distribution, which was prepared and signed by Mr. Kovacevich.

8 39. On August 26, 2016, Judge Moreno entered an order denying Aaron Lowe's
9 Motion to Continue Final Report and Petition for Distribution and approving the Final Report.

10 40. After years of litigation, a bench trial, appeals, and entry of an order directing
11 the disbursement of funds in the Betty Lowe Estate, Aaron Lowe filed an affidavit of prejudice
12 against Judge Moreno on October 4, 2016.

13
14 41. On September 16, 2016, Aaron Lowe filed a notice of appeal of Judge Moreno's
15 August 26 Order denying his motion to continue. The notice of appeal was prepared and
16 signed by Mr. Kovacevich. That appeal is currently pending before the Washington Court of
17 Appeals, Division Three.

18 **Aaron's Third Attempt to Re-Litigate Donald Lowe's Estate (Spokane County Superior**
19 **Court Cause No. 16-4-01072-7)**

20 42. Aaron Lowe filed yet another lawsuit – the instant case – claiming the existence
21 of a "trust" containing his father's assets on July 26, 2016. The Complaint of Trustee to
22 Recover Trust Assets was signed by both Aaron Lowe and Mr. Kovacevich.
23
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1 43. Lonnie Lowe filed a Motion to Dismiss and for Sanctions on February 21, 2017
2 in the matter arising out of Aaron Lowe's "trust" claim. Oral argument on the motion was
3 heard on April 21, 2017.

4 44. This Court granted Lonnie Lowe's Motion to Dismiss and for Sanctions by letter
5 ruling issued July 11, 2017. Following issuance of the letter ruling, and in response to Lonnie
6 Lowe's proposed order on summary judgment, Aaron Lowe attempted to submit an untimely
7 CR 56(f) declaration, which this Court struck.

8 45. This Court entered an order converting Lonnie Lowe's motion to one for
9 summary judgment and dismissing Aaron Lowe's claims in full and with prejudice on August
10 17, 2017. The August 17 Order further ruled that the Court "will make an award of fees and
11 sanctions in a separate ruling, subject to findings of fact and conclusions of law to be
12 submitted."

13 46. This Court's July 11 Letter Ruling and August 17 Order are fully incorporated
14 by reference herein.

15 47. Plaintiff Aaron Lowe's claims in the present action have previously been
16 litigated in Spokane County Superior Court Cause No. 11-4-01394-6 (the Estate of Betty
17 Lowe), rendering his complaint devoid of any claim upon which relief can be granted.

18 48. Aaron Lowe's claims regarding Donald Lowe's Estate, including the alleged
19 "trust," were also raised in Aaron's Amended Petition to Reopen the Estate of Donald Lowe
20 (Cause No. 03-4-01223-0), which Aaron has let lie dormant for more than a year, and Aaron's
21 multiple appeals in the Estate of Betty Lowe.
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1 49. Aaron has already had a full and fair opportunity to present his case in the Estate
2 of Betty Lowe.

3 50. Aaron was a party in the Estate of Betty Lowe. The issues presented by Aaron
4 in the instant case are identical to the issues presented in his prior lawsuit in the Estate of Betty
5 Lowe. A final judgment was entered on the merits against Aaron in the Estate of Betty Lowe.
6

7 51. Aaron Lowe's claims are barred by the doctrine of collateral estoppel. No
8 injustice will result in applying the doctrine of collateral estoppel, as it is Aaron's and his
9 counsel's frivolous actions that are causing prejudice to Lonnie Lowe.

10 52. Aaron is barred from presenting all grounds of recovery in the instant case that
11 could have been presented in the Estate of Betty Lowe, as the Estate of Betty Lowe was a suit
12 between the same parties and the same cause of action, and the Estate of Betty Lowe resulted in
13 a final judgment on the merits.
14

15 53. Aaron's claims are barred by the doctrine of res judicata.

16 54. Aaron's claims are also barred by the statute of limitations in RCW 11.68.110,
17 as Betty Lowe filed a declaration of completion in the Estate of Donald Lowe on April 15,
18 2004, and neither Aaron nor any other party objected to or otherwise sought to challenge the
19 declaration with the 30-day limitations period.
20

21 55. As Aaron Lowe's present claims are barred by collateral estoppel and res
22 judicata, Aaron's claims have no chance of success, and there exists no basis in fact or law for
23 Aaron's claims.
24

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1 Lowe), rendering his complaint devoid of any claim upon which relief can be granted. Aaron
2 Lowe's claims regarding Donald Lowe's Estate, including the alleged "trust," were also raised
3 in Aaron's Amended Petition to Reopen the Estate of Donald Lowe (Cause No. 03-4-01223-0),
4 which Aaron has let lie dormant for more than a year, and Aaron's multiple appeals in the
5 Estate of Betty Lowe.
6

7 2. Aaron has already had a full and fair opportunity to present his case in the Estate
8 of Betty Lowe.

9 3. Aaron was a party in the Estate of Betty Lowe. The issues presented by Aaron
10 in the instant case are identical to the issues presented in his prior lawsuit in the Estate of Betty
11 Lowe. A final judgment was entered on the merits against Aaron in the Estate of Betty Lowe.
12

13 4. Aaron Lowe's claims are barred by the doctrine of collateral estoppel. No
14 injustice will result in applying the doctrine of collateral estoppel, as it is Aaron's and his
15 counsel's frivolous actions that are causing prejudice to Lonnie Lowe.

16 5. Aaron is barred from presenting all grounds of recovery in the instant case that
17 could have been presented in the Estate of Betty Lowe, as the Estate of Betty Lowe was a suit
18 between the same parties and the same cause of action, and the Estate of Betty Lowe resulted in
19 a final judgment on the merits.
20

21 6. Aaron's claims are barred by the doctrine of res judicata.

22 7. Aaron's claims are also barred by the statute of limitations in RCW 11.68.110,
23 as Betty Lowe filed a declaration of completion in the Estate of Donald Lowe on April 15,
24

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1 2004, and neither Aaron nor any other party objected to or otherwise sought to challenge the
2 declaration with the 30-day limitations period.

3 8. As Aaron Lowe's present claims are barred by collateral estoppel and res
4 judicata, Aaron's claims have no chance of success, and there exists no basis in fact or law for
5 Aaron's claims.
6

7 9. This action seeks re-litigation of identical issues previously decided by a court
8 with no new rational argument based on law or fact. Under such circumstances, the action is
9 frivolous and attorneys' fees must be granted. Déjà Vu-Everett-Federal Way, Inc. v. City of
10 Federal Way, 96 Wn. App. 255, 264, 979 P.2d 464 (1999).

11 10. Aaron's claims are neither well-grounded in fact nor warranted by existing law
12 or a good-faith argument for altering existing law.

13 11. Aaron Lowe's action is frivolous and sanctions are appropriate under CR 11 and
14 RCW 4.84.185.
15

16 12. Aaron Lowe and his attorney, Robert Kovacevich, failed to conduct proper legal
17 and factual investigation prior to bringing the claims in the instant case.

18 13. Both Aaron Lowe and Mr. Kovacevich knew or should have known that Aaron
19 Lowe's claims in the instant case would be barred by collateral estoppel and res judicata.
20

21 14. Both Aaron Lowe and Mr. Kovacevich also knew or should have known that
22 Aaron Lowe's present lawsuit was brought for the improper purpose of harassing Lonnie Lowe,
23 and Mr. Kovacevich should not have prepared or signed the Complaint of Trustee to Recover
24 Trust Assets filed July 26, 2016.

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1 15. In addition to the fact that Aaron Lowe's present lawsuit is not grounded in fact
2 or law, and that both Aaron and Mr. Kovacevich failed to make a reasonable inquiry into the
3 law or facts before filing this lawsuit, Aaron's lawsuit was filed for an improper purpose -- to
4 harass and burden his brother, Lonnie Lowe.
5

6 16. As Mr. Kovacevich has aided and facilitated Aaron Lowe's frivolous filings,
7 including signing Aaron's frivolous complaint and many of the filings in the prior litigation, the
8 imposition of sanctions jointly and severally against both Aaron Lowe and Mr. Kovacevich are
9 appropriate.
10

11 17. Lonnie Lowe, individually and as Personal Representative, shall be awarded
12 reasonable attorneys' fees and costs as are authorized by Washington law.
13

DONE IN OPEN COURT this 6th day of November, 2017.



THE HON. RAYMOND E. CLARY, Judge

14
15
16 *Presented By:*



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*Approved as to Form and Content;
Notice of Presentment Waived:*

ROBERT E. KOVACEVICH, WSBA No. 2723
ROBERT E. KOVACEVICH, P.L.L.C.
Attorney for Plaintiff

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 30th day of August, 2017, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

Robert Kovacevich
Robert E. Kovacevich, P.L.L.C.
818 W. Riverside, Suite 525
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VIA REGULAR MAIL
VIA CERTIFIED MAIL
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Attorney for Estate of Betty L. Lowe


Beverly R. Briggs

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ROBERT E KOVACEVICH PLLC

August 27, 2018 - 10:53 AM

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