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No. 358445-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

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

Appellants,

vs.

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

Respondent.

AMENDED RESPONDENT'S BRIEF

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1. Introduction.

This appeal is based on the award of attorney fees against both Aaron Lowe and his attorney, Robert Kovacevich, as a sanction pursuant to CR 11 and RCW 4.84. The underlying grant of summary judgment dismissing Aaron Lowe's newest in a series of actions is before this Court on a separate appeal. The suit was dismissed based on res judicata and collateral estoppel because it was based on the same facts and claims that had been adjudicated previously, and simply "repackaged" as a "trust" claim. Here, Appellants Aaron Lowe and Bob Kovacevich argue various procedural bases to overturn the award of fees, and extensively re-argue the underlying validity of the claims, apparently to assert that their "debatable" nature precluded a finding that they were improperly or frivolously pursued. The trial court properly analyzed the record and utilized its discretion without abuse in the award of fees, and the Appellants offer this Court no basis to reverse that decision.

2. Statement of the Case.

Because a large part of Aaron Lowe and Robert Kovacevich's appeal of the sanctions awarded by the trial court are based on assertions that their underlying action was valid and should not have been dismissed, and thus could not be the basis for an award of fees for frivolity or a violation of CR 11, the underlying case history is necessary to this appeal

and will be briefly restated here, in addition to the procedural facts as to the court's determination that sanctions were appropriate.

(a) Prior actions.

Betty Lowe died testate in 2011 and her estate was probated under Cause No. 11-4-01394-6. In that same probate action, Aaron Lowe filed an action denominated "Verified Petition for a Will Contest." (CP 40-48) He was represented by Robert Kovacevich. *Id.* During the course of that case and at trial, one of Aaron's¹ primary claims revolved around property he claims his father had amassed, and which he claimed should have gone to himself instead of his mother Betty, challenging Betty's will, as well as Lonnie Lowe's duties as her personal representative. *Id.* Don Lowe had died in 2002, and his estate was distributed to Betty as his sole heir; it closed on April 15, 2004. (CP 226-227)

Prior to trial on Aaron's challenges to the distribution of Betty's estate, Aaron moved to file a second amended and supplemental petition, which more specifically alleged that the estate of Donald Lowe was erroneously distributed to Betty Lowe. (CP 71-87) The trial court denied that motion. (CP 122-123)

¹ First names of the Lowe parties are utilized to avoid confusion.

At the four day bench trial, the court heard extensive evidence surrounding the gold and silver collected by Don Lowe, as well as the letter which Aaron now claims created a "trust," and Betty's distribution of the silver and gold before her death as gifts, and in her written instructions. See, Appellants' briefs with citation to Verbatim Report of Proceedings at trial. (CP 400-402, 326-328)

Judge Maryann Moreno issued a Memorandum Opinion on December 16, 2013, and Findings and Conclusions on May 30, 2014. (CP 129-142, 165-174) The court's Findings of Fact dealt with Don Lowe's estate history, and Betty's entitlement to the inheritance of the entirety of that estate, specifically finding that Don Lowe's estate and will had been properly probated and closed, and:

13. Betty L. Lowe was the sole intestate heir of Donald E. Lowe's residuary estate and was entitled to inherit all of Donald E. Lowe's property.
14. Probate of Donald E. Lowe's will was closed on April 15, 2004.
15. Don Lowe executed a pre-death, undated, handwritten note to his sons regarding his wishes, but it was not a testamentary document.

(CP 167)

The court, as a Conclusion of Law, also found there was no basis in law or fact to reopen the estate of Don Lowe. (CP 173)

Final judgment was entered against Aaron in that case on May 30, 2014, and attorney fees in the amount of \$46,376 were awarded. (CP 175-179)

Aaron filed a Notice of Appeal of that decision on January 7, 2014, and an Amended Notice of Appeal on September 17, 2014. (CP 144-146, 183-185) On November 10, 2015, the judgment was affirmed, and this court found Aaron was not entitled to any of the relief he sought. In re Estate of Lowe, 191 Wn.App. 216, 361 P.3d 789 (2015), rev. den., 185 Wn.2d 1019 (2016) ("Lowe I").

The final report and petition for distribution of Betty's estate was filed on August 3, 2016. (CP 186-192) Aaron filed a motion to continue that hearing, again claiming status as a beneficiary and trustee of the Donald Lowe "trust" and later sought to stay the closure of the Betty Lowe estate based on repeated claims that gold and silver in the estate of Betty Lowe were the assets of Donald Lowe and subject to a "trust." (CP 203-204) Judge Moreno denied the motion to continue and entered an order approving the final report on August 26, 2016. (CP 207-208) Aaron appealed that decision. (CP 211-212) This Court again confirmed Judge Moreno, approving the final report and petition for decree of distribution in Betty's estate. See, In re Estate of Lowe, 2 Wn.App.2d 1017, rev. den., 190 Wn.2d 1024 (2018) ("Lowe II").

(b) Current action.

Aaron filed the present action claiming the existence of a "trust" containing his father's assets, which he asserted had not been adjudicated or addressed at any previous point. (CP 10-22) On February 21, 2017, Lonnie filed a motion to dismiss and for sanctions. (CP 596-613) In addition to outlining the underlying basis for dismissal on res judicata and collateral estoppel grounds, Lonnie's brief extensively analyzed the basis for CR 11 sanctions and the frivolousness of the litigation under RCW 4.84.185. Id. Aaron and his attorney Robert Kovacevich filed a response to defendant's motion to dismiss on March 16, 2017, addressing the sanctions under Rule 11 and the frivolous action under RCW 4.84.185. (Third Supp. CP 745-750)² Aaron also filed a separate response relating to the underlying substance of the motion to dismiss, basically asserting that the existence of the "trust" had never been litigated and was separate and apart from the estate matters that had been tried. (Third Supp. CP 752-767) Both Aaron and Mr. Kovacevich also filed declarations

² Respondent is filing supplemental portions of the record, and will file an amended brief with the citations to the Clerk's Papers when assigned numbers. While normally briefing would not be included, portions of Appellants' arguments are directed to notice, opportunity to be heard, procedure, and alleged abuse of the trial court's discretion, necessitating the record of pleadings to establish the propriety of the trial court record, and its review of materials in making decisions.

outlining their subjective beliefs as to the propriety of the claims and the "investigation" conducted. (CP 614-619, 620-631)

The matter was orally argued on April 21, 2017, and the trial court issued a Letter Ruling on July 11, 2017, dismissing Aaron's claims in full and with prejudice. (Second Supp. CP 711) The court determined:

Aaron's primary theory is that the 2003 probate in the trial in the 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.

(Id.)

The trial court found that Lonnie had properly established that there was "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 [for summary judgment] must be granted". (Id.)

The trial court also found that the underlying proceeding supported sanctions in the form of recovery of reasonable attorney fees, but reserved its final order pending receipt of proposed findings of fact and conclusions of law. (Id.) The trial court set a schedule for the parties to exchange and/or submit Findings and Conclusions on both the substantive dismissal and the sanction award, and indicated no further argument would be had barring future court order. (Id.)

The parties could not agree on the form of the order, and Lonnie's counsel submitted his proposed order to the court on July 24, 2017. (See Decl. of T. Whitney, Third Supp. CP 778-804) On July 28, 2017, Aaron filed a memorandum objecting to defendants' proposed order on summary judgment, which basically disputed the court's ultimate ruling on res judicata and collateral estoppel. (Third Supp. CP 752-767) At that same time, Aaron filed a declaration asking for a continuance of the summary judgment under CR 56(f), claiming he needed to conduct discovery. (CP 632-634) The trial court extended the originally scheduled presentment of the order to August 4, 2017, in order to allow Lonnie to reply to the late submitted objections. (Third Supp. CP 768)

On August 2, 2017, Lonnie replied to the objection on the order on summary judgment, and asked the court to strike the untimely CR 56(f) declaration of Aaron. (Third Supp. CP 769-777, 778-804)

On August 16, 2017, the trial court entered Lonnie's Order Re Defendants' Motion for Summary Judgment dismissing the claim, providing:

The court will make an award of fees and sanctions in a separate ruling subject to findings of fact and conclusions of law to be submitted.

(CP 635-638) On the same date, the court also entered an order striking Aaron's "CR 56(f) declaration." (Second Supp. CP 710)

As ordered by the court, Lonnie submitted Proposed Findings of Facts and Conclusions of Law, relating to the substantive issues and the award of sanctions; Aaron and Mr. Kovacevich responded, including a supplemental declaration by Mr. Kavoccevich arguing that the findings did not reference the declarations of Aaron Lowe and Robert Kovacevich filed on March 16, 2017. (CP 639-647)

Subsequently, on September 25, 2017, as ordered in the trial court's Letter Ruling of July 11, 2017, Lonnie presented proposed findings of fact and conclusions of law as to the amount and reasonableness of fees, along with the Affidavit of Greg Devlin in Support of the Request for an Award of Reasonable Attorney Fees and Costs. (Third Supp. CP 805-812)

On September 27, 2017, plaintiffs objected to that affidavit on the basis for the award of fees, and on the reasonableness of the amount. (Third Supp. CP 813-819)

On November 6, 2017, the trial court entered the findings of fact and conclusions of law, on both the substantive matters and basis for sanctions, as well as the reasonableness of fees. (Second Supp. CP 711-726; CP 648-654) Those findings included explicit determinations on the basis for sanctions, including the following:

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

57. Aaron Lowe and his attorney Robert Kovacevich failed to conduct proper legal and factual investigation prior to bringing the claims in the instant case.
58. Both Aaron and Mr. Kovacevich knew or should have known that Aaron Lowe's claims in the instant case would be barred by collateral estoppel and res judicata.
59. Both Aaron and Mr. Kovacevich also knew or should have known that Aaron Lowe's present lawsuit was brought for the improper purpose of harassing Lonnie Lowe, and Mr. Kovacevich should not have prepared or signed the complaint of trustee to recover trust assets filed July 26, 2016.
60. In addition to the fact that Aaron Lowe's present lawsuit is not grounded in fact or law, and that both Aaron and Mr. Kovacevich failed to make a reasonable inquiry into the law or facts before filing this lawsuit, Aaron's lawsuit was filed for an improper purpose – to harass and burden his brother, Lonnie Lowe.
61. Mr. Kovacevich has aided and facilitated Aaron Lowe's frivolous filings, including signing Aaron's frivolous complaint and many of the filings in the prior litigation.

(Second Supp. CP 711-726)

And the following conclusions of law:

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

9. This action seeks re-litigation of identical issues previously decided by a court with no new rational argument based on law or fact. Under such circumstances, the action is frivolous and attorney fees must be granted. Déjà Vu-Everett-Federal Way, Inc. v. City of Federal Way, 96 Wn.App. 255, 264, 979 P.2d 464 (1999).
10. Aaron's claims are neither well-grounded in fact nor warranted by existing law or a good faith argument for alternate existing law.
11. Aaron Lowe's action is frivolous and sanctions are appropriate under CR 11 and RCW 4.84.185.
12. Aaron Lowe and his attorney, Robert Kovacevich, failed to conduct proper legal and factual investigation prior to bringing the claims in the instant case.
13. Both Aaron Lowe and Mr. Kovacevich knew or should have known that Aaron's Lowe's claim in the instant case would be barred by collateral estoppel and res judicata.
14. Both Aaron Lowe and Mr. Kovacevich also knew or should have known that Aaron Lowe's present lawsuit was brought for the improper purpose of harassing Lonnie Lowe, and Mr. Kovacevich should not have prepared or signed the complaint of trustee to recover trust assets filed July 26, 2016.
15. In addition to the act that Aaron Lowe's present lawsuit is not grounded in fact or law, and that both Aaron and Mr. Kovacevich failed to make a reasonable inquiry into the law or facts before filing this lawsuit, Aaron's lawsuit was filed for an improper purpose -- to harass and burden his brother, Lonnie Lowe.

16. As Mr. Kovacevich has aided and facilitated Aaron's Lowe's frivolous filings, including signing Aaron's frivolous complaint and many of the filings in the prior litigation, the imposition of sanctions jointly and severally against both Aaron Lowe and Mr. Kovacevich are appropriate.
17. Lonnie Lowe, individually and as personal representative, shall be awarded reasonable attorney fees and costs as are authorized by Washington law.

(Id.)

On November 9, 2017, the court entered an order quantifying the reasonable attorney fees and costs, and incorporating the previous orders. (CP 655-657) On November 17, 2017, plaintiff filed a motion for a new trial pursuant to CR 59, which was in essence a motion for reconsideration on the underlying claims. (CP 658-690)

On December 29, 2017, Aaron and Robert Kovacevich filed a Motion for Evidentiary Hearing, which asked for the depositions of opposing counsel, and appeared to challenge the genesis of the Court's order striking Aaron's declaration seeking a continuance, which he filed after the court had ruled on the motion to dismiss. (CP 691-694) That motion was withdrawn by the Appellants on January 4, 2018. (Third Supp. CP 820-824)

On January 16, 2018, the trial court entered an order denying the motion for new trial reconsideration, and contemporaneously entered a judgment on the attorney fees. (Third Supp. CP 825-827; CP 695-697)

This appeal followed, asserting that the underlying claims were not barred by collateral estoppel or res judicata and should not have been dismissed, and/or were at least “debatable”, thus precluding any award of fees. Aaron and his counsel argue that the trial court failed to follow the necessary procedural requirements, failed to review or rejected the appropriate evidence, and that they had made all reasonable inquiry, and properly investigated the law and facts, precluding an award of fees. Procedurally, the court gave all process which was due, properly exercised its discretion in entering findings and conclusions which support the award of fees and the judgment entered, and no basis for reversal exists.

3. Law.

While the arguments are often intermingled throughout the brief, the Appellants' primarily assert that the "trust" action was separable, and that the trial court incorrectly ruled that res judicata and collateral estoppel applied, and thus also incorrectly ruled that their action was without basis in law or fact, or was frivolous.

In addition, the Appellants assert that the trial court procedurally erred because it did not conduct the appropriate inquiry under CR 11,

failed to review the evidence they submitted to defeat CR 11, Appellants were not given adequate notice or hearing as to the CR 11 sanctions, and that the sanctions constituted improper "fee shifting."

Neither the underlying substance nor the procedural posture of this case establish any error by the trial court. An attorney may be subject to CR 11 sanctions if: (1) the action is not well grounded in fact, (2) it is not warranted by existing law, and (3) the attorney signing the pleading has failed to conduct a reasonable inquiry into the factual or legal basis of the action. Doe v. Spokane & Inland Empire Blood Bank, 55 Wash.App. 106, 780 P.2d 853 (1989). Rule 11 sanctions are appropriate if reasonable inquiry would reveal that the party's position is "untenable". Kearney v. Kearney, 95 Wash.App. 405, 417, 974 P.2d 872 (1999). A court may also impose Rule 11 sanctions for findings that are interposed for an improper purpose. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 217, 829 P.2d 1099 (1992).

The decision to award attorney fees as a sanction is left to the discretion of the trial court, and the court's decision will not be disturbed absent a showing of abuse of discretion. Lockhart v. Greive, 66 Wn.App. 735, 743–44, 834 P.2d 64, 69 (1992).

Similarly, RCW 4.84.185 provides that:

...[i]n any civil action, the court...may, upon written findings...that the action...was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense....

The determination of frivolity pursuant to RCW 4.84.185 is also left to the court's discretion; the court must find the action to be frivolous as a "whole" to award fees. Biggs v. Vail, 119 Wn.2d 129, 137, 830 P.2d 350 (1992). The record here establishes that the trial court properly exercised its discretion to award sanctions.

3.1 No "debatable" issue of law or fact existed to preclude sanctions.

Many of the Appellants' assignments of error, issues, and interspersed arguments, are that this "trust" action was separate and different from any probate matters, had not been adjudicated below, and thus, not only was the dismissal on res judicata grounds improper, any finding of sanctions for pursuing it was improper because it at least presented "debatable" issues. The substance of the dismissal on res judicata grounds is the subject of, and has been briefed in the simultaneous appeal; just as there, none of the authorities cited as to trusts and probates establish that this action was not previously pursued, or that there were "debatable" issues which legally or factually supported yet another lawsuit.

Instead, all of the issues were and are aimed at the single "nucleus" of facts and claims, i.e. that the handwritten letter by Don Lowe should have been utilized to find that the assets which passed to Betty in the course of the distribution of his estate in 2003, and then distributed by Betty either during her lifetime or via the probate of her estate after her death in 2011, should have gone to Aaron and his brothers.

However, those facts and claims had previously been litigated; specific findings were made that the letter was not a testamentary instrument, that no basis existed to open Don's estate or retract the distribution of assets to Betty, that Lonnie did not improperly obtain assets belonging to Don by gift from Betty, and that Betty's estate properly distributed the assets. (Second Supp. CP 711-726 All of these underlying facts and findings would of necessity have to be reversed and unwound to litigate the alleged existence of a "trust," which underscores the reality that these issues of law and fact have been firmly and finally litigated, rendering this suit frivolous and without support in fact or law.

As this Court has already ruled in "Lowe II," supra, claims which are of a single transactional nucleus of facts, that were or "should have been" litigated, are subject to application of issue and claim preclusion despite differing titles, theories, or captions. When a court finds that a new lawsuit was clearly barred by the concepts of collateral estoppel and

res judicata, attorneys fees are properly awarded under CR 11, since the action was not supported by any rational argument based on law and fact. Déjà Vu-Everett-Federal Way v. City of Federal Way, 96 Wn.App. 255, 979 P.2d 464 (1999).

Appellants have not, and cannot, establish that denominating the handwritten letter a trust automatically renders the elements of issue and claim preclusion "debatable", or of "first impression". Appellants' citation to authorities, which generally address the differing natures of trusts and probate matters, are unrelated to the analysis of res judicata and collateral estoppel as it applies to the very specific circumstances with which the trial court was presented here. No reasonable minds have differed on the application of issue and claim preclusion to this action; this Court has already found it "obvious" that the matters here shared sufficient identity to preclude relitigation. Lowe II, 2018 WL 52670 at *4 [quoting Hadley v. Cowan, 60 Wn.App. 433, 442-43, 804 P.2d 1271 (1991)]. A reasonable attorney would have understood the identity of issues, factors, and matters and it was not error for the court to not only dismiss the action, but exercise its discretion to award sanctions.

And contrary to Appellants' assertion that In re Estate of Heater, 547 P.2d 636 (Or. 1976) "applies" to establish the debatable nature of the claims pursued here, the cases cited were neither factually nor legally

similar, and this Court in "Lowe II" did not create some uncertainty in Washington law as applied to these facts. In re Heater found that a petition to remove a personal representative did not foreclose a challenge to the final accounting in the same probate. This is not the basis on which the trial court dismissed **this** action and found it frivolous. Heater and the other out-of-state cases do not establish that the trial court abused its discretion in finding this action without basis.

3.2 The award does not constitute "fee-shifting".

The propriety of a sanctions award will be reversed only on a trial court's abuse of discretion; it is within the trial court's discretion to determine whether the filing of successive actions are an abuse of the judicial system. See, In re Marriage of Rich, 80 Wn.App. 252, 907 P.2d 1234 (1996). The trial court here did not use sanctions as a "fee-shifting" device, but properly found the subject suit was being pursued improperly as yet another end-run around previous trial and appellate court rulings; successive or simultaneous proceedings are not to be utilized as an "additional procedural avenue down which a disgruntled litigant can march if he or she is dissatisfied with the trial court's disposition." Id. at 258. The sanctions award here was made against both party and counsel, and not as a "prevailing party" fee shift.

3.3 The trial court properly conducted the analysis on the award of sanctions, and Appellants were not denied appropriate process.

The trial court made the necessary and explicit findings that the Appellants' action had no basis in law and fact, which Appellants knew or should have known; that objectively reasonable inquiry would have disclosed that; and that the action was pursued for an improper purpose. There is neither a substantive or procedural basis to find an abuse of the court's discretion in those findings.

(a) The trial court was not required to accept objective declarations as to the inquiry.

CR 11 requires an attorney to make an "objectively" reasonable inquiry onto the facts or law supporting a case before filing a lawsuit. Watson v. Maier, 64 Wn.App. 889, 897, 827 P.2d 311 (1992). This means the court must inquire whether a reasonable attorney in like circumstances would believe his or her actions are factually and legally justified. In re Cooke, 93 Wn.App. 526, 529, 969 P.2d 127 (1999). See also, Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (2015) (courts must employ an objective standard, tested by what was reasonable to believe at the time the pleading was submitted).

Appellants have no basis to assert that the trial court "never reviewed" the declarations they submitted to determine if review was

reasonable. Such declarations were part of the record, and were submitted in opposition to Lonnie's Motion to Dismiss for Sanctions. (CP 614-631) The Appellants in reality appear to argue that their subjective statements that they adequately researched the basis for the new lawsuit and did not bring it for an improper purpose should have been accepted at face value. The trial court, however, was charged with making a determination based on an "objective" standard, as to what a "reasonable" person would do in like circumstances; the court did not abuse its discretion in finding that with the history of this litigation, the subsequent "trust" action was not reasonably analyzed, and was pursued for improper purpose, and on the whole frivolous.

Appellants declaration that they believed it was appropriate to further litigate the issue of the handwritten letter by now calling it a "trust", after multiple determinations that Don Lowe's assets properly passed to Betty Lowe, and that Betty Lowe had properly used and distributed those assets in her lifetime and upon her death, and that Lonnie had properly probated her estate, lacks all "reasonable person" analysis. Any reasonable lawyer would have understood that the claim and remedy sought had previously been litigated and rejected multiple times, and the protestations by counsel of good faith could not overcome the reasonable standard. The trial court did not abuse its discretion in finding the pattern

of litigation and appeal was objectively meritless and interposed for an improper purpose, irrespective of the Appellants subjective protestations otherwise.

(b) Appellants were not entitled to an evidentiary hearing to establish the basis for sanctions.

In determining sanctions under Rule 11, a party or counsel is not entitled to discovery or an evidentiary hearing, even though there may be factual determinations made. Watson, 64 Wn.App. at 899-900. As noted in that case:

The major goal of CR 11 is to rid the court of meritless litigation and thereby reduce the growing cost and attendant burden of civil litigation. It would be counter productive if the rule itself were to cause an increase in unnecessary litigation by mandating extensive collateral procedures as a pre-requisite for CR 11 sanctions...for this reason, satellite litigation is to be avoided.

Id. at 899.

The trial court here had no need of additional inquiry; it had before it all of the parties' previous pleadings, and the declarations and briefing of Appellants; they were not denied due process simply because the court did not hear "live" testimony on their subjective beliefs that they were entitled to continue to pursue this litigation.³ Such testimony would not have

³ Although unclear, any suggestion by Appellants that a different judge had to rule on sanctions is unsupported by any legal theory.

established the "objective" reasonable person standard which the court was bound to utilize.

Moreover, the Appellants incorrectly claim a "Motion for Evidentiary Hearing" was denied. (Appellants' Brief, p. 17) This apparently references a motion to conduct discovery as to who prepared and presented an Order striking a "CR 56(f) Declaration" of Aaron. (CP 691-694) This is unrelated to the court's duty of inquiry to determine the basis for CR 11 sanctions, or any request for "live" testimony as to sanctionable conduct. And, and in fact, this unrelated motion was voluntarily withdrawn by the Appellants. (Third's Supp. CP 820-824)

(c) The parties had notice of the request for sanctions.

The Appellants inexplicably argue that counsel had insufficient notice of the potential for the imposition of CR 11 sanctions. (Appellants' Brief, pp. 26-27) Lonnie's motion to dismiss was filed on February 21, 2017,⁴ and requested the court "impose sanctions in the form of attorney's fees against both the plaintiff and his counsel pursuant to CR 11 and RCW 4.84.185." (CP 596) Unlike the federal rule, there is no "safe harbor" requirement in Washington which requires notice **before** filing or

⁴ This motion was brought as promptly as possible after suit was filed on July 26, 2016; because affidavits of prejudice were filed, and there was a docket switch in Spokane County Superior Court, a judge was not assigned until January 13, 2017.

hearing a motion for sanctions. See, Fed.R.Civ.P. 11(c). Instead, in Washington, the purpose is to insure due process, and notice is sufficient when sanctions are requested by motion and the non-moving party is given the opportunity to respond and be heard. See, Bryant v. Joseph Tree, Inc., 119 Wn.2d at 224 (1992) (CR 11 procedures must "comport with due process"; notice of Rule 11 sanctions request prior to oral argument afforded the offending party the opportunity to be heard).

While a court may consider whether a party was given informal notice before a motion, in order to allow them to entirely avoid the offending conduct, here, the offending conduct was filing the meritless suit, and Lonnie would have had no advance notice in order to warn the Appellants their conduct was sanctionable. And the entire underlying rationale for notice would be so that the party could choose to dismiss the case - - Appellants have not dismissed and instead have appealed the dismissal. Any additional informal notice prior to motion would have served no purpose here.

(d) No "separate" allocation proceeding had to occur.

Contrary to Appellants' claim, and in fact as noted by the case cited by Appellants, In re Wixon, 190 Wn.App. 719, 728-729, 360 P.3d 960 (2015), courts may order that parties and their attorneys are jointly and severally liable for sanctions. Both Mr. Kovacevich and Aaron Lowe

were afforded the same due process opportunity to be heard as to sanctions, and under the circumstances here, the conduct which engendered the sanction was the successive filing of a barred suit; no allocation between issues or basis for sanctions needed to be made.⁵

(e) Rejection of 56(f) declaration.

Lonnie's motion to dismiss and for sanctions was filed on February 21, 2017. (CP 596-613) In its Letter Ruling, the trial court found that sanctions were appropriate, reserving final decision pending submission of the appropriately explicit findings and conclusions, and noting no further argument would be had. The trial court also set up the procedural process to determine the lodestar amount of fees. (Second Supp. CP 707-709) The court similarly found no further oral argument would be had as to the amount of fees awarded unless requested by the court. (Id.)

Over two weeks after this ruling, Aaron filed a "CR 56(f) Declaration of Aaron Lowe" (CP 632-634) apparently requesting discovery on the underlying facts of a case in which the trial court had already considered briefing, heard oral argument, and dismissed with

⁵ The allocation circumstances addressed in Orwick v. Fox, 65 Wn.App. 71, 828 P.2d 12 (1992) (Appellants' Brief, p. 28) are inapplicable here; the court there addressed allocation of fees awarded for a frivolous appeal as between two appellants with differing issues. Appellants' attorneys were found jointly and severally liable with the clients.

sanctions, pending only the form of the orders. Lonnie objected to the late and repetitive objection, and asked the court to strike the declaration because it did not comport with Rule 56(f) and because the motion had already been ruled upon. (Third Supp. CP 769-804)

The trial court entered the Order in the form proposed by Lonnie on August 17, 2017, dismissing this case with prejudice. (CP 635-638) At the same time, the court entered its own order granting the motion to strike the CR 56(f) declaration as untimely. (Second Supp. CP 710)⁶

A CR 56(f) motion for a continuance to conduct discovery is one which can be made in response to a motion for summary judgment; it requires that the party indicate what evidence would be established, why there was delay in obtaining the evidence, and that the new evidence would establish a genuine issue of fact. Winston v. Dept. of Corrections, 130 Wn.App. 61, 65, 121 P.3d 1201 (2005). The trial court's rejection of a CR 56(f) motion is reviewed only for an abuse of the trial court's discretion. Id.

⁶ While Appellants continue to argue it is a "mystery" of who drafted the order on the motion to strike, it is unclear why that is at issue. It was also a basis on which the Appellants filed a motion to conduct discovery as to who drafted the order, which was withdrawn after receipt of a letter from Lonnie's counsel. (Third Supp. CP 820-824) Again, it is unclear what the import of this is; the court has the authority to sua sponte strike matters as appropriate, and was not required to provide additional argument or motion practice after the motion to dismiss had been determined. See, CR 12(f).

Here, the CR 56(f) declaration was filed **after** the Appellants' response on the motion to dismiss and for sanctions, and after oral argument. Moreover, it failed to meet the requirements to show what evidence would have been obtained to alter the substantive ruling, or the ruling on sanctions. Appellants' entire argument is not one of fact, but of law; they assert that by simply calling the letter from Don a "trust," and suing as beneficiary, precluded dismissal on a claim or issue of preclusion. Appellants made that argument and it was rejected; additional discovery was unnecessary to either the substance or the sanction decision, and the trial court did not abuse its discretion in striking it.

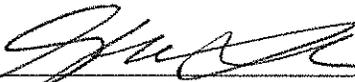
3.4 Appellants are entitled to attorney fees on appeal.

For the same reasons that the Appellants were sanctioned below, this appeal similarly presents no debatable issues and is devoid of merit, and Lonnie Lowe requests fees pursuant to RAP 18.9(a). An individual does not have an absolute and unlimited constitutional right of access to the judicial system. Yurtis v. Phipps, 143 Wn.App. 680, 683, 181 P.3d 849 (2008) (attorney fees on appeal awarded after successive suits and appeals, barred by collateral estoppel and res judicata).

4. Conclusion.

For the foregoing reasons, Lonnie Lowe requests that the court affirm the trial court's award and judgment of attorney fees, and grant an award of attorney fees on appeal.

DATED this 29th day of November, 2018.



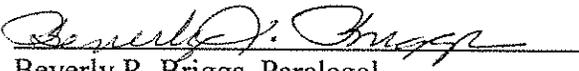
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CERTIFICATE OF SERVICE

This is to certify that on November 29, 2018, the Amended Respondent's Brief, was served on Pro Se Appellants via the Washington State Appellate Court's Secure Portal Electronic Filing system.


Beverly R. Briggs, Paralegal

WINSTON & CASHATT, LAWYERS

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