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Division III  
State of Washington  
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**Court of Appeals for the  
STATE OF WASHINGTON  
Division III**

**Division III Case No. 371638**

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**Nancy Olson, Respondent**

**v.**

**George (“Eric”) Olson, Appellant  
(and Craig A. Mason, as to CR 11 sanction)**

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**OPENING BRIEF OF APPELLANT**

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<b>TABLE OF CONTENTS</b>	<b>Page</b>
<b>Table of Authorities</b>	<b>iii</b>
<b>I. INTRODUCTION</b>	<b>1</b>
<b>II. ASSIGNMENTS OF ERROR</b>	<b>2</b>
<b>Assignment of Error and Issue No. 1:</b>	<b>2</b>
Did the trial court abuse its discretion when it sanctioned Eric Olson for asking the court to revisit the use of funds in his case?	
<b>Answer:</b> Yes, the court abused its discretion as the wrong legal standard was applied (error of law), there was no substantial evidence to support the sanction, and the decision was manifestly unreasonable. (Specific exceptions to findings/lack of findings will be in the Argument section of the brief for these three issues on appeal.)	
<b>Assignment of Error and Issue No. 2:</b>	<b>3</b>
Did the trial court abuse its discretion when it sanctioned Eric Olson’s attorney (Craig A. Mason) for allowing Eric Olson to ask the court to revisit the use of funds in his case?	
<b>Answer:</b> Yes, the court abused its discretion as the wrong legal standard was applied (error of law), there was no substantial evidence to support the sanction, and the decision was manifestly unreasonable.	
<b>Assignment of Error and Issue No. 3:</b>	<b>3</b>
Did the trial court abuse its discretion when it found Eric Olson in Contempt of the Court’s Automatic Temporary Restraining Order for moving funds to preserve them for distribution by the court as Nancy was dissipating the funds?	
<b>Answer:</b> Yes, the trial court abused its discretion as the wrong legal standard was applied (error of law), as there was no substantial evidence to support the finding of contempt (and attorney fee award), and as the decision was manifestly unreasonable, for, among other reasons, that in the same oral contract raised by Eric, and rejected by the court, was inconsistently accepted by the court to allow Nancy Olson to claim an oral promise allowing her to actually dissipate the funds, while Eric simply changed accounts to preserve the funds, spending none of the funds.	

<b>TABLE OF CONTENTS, cont.</b>	<b>Page</b>
<i>NOTE on Final Decree and Eric's Declarations:</i>	4
It is also valuable to note that the final decree was agreed by Nancy on the same terms that Eric consistently stated was their original agreement.	
<i>NOTE on Names:</i>	4
First names are used for ease of reference.	
<b>III. STATEMENT OF THE CASE</b>	<b>4</b>
<b>A. Overview of Motions, Decisions and Orders</b>	<b>4</b>
<b>B. Identification of the VRPs in the Clerk's Papers</b>	<b>6</b>
<b>IV. ARGUMENT</b>	<b>6</b>
<b>A. Standard of Review: Abuse of Discretion to Find CR 11 Violations</b>	<b>6</b>
<b>1. Attorney Fee Award is Reviewed De Novo</b>	<b>9</b>
<b>2. CR 11 Sanctions are Not to Chill Representation</b>	<b>10</b>
<b>3. Contempt Sanctions Are Also Reviewed for Abuse of Discretion</b>	<b>10</b>
<b>4. Contempt Findings Require a Finding of Bad Faith with the Order at Issue Strictly Construed in Favor of the Alleged Contemnor</b>	<b>11</b>
<b>B. Argument That CR 11 Sanctions Were Issued in Error</b>	<b>13</b>
<b>1. Findings of Revision Judge are Under Review</b>	<b>13</b>
<b>2. 6/20/19 Motion for Use of Funds</b>	<b>14</b>
<b>3. Trial Court's Ruling of 6/20/19 for CR 11 Purposes</b>	<b>20</b>
<b>4. 8/29/19 Hearing and Eric's Motion to Revisit the Use of Funds</b>	<b>22</b>
<b>5. Court's Rulings and Findings on 8/29/19 (Order filed 8/31/19)</b>	<b>26</b>
<b>6. Court's Written Order of 11/15/19 on CR 11 Sanctions</b>	<b>31</b>
<b>7. Conclusion and Relief Requested</b>	<b>32</b>
<b>C. Argument That Contempt Finding Against Eric Was Erroneous</b>	<b>33</b>
<b>D. Chilling Effect of the CR 11 Sanction</b>	<b>36</b>
<b>V. CONCLUSION</b>	<b>37</b>

**TABLE OF AUTHORITIES****Page****Court Rules:**CR 11 2, 5-14, 20-21, 26, 30-32, 36-37 and *en passim***State Cases:**

<i>Alwood v. Aukeen Dist. Court</i> , 94 Wash. App. 396, 973 P.2d 12 (1999)	29, 31
<i>Berryman v. Metcalf</i> , 177 Wash. App. 644, 312 P.3d 745 (2013)	32
<i>Biggs v. Vail</i> , 124 Wash. 2d 193, 876 P.2d 448 (1994)	6-8
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wash.2d 210, 829 P.2d 1099 (1992)	7-10, 37
<i>Chaffee v. Keller Rohrback LLP</i> , 200 Wash. App. 66, 401 P.3d 418 (2017)	29-31
<i>Eller v. E. Sprague Motors &amp; R.V.'s, Inc.</i> , 159 Wash. App. 180, 244 P.3d 447 (2010)	8
<i>Graves v. Duerden</i> , 51 Wash. App. 642, 754 P.2d 1027 (1988)	13, 35
<i>Grieco v. Wilson</i> , 144 Wash. App. 865, 184 P.3d 668, 674 (2008), <i>aff'd sub nom. In re Custody of E.A.T.W.</i> , 168 Wash. 2d 335, 227 P.3d 1284 (2010).	13-14
<i>Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.</i> , 143 Wash. App. 345, 177 P.3d 755 (2008)	9
<i>In re Marriage of Dodd</i> , 120 Wash.App. 638, 86 P.3d 801 (2004)	13
<i>In re Marriage of Hooper &amp; Zduniak</i> , 158 Wash. App. 1052 (2010)	12, 35
<i>In re Marriage of Humphreys</i> , 79 Wash. App. 596, 903 P.2d 1012 (1995)	11, 35

<b><u>TABLE OF AUTHORITIES cont.,</u></b>	<b><u>Page</u></b>
<i>In re Marriage of James</i> , 79 Wash.App. 436, 903 P.2d 470 (1995)	10-11
<i>In re Marriage of Moody</i> , 137 Wash.2d 979, 976 P.2d 1240 (1999)	13
<i>Johnston v. Beneficial Management Corp. of Am.</i> , 96 Wash.2d 708, 638 P.2d 1201 (1982)	11-12
<i>Just Dirt, Inc. v. Knight Excavating, Inc.</i> , 138 Wash.App. 409, 157 P.3d 431 (2007)	8
<i>Kunath v. City of Seattle</i> , 444 P.3d 1235, 1250 (Wash. Ct. App. 2019), as amended on denial of reconsideration (Aug. 7, 2019), review denied, 195 Wash. 2d 1013, 460 P.3d 183 (2020)	9
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wash.2d 677, 132 P.3d 115 (2006)	8
<i>Rogerson Hiller Corp. v. Port of Port Angeles</i> , 96 Wash.App. 918, 982 P.2d 131 (1999)	12
<i>Schuster v. Schuster</i> , 90 Wash.2d 626, 630, 585 P.2d 130 (1978)	11
<i>State v. Caffrey</i> , 70 Wash.2d 120, 422 P.2d 307 (1966)	11
<i>State v. Hazeltine</i> , 82 Wash. 81, 143 P. 436, 439 (1914)	36
<i>State v. International Typographical Union</i> , 57 Wn.2d 151, 356 P.2d 6 (1960)	12-13
<i>State ex rel. J.V.G. v. Van Guilders</i> , 137 Wash.App. 417, 154 P.3d 243 (2007)	13
<i>Tyler v. Grange Ins. Ass'n</i> , 3 Wash. App. 167, 473 P.2d 193 (1970)	12, 25
<i>Washburn v. Beatt Equip. Co.</i> , 120 Wash. 2d 246, 840 P.2d 860 (1992)	29-31

**TABLE OF AUTHORITIES cont.,** **Page**

*Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 858 P.2d 1054 (1993) **7-8**

*Williams v. Williams*, 156 Wash. App. 22, 232 P.3d 573 (2010) **10-11**

**Federal Cases:**

*International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967) **12**

*Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir.1990) **10**

## I. INTRODUCTION

In this dissolution case, George Eric Olson (hereinafter "Eric") declared that he and Nancy Olson had come to an agreement in which she received the fully paid-off, and new, home in Post Falls worth over \$500,000, and he would receive \$200,000 in cash to use for his own new home, and then other cash from the sale of their prior home would be divided. Nancy hired an attorney who revoked this agreement, and then Eric hired counsel, as well. However, the case ultimately resolved on the very same terms Eric described in his early motions for temporary orders, and final documents were entered on the very same terms Eric swore had been the pre-filing agreement.

As noted above, after procuring representation to file the divorce, Nancy's attorney (Paul Mack) repudiated this deal. Eric also procured representation (Craig Mason), at which point Eric brought a temporary order motion for use of the funds (\$200,000 of \$250,000 in his possession) without prejudice to the final distribution in the decree.

Also, as Nancy was beginning to dissipate the other residual funds from the \$800,000 sale of their prior home, Eric moved his other \$50,000 to a separate account (but never spent any of either fund). Eric was later held in contempt for moving the funds to protect them from dissipation, and that contempt is on appeal.

Eric's motion to use the \$200,000 to procure his own housing per the agreement he alleged (and upon which terms the final decree was entered) was denied by the commissioner and on revision. On revision on 6/20/19, the trial judge opined that had other information been available the court – for example plans for a home, and/or promises of security for the funds – the court might have decided differently.

In response to the court's 6/20/19 ruling, Eric proposed that new information and made a motion to revisit the use of the funds, for which he and his attorney (Mr. Mason) were sanctioned under CR 11 on 8/29/19. Those CR 11 sanctions are under appeal.

Nancy later fired her attorney (Mr. Mack) and concluded the divorce, pro se, with Mr. Mason, on the terms alleged by Eric Olson at the outset of the dissolution.

The contempt and the CR 11 sanctions were timely appealed.

## **II. ASSIGNMENTS OF ERROR**

**Assignment of Error and Issue No. 1:** Did the trial court abuse its discretion when it sanctioned Eric Olson for asking the court to revisit the use of funds in his case?

**Answer:** Yes, the court abused its discretion as the wrong legal standard was applied (error of law), there was no substantial evidence to support the sanction, and the decision was manifestly unreasonable.

(Specific exceptions to findings/lack of findings will be in the Argument section of the brief for these three issues on appeal.)

**Assignment of Error and Issue No. 2:** Did the trial court abuse its discretion when it sanctioned Eric Olson's attorney (Craig A. Mason) for allowing Eric Olson to ask the court to revisit the use of funds in his case?

**Answer:** Yes, the court abused its discretion as the wrong legal standard was applied (error of law), there was no substantial evidence to support the sanction, and the decision was manifestly unreasonable.

**Assignment of Error and Issue No. 3:** Did the trial court abuse its discretion when it found Eric Olson in Contempt of the Court's Automatic Temporary Restraining Order for moving funds to preserve them for distribution by the court as Nancy was dissipating the funds?

**Answer:** Yes, the trial court abused its discretion as the wrong legal standard was applied (error of law), as there was no substantial evidence to support the finding of contempt (and attorney fee award), and as the decision was manifestly unreasonable, for, among other reasons, that in the same oral contract raised by Eric, and rejected by the court, was inconsistently accepted by the court to allow Nancy Olson to claim an oral promise allowing her to actually dissipate the funds, while Eric simply changed accounts to preserve the funds, spending none of the funds.

*NOTE on Final Decree and Eric's Declarations:* It is also valuable to note that the final decree was agreed by Nancy on the same terms that Eric consistently stated was their original agreement.

*NOTE on Names:* First names are used for ease of reference.

### **III. STATEMENT OF THE CASE**

#### **A. Overview of Motions, Decisions and Orders**

Nancy filed her Petition for Dissolution on 1/15/19. CP:4-8. Per usual, the automatic temporary restraining order issued upon filing. CP:9-11.

Eric brought his first motion for the use of funds on 4/12/19. CP:17-20. The commissioner denied the motion on 5/15/19. CP:113-14.

Eric moved to revise the commissioner's ruling on 5/20/19. CP:116-21. Revision was denied on 6/20/19. CP:162. The transcript of the 6/20/19 denial of revision is at CP:172-93.

Eric moved the court to revisit the use of funds issue on 7/12/19 (CP:205), based upon his understanding of the transcript of 6/20/19 (CP:172-93). The commissioner denied this motion on 7/31/19. CP:516-17. It was at this hearing that Eric was also found in contempt for moving \$50,000 into another account, as a violation of the automatic temporary restraining order. *Id.*

Eric brought a contempt motion on 6/20/19, for Nancy spending \$25,789.00 of the funds at issue, given her position taken in the hearings on Eric's first motion for use of funds. CP:164-69, esp.CP:165. Nancy then filed her motion for contempt for Eric moving \$50,000 from one account to another, even though none of the funds were spent by Eric. CP:388-89.

Eric's motion for contempt was denied, and Nancy's was granted. CP:516-17. (As indicated, Eric's motion to revisit the use of funds was also denied.) Attorneys fees on the contempt were subject to fee affidavit, and Nancy's CR 11 motion was reserved. Id.

Eric brought a motion to revise. CP:540-45. Revision was denied on 8/29/19, and CR 11 sanctions were granted. CP:581-82.

The appeal of the contempt and CR 11 sanctions were timely filed, and Division III confirmed the matters were appealable by the Division III commissioner's ruling of 1/16/20.

Paul Mack withdrew from representing Nancy on 1/17/20, effective 1/15/20 [not an error, as it was signed by Mr. Mack on 1/16/20]. CP:737-38.

Eric and Nancy finalized their divorce on 1/22/20. CP:748-51 (Decree) and CP:743-47 (FFCL).

The divorce was finalized on the terms that Eric Olson indicated in his first motion for use of funds that had been the pre-filing and pre-attorney agreement of the parties. Compare Decree and FFCL to CP:17-20 & CP:68-73.

The orders on fee awards are at CP:635-37 on contempt and at CP:730-31 on CR 11 sanctions.

#### **B. Identification of the VRPs in the Clerk's Papers**

The Clerk's Papers list four Verbatim Reports of Proceedings, without identifying them. Here they are specified:

VRP filed 6/02/19 at CP:128-48: *First Hearing on Use of Funds, 5/15/19.*

VRP filed 7/10/19 at CP:172-93: *Revision Hearing of 6/20/19.*

VRP filed 8/23/19 at CP:550-580: *Motion to Revisit Use of Funds, Contempt, and CR 11 Sanctions of 7/31/19.*

VRP filed 9/16/19 at CP:600-31: *Revision of Motion to Revisit Use of Funds, Contempt, and CR 11 Sanctions of 8/31/19.*

#### **IV. ARGUMENT**

##### **A. Standard of Review: Abuse of Discretion to Find CR 11 Violations**

The *Biggs v. Vail* case presents a succinct summary of the abuse of discretion standard of review in the context of CR 11 (italics in the original, underlining added):

Before beginning an analysis of the specific issues raised by the parties, it will be helpful to review the contours of CR 11.

CR 11 requires attorneys to date and sign all pleadings, motions and legal memoranda. Such signature constitutes the attorney's certification that:

to the best of the ... attorney's knowledge, information, and belief, formed after reasonable inquiry it [the pleading, motion or memoranda] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

CR 11. 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. *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 218–19, 829 P.2d 1099 (1992). If it appears that CR 11 has been violated, “the court, upon motion or upon its own initiative, shall impose upon the person ... an appropriate sanction”<sup>1</sup> which *may* include reasonable attorney fees and expenses. Former CR 11.

The standard of appellate review for such sanctions is the abuse of discretion standard. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338–39, 858 P.2d 1054 (1993). In deciding whether the trial court abused its discretion, we must keep in mind that “[t]he purpose behind CR 11 is to deter *baseless* filings and to curb abuses of the judicial system”. *Bryant*, 119 Wash.2d at 219, 829 P.2d 1099. CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings. *Bryant*, at 220, 829 P.2d 1099. 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”. *Bryant*, at 220, 829 P.2d 1099. In deciding upon a sanction, the trial court should impose the least severe sanction necessary to carry out the purpose of the rule. *Bryant*, at 225, 829 P.2d 1099. CR 11 sanctions are not appropriate where other court rules more specifically apply. *Fisons*, 122 Wash.2d at 339–40,

858 P.2d 1054.

*Biggs v. Vail*, 124 Wash. 2d 193, 196–97, 876 P.2d 448, 450–51 (1994).

Failing to win a motion on the merits does not mean the motion was frivolous or that the motion had no basis in law or fact, as the court summarized in *Eller v. E. Sprague Motors & R.V.'s, Inc.* (emphasis added):

If a party violates CR 11, the court may impose an appropriate sanction, which may include reasonable attorney fees and expenses. CR 11(a); *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wash.App. 409, 417, 157 P.3d 431 (2007). The fact that a party's action fails on the merits is by no means dispositive of the question of CR 11 sanctions. *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 220, 829 P.2d 1099 (1992). The court applies an objective standard to determine “whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.” *Id.*; *Biggs v. Vail*, 124 Wash.2d 193, 197, 876 P.2d 448 (1994) (*Biggs II*).

*Eller v. E. Sprague Motors & R.V.'s, Inc.*, 159 Wash. App. 180, 190, 244 P.3d 447, 452 (2010). The *Eller* court added that a misapplication of the law is also an abuse of discretion:

To the extent the trial court misapplied the law, we may conclude that it abused its discretion. *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006).

*Eller v. E. Sprague Motors & R.V.'s, Inc.*, 159 Wash. App. 180, 191, 244 P.3d 447, 452 (2010).

Even a legally inaccurate claim does not subject one to CR 11:

We review a decision to impose or deny CR 11 sanctions for abuse of discretion.<sup>140</sup> The purpose behind CR 11 is to deter

baseless filings and to curb abuses of the judicial system.<sup>141</sup> A filing “must lack a legal or factual basis before it can become the proper subject of CR 11 sanctions.”<sup>142</sup> And even then, an attorney cannot be sanctioned unless they also failed to conduct a reasonable inquiry into the factual and legal basis of the claim.<sup>143</sup> EOI’s argument before the trial court about the title of SSB 4313 may have been incorrect,<sup>144</sup> but making a legally inaccurate argument does not, without more, expose an attorney to sanctions under CR 11.<sup>145</sup> Kunath fails to show the court abused its discretion.

*Kunath v. City of Seattle*, 444 P.3d 1235, 1250 (Wash. Ct. App. 2019), *as amended on denial of reconsideration* (Aug. 7, 2019), *review denied*, 195 Wash. 2d 1013, 460 P.3d 183 (2020).

### **1. Attorney Fee Award is Reviewed De Novo**

The decision to find a CR 11 violation is reviewed for an abuse of discretion, but the decision to award attorney’s fees is reviewed de novo, again from *Kunath*: “We review a decision to award or deny attorney fees de novo.” *Kunath v. City of Seattle*, 444 P.3d at 1250, *supra*, citing *Harmony at Madrona Park Owners Ass’n v. Madison Harmony Dev., Inc.*, which stated:

Whether a party is entitled to attorney fees is an issue of law, which we review de novo.<sup>29</sup> We review whether the amount of a fee award is reasonable for abuse of discretion.<sup>30</sup>

*Harmony at Madrona Park Owners Ass’n v. Madison Harmony Dev., Inc.*, 143 Wash. App. 345, 363, 177 P.3d 755, 764 (2008).

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## **2. CR 11 Sanctions are Not to Chill Representation**

As the court said of CR 11 sanctions in *Bryant v. Joseph Tree, Inc.*, the court must be careful to avoid chilling effects of CR 11 sanctions:

However, the rule [CR 11] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 199. The Ninth Circuit has observed that:

Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.

*Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363–64 (9th Cir.1990). Our interpretation of CR 11 thus requires consideration of both CR 11's purpose of deterring baseless 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 Wash. 2d 210, 219, 829 P.2d 1099, 1104 (1992).

## **3. Contempt Sanctions Are Also Reviewed for Abuse of Discretion**

The abuse of discretion standard also applies to contempt orders:

We review a trial court's decision in a contempt proceeding for an abuse of discretion. *In re Marriage of James*, 79 Wash.App. 436, 440, 903 P.2d 470 (1995). A court abuses its discretion by exercising it on untenable grounds or for untenable reasons. *Id.*

*Williams v. Williams*, 156 Wash. App. 22, 27, 232 P.3d 573, 575 (2010).

#### **4. Contempt Findings Require a Finding of Bad Faith with the Order at Issue Strictly Construed in Favor of the Alleged Contemnor**

A contempt finding requires that there be a bad faith violation of a clear order strictly construed in favor of the alleged contemnor:

Contempt of court is defined in part as intentional disobedience of a lawful court order. RCW 7.21.010(1). “Punishment for contempt of court is within the sound discretion of the judge so ruling. Unless there is an abuse of a trial court's exercise of discretion, it will not be disturbed on appeal.” *Schuster v. Schuster*, 90 Wash.2d 626, 630, 585 P.2d 130 (1978) (quoting *State v. Caffrey*, 70 Wash.2d 120, 122–23, 422 P.2d 307 (1966)). In the context of a dissolution order, there must be evidence the parent's failure to comply with an order was in bad faith. RCW 26.09.160(2). In determining whether the facts support a finding of contempt, the court must strictly construe the order alleged to have been violated, and the facts must constitute a plain violation of the order. *Johnston v. Beneficial Management Corp. of Am.*, 96 Wash.2d 708, 713–14, 638 P.2d 1201 (1982).

*In re Marriage of Humphreys*, 79 Wash. App. 596, 599, 903 P.2d 1012, 1013 (1995). And see:

A parent seeking a contempt order to compel another parent to comply with a parenting plan must establish the contemnor's bad faith by a preponderance of the evidence. *James*, 79 Wash.App. at 442, 903 P.2d 470. In a contempt case the trial court balances competing documentary evidence, resolves conflicts, weighs credibility, and ultimately makes determinations regarding bad faith. *Rideout*, 150 Wash.2d at 350–51, 77 P.3d 1174. We review the court's findings to determine whether they were supported by substantial evidence in the record. *Id.* at 352, 77 P.3d 1174.

*Williams v. Williams*, 156 Wash. App. 22, 28, 232 P.3d 573, 575 (2010).

Bad faith requires some miscreant or prejudicial motive:

Bad faith means “[d]ishonesty of belief or purpose.” Black’s Law Dictionary 159 (9th ed.2009). Bad faith occurs when a party intentionally brings a claim with an improper motive or purpose. *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wash.App. 918, 929, 982 P.2d 131 (1999).

*In re Marriage of Hooper & Zduniak*, 158 Wash. App. 1052 (2010).

When courts speak of liability for bad faith or the duty to use good faith, they are usually referring to the same obligation. Generally speaking in the context of these cases, good faith means being faithful to one’s duty or obligation; bad faith means being recreant thereto.

*Tyler v. Grange Ins. Ass’n*, 3 Wash. App. 167, 173, 473 P.2d 193, 197

(1970). As part of strict construction of orders, the purpose of the order should be considered, as well (underlining added):

Washington courts have consistently applied a “strict construction” rule for interpretation of judicial decrees, violation of which provides the basis for contempt proceedings:

In contempt proceedings, an order will not be expanded by implication beyond the meaning of its terms when read in light of the issues and the purposes for which the suit was brought. The facts found must constitute a plain violation of the order. *State v. International Typographical Union*, 57 Wn.2d 151, 158, 356 P.2d 6 (1960); 17 C.J.S. *Contempt* § 12 (1963).

*Johnston v. Beneficial Management Corp.*, 96 Wash.2d 708, 712–13, 638 P.2d 1201 (1982).

The purpose for this rule is to protect persons from contempt proceedings based on violation of judicial decrees that are unclear or ambiguous, or that fail to explain precisely what must be done. See *International Longshoremen’s Ass’n v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967) (“unintelligible” decree “defie[d] comprehension”); *State v. International Typographical Union*, 57 Wash.2d 151, 356 P.2d 6 (1960) (act complained of not specifically prohibited by

decree).

*Graves v. Duerden*, 51 Wash. App. 642, 647–48, 754 P.2d 1027, 1030 (1988).

Based upon the foregoing standards, the contempt and CR 11 sanctions at issue on appeal should be reversed as erroneous.

### **B. Argument That CR 11 Sanctions Were Issued in Error**

Eric has not appealed the orders denying him the use of funds to gain housing for himself. Eric is appealing the CR 11 sanctions levied upon him (and his attorney) for asking the court to revisit the issue of the use of funds, upon supplying new information he believed the court said would lead it to further consider his motion.

#### **1. Findings of Revision Judge are Under Review**

In both the contempt and the CR 11, the revision judge (Judge Timothy Fennessy) made his own findings, and his findings are at issue:

On revision of a commissioner's decision, the superior court reviews the findings of fact and conclusions of law *de novo*. *In re Marriage of Moody*, 137 Wash.2d 979, 993, 976 P.2d 1240 (1999). If the superior court simply denies the motion to revise the commissioner's findings or conclusions, we have held that the court then adopts the commissioner's findings, conclusions, and rulings as its own. *State ex rel. J.V.G. v. Van Guilder*, 137 Wash.App. 417, 423, 154 P.3d 243 (2007). But when the court makes independent findings and conclusions, the court's revision order then supersedes the commissioner's decision. *In re Marriage of Dodd*, 120 Wash.App. 638, 644, 86 P.3d 801 (2004).

*Grieco v. Wilson*, 144 Wash. App. 865, 877, 184 P.3d 668, 674 (2008), *aff'd sub nom. In re Custody of E.A.T.W.*, 168 Wash. 2d 335, 227 P.3d 1284 (2010).

The provisional Order of 8/31/19 (CP:581-82) incorporated its oral findings in the Order, denied revision of the contempt, and granted CR 11 sanctions, with the magnitude of the sanction to be determined on both matters.

The full written order on contempt was entered on 9/25/19 at CP:635-37.

The order of 11/14/20 (CP:730-31) finalized the CR 11 Sanction Ruling, sanctioning Eric Olson \$2500 in attorney's fees, and sanctioning Mr. Mason \$1000 in attorney's fees.

Other than the written findings in the orders listed above (CP:635-37 & 730-31), the majority of the judge's findings are in the oral rulings in the transcript of 8/29/19 at CP:600-631. (The order was filed 8/31/19.)

## **2. 6/20/19 Motion for Use of Funds**

When Eric Olson asked the court's permission to use the \$200,000, he asserted that Nancy had agreed that he could use the funds for his own home, and in reliance upon this pre-filing promise, Eric had left Nancy in possession of the new \$500,000 home in Post Falls. These facts can be

seen in Eric's Motion for a Temporary Order (CP:17-20) in Section 6,

where Eric states the following, on the Use of the Family Home:

I have left my wife with the family home on the following conditions agreed between us: (a) Of the \$800,000 that we received from the closing of the sale of the family home at 3915 S. Long Lane, Greenacres, WA, (b) we used \$500,000 to purchase a home at Post Falls that I have left in her possession, and (c) I did that in reliance upon her promise that I would use at least a residual \$200,000 to make a significant down payment on a home for me to purchase or to build. (d) After I retain my \$200,000 for that purpose, that leaves about \$100,000 of which we used to pay \$25,000 on community bills, and she could take \$25,000 for landscaping and a fence, and that would leave me another \$50,000. (e) Nancy keeps telling me that she intends to keep this promise on which I relied; however (f) her attorney asked my attorney to keep the \$200,000 in trust. (g) That would leave me homeless and without the benefit of the bargain on which I relied.

In Section 7, on Use of Property, he wrote:

No request at this time, other than the request to use the \$200,000 to get a house for myself started.

In Section 15, the declaration section of the motion, Eric wrote:

We both have sufficient monthly income to live on; however, I need a home, and so I am seeking the court's permission to use the \$200,000 in my possession for that purpose.

I have left my wife with the family home on the following conditions agreed between us: (a) Of the \$800,000 that we received from the closing of the sale of the family home at 3915 S. Long Lane, Greenacres, WA, (b) we used \$500,000 to purchase a home at Post Falls that I have left in her possession, and (c) I did that in reliance upon her promise that I would use at least a residual \$200,000 to make a significant down payment on a home for me to purchase or to build. (d) After I retain my \$200,000 for that purpose, that leaves about \$100,000 of which we used to pay \$25,000 on community bills, and she could take

\$25,000 for landscaping and a fence, and that would leave me another \$50,000. (e) Nancy keeps telling me that she intends to keep this promise on which I relied; however (f) her attorney asked my attorney to keep the \$200,000 in trust. (g) That would leave me homeless and without the benefit of the bargain on which I relied. (h) Today, 4/12/19, Nancy again reiterated to me that I am free to use the \$200,000 for a house.

4/12/19 Reiteration of promise and reliance: Nancy reiterated her promise by phone today at 11 a.m. I also went to the Kootenai County Assessors Office for Nancy and filed the Affidavit of Owner-Occupied residence for the \$100K homeowner exemption, as Nancy requested of me.

If somehow Nancy now wants to breach her promises, and wants to take more of our resources in the final dissolution, there are other items of value from which distribution may be made, and putting the money into a home is not a wasting of assets. The \$200,000 is what it is at this point, and any battle over tracing the funds, or if they are community or separate, can still be done, and my getting a roof over my head does not prevent that result, nor prejudice Nancy in any way.

I ask the court to allow me to proceed to invest the \$200,000 in a home, reserving other issues.

CP:17-20.

In his Reply Declaration of 5/10/19 (CP:68-73) Eric added the following more exact information (exhibits omitted):

1. Here follows the background of my agreement with Nancy that left her with the \$480,098.00 Post Falls home (purchased in March, 2019), while I was to have \$200,000 of the money left over from selling our Greenacres home (for \$800,000) to get my own new home going.

1.1 We were also intending to split the remainder of the Greenacres sale monies – that is \$783,000 minus \$480,000 = \$303,000, and then minus \$200,000 for my house = \$103,000 remaining.

1.2 We then used about \$28,000 to pay bills and for Nancy to upgrade appliances and make other upgrades in the Post Falls home, which Nancy now retains.

1.3 There was \$75,000 remaining that we agreed to split (\$37,500 each).

1.4 Nancy has already acted in further reliance upon this agreement, since she, *after the automatic order issued*, has taken over \$25,000 of her \$37,500. (see sealed source)

1.5 I am asking to continue with our agreement, upon which I relied, and from which Nancy has benefitted, and upon which Nancy has continued to act to her benefit, to get my own home.

1.6 The funds will be placed into an appreciating and lien-able asset – a house in a rising real estate market.

Home History Background:

2. Before Nancy and I married, I sold my separate home for \$125,000 net in late 2003 or early 2004. (We married on 4/27/04.) I also sold a Liberty Lake lot that I had owned before marriage upon which I hoped to build a home, and I sold it for about a \$30,000 gain. I put that combined separate property (\$148,151.00) into the purchase of a lot upon which Nancy and I built a home that ended up costing a total of \$847,115.49.

**Exhibit A** (sealed source) is a true and accurate copy of the costs for building the home at 41 N. Legend Tree Lane, Liberty Lake, the “Liberty Lake house.”

2.1 At the bottom of page 1 of **Exhibit A** is the lot I provided our subsequent building of the home, with the payments for its construction running from 6/1/05 through 3/17/06 in **Exhibit A**.

3. Starting in 2006, while our \$847,115.49 Liberty Lake house was being built, Nancy and I also bought a small valley home in which to live and we invested in upgrading it, and sold it two years later for about a \$10,000 net gain.

4. Nancy starting wanting a farm with a barn, etc. for horses, and after we looked at a house with acreage and another 40 acres for sale adjoining it, near the Rockford/Mica area. We bought just that adjoining 40 acre parcel for \$130,000. Nancy abandoned that idea, and so we sold those 40 acres at a \$15,000 loss.

5. Next, Nancy had found a home in Greenacres with 10 acres, a large barn with an indoor arena, and an area for horses. We sold the Liberty Lake home at least a \$247,115.49 loss (\$847,115.49 v. \$620,000.00 sale price on 2/4/11, not counting other improvements to the Liberty Lake house). See **Exhibit B** (sealed source), which is a true and accurate account of the settlement statement of 2/4/11.

6. On 2/4/11, we paid \$639,000.00 for the home at 3915 S. Long Rd. Greenacres, WA (“the Greenacres home”). See sealed source **Exhibit C**, which is a true and accurate copy of the 2/4/11 settlement statement for the purchase of the Greenacres home.

7. In addition to the \$639,000, we also invested at least another \$112,000. For instance: \$32,000 was my inheritance that was used for an attached garage. Improving the driveway and front of the garage was \$15,000, a bathroom remodel was \$45,000, and there were another \$20,000 in kitchen upgrades, plus work on the barn and other upgrades.

8. In 2018, I told Nancy: “I am 67, and I want to transition away from the big animals by the time I am 70.” Nancy decided that we should “do it now.”

9. In the fall of 2018, after we had a buyer for the Greenacres house, we selected a home that was nearly complete at 3479 North Shelburne Loop, Post Falls, ID, and we contracted for the home. Nancy requested upgrades (see **Exhibit E**).

10. The Greenacres home (3915 S. Long Rd.) sold for a total of \$800,000, but of that sale price, after transaction costs the net of \$753,577.40. Then there was another \$30,000 in equipment that was also purchased by the buyer, such as a John Deere tractor, Gator, flatbed trailer, mower and related attachments, etc.

**Exhibit D** is a true and accurate copy of the sale of the Greenacres home. The \$783,577.40 paid to us was after transaction costs. However, it should be noted that I was the realtor on the seller’s side and I waived my 3 percent commission, or \$24,050.00, and so in that sense, that was another community contribution of my labor. And then, as was noted, above, \$30,000 was added to that for equipment that was purchased by the home buyers from us.

11. **Exhibit E** shows the ultimate purchase of the Post Falls home, for which we contracted in the fall of 2018, and paid \$480,098.

11.1 After purchasing the Post Falls home at 3479 North Shelburne Loop, Post Falls, and after the the sale of the Greenacres home, we had \$303,000 left over, as shown on page 1.

12. About six weeks before the Post Falls home was finished, Nancy filed for divorce and asked me to move out.

13. As we were discussing matters, Nancy said to me, "Because this is a community property state, you own ½ of the \$800,000 from the Liberty Lake house."

14. Nancy wanted to keep the Post Falls home, and so that I would have a home, I said, "You can have the [Post Falls] house if I can keep the \$200,000 to get started [on a house for myself]. Of course, the Post Falls home was fully paid off, and had no mortgage. Nancy agreed. I relied upon this promise when I moved out.

15. We were also roughly splitting the other \$75,000 left over from the \$303,000 in cash after the sale of the Greenacres house. As was previously indicated about \$28,000 went to pay off of bills and for additional post-purchase upgrades of the Post Falls house in which Nancy now lives.

16. So, I expected to have \$200,000 to begin building my own home, and an additional \$37,500 from the sale of the Greenacres home. I reiterate that Nancy has already taken over \$25,000 that is either (a) in reliance upon our agreement (as I believe), or (b) in contempt of the automatic temporary restraining order. I think she should be bound to my reliance upon our agreement, and be bound to her acting in reliance upon the agreement, and Nancy should be bound as she has benefitted from our agreement.

17. This is reasonable as a contract upon which I relied, when giving up my housing, and it is reasonable that I put money into a rising market and not lose out on appreciation and not face rising costs. It is in all our interests that I get the money into a rising market.

18. I realize that this is not a trial, but even a temporary order should be just and equitable. Looking at Exhibit F, a true and accurate filing of my Nationwide retirement account, it is clear that my balance went from \$209,699 on 11/30/2011 to \$54,124 on 3/31/2017. (The current balance is \$60,542 on 5/2/2019.) That is \$159,000 invested into the purchases of this marriage, and other funds will be shown at trial.

19. Allowing me to use the \$200,000 to continue with the plans I have made, and contracts I have ready to sign, is requested.

20. It is not like the money will vanish or be lost. It will be invested in an appreciating asset. I will be harmed if I am locked out of this rising market that rose 14 percent last year.

21. If somehow Nancy ends up with an interest in my new home, she can lien that appreciating asset. If the court awards me more

property, and, for example, allows me to lien Nancy's Post Falls' home, to make a just and equitable final distribution, it is in Nancy's interest that I make this investment now and appreciate the value of the assets, and improve my own final condition at divorce, which will save her money in the end. The best interests of all parties, and of equitable justice, are served by allowing me to proceed with my planned contracts and purchases.

22. I deny using Nancy's money in any way. I think those are the words of litigation strategy, and not of accurate history, and perhaps not from Nancy herself.

23. I made over \$100,000 per year working for the Fire Department. I also did real estate and made from a low of \$3,000 to a high of \$30,000 per year. I have shown that I contributed \$159,000 of my retirement funds to our life (and I believe I will eventually show more contributions). And I worked very hard, physically, so that Nancy could have the life with horses that she desired. Caring for large animals is very demanding, and I did that, and moved to the kind of home in which Nancy wanted to live, all to contribute to, and support, her preferred way of life.

24. I ask the court to allow me to proceed with my plans to buy a home so that I do not waste money on interim housing while the market appreciates, nor have to make pension withdrawals and suffer tax consequences when that money could be preserved, and could be an alternate asset to guarantee collection of whatever Nancy hopes to gain in the dissolution.

CP:68-73. Nancy denied any agreement in her Response. CP:45-47.

As was noted in the Statement of the Case, the commissioner denied the motion and revision was heard on 6/20/19. The VRP is 21 pages at CP:172-93.

### **3. Trial Court's Ruling of 6/20/19 for CR 11 Purposes**

At the 6/20/19 revision, the court interrupted counsel with questions, but made no real findings until the court began to rule on CP:189-92.

The court defined the issue as one of *enforcing a promise*: “I think this is really a question of whether or not the Court is enforcing under its equitable power an alleged promise...” CP:190.

The court ruled: “...presently the Court doesn’t feel it has enough information about the size of the estate or ultimate distribution of the estate that justify ordering a \$200,000 investment.” Id. The court added, “...he’s made plans. I don’t know what those plans are...”

The court also said: “And if Mr. Olson wants to offer some sort of guarantee, that’s maybe a different kettle of fish.” CP:188.

Mr. Mack acknowledged the court had altered the basis of the decision at CP:191, but was happy with the result of denying revision.

For purposes of Eric’s subsequent motion (for which he was sanctioned under CR 11) *he understood the decision to be one to enforce a promise and not a free-standing request for temporary use of funds*. In other words, Eric felt free to re-formulate the motion as one of temporary use of funds, and to add plans, additional information and to offer guarantees.

In other words, *Eric understood the court to be saying that if he presented “plans,” a further description of his intended use of the funds, and “guarantees,” that he had yet another basis to return to the court.*

The 6/20/19 written order denying revision had incorporated the oral record as the basis of the findings, and the court's main basis articulated was that it lacked information. It was reasonable for Eric to believe that he could return to court with more information, especially if he specifically addressed the issues raised by the court.

#### **4. 8/29/19 Hearing and Eric's Motion to Revisit the Use of Funds**

Eric filed a Motion to Revisit the Use of Funds on 7/12/19. CP:205. And Eric filed a Declaration in Support of his motion at CP:194-201, including Exhibits at CP:202-04.

Eric attempted to be responsive to the full range of the court's ruling on 6/20/19 at CP:197-201:

1. I have previously traced how Nancy and I sold our home for a net of 783,000 and how Nancy received the \$480,098.00 Post Falls (new and paid off) home, how we used the other funds, and how I was promised \$200,000 to begin to build my own home, and how we used the other \$103,000 to pay bills, leaving about \$73,000 that we agreed to split.

2. When the court commissioner first denied my motion, I felt that my motion was not fully understood, and the slanders against me at oral argument went far beyond the few false allegations Nancy made in her declaration. The outrageous statements intensified at oral argument on Revision on 6/20/19. (The commissioner's ruling was on 5/15/19.) In this declaration, I intend to rebut some of those impediments to a decision to allow me to have a home of my own.

3. The court's statements, and my counsel's clarifications, on 6/20/19, also point the way to a more favorable response to my request, and I will follow those in this motion and declaration.

4. *Clarification of the Motion – The Court's Power to Characterize and to Distribute Property at Trial is Not at Issue:*

The VRP of 6/20/19 was filed on 7/8/19, and at page 14, Mr. Mason clarified that my understanding of the agreement between Nancy and me was not meant to pre-judge characterization of the property, nor to pre-judge final distribution. And therefore, even if the court did not find that my detrimental reliance and Nancy's behavior in conformity with the agreement that I describe should be equitably enforced as an agreement, it could still be understood as an equitable use of pre-distribution, and pre-characterization, funds under temporary orders. In other words, I have presented the agreement as an "agreed temporary order" (as Mr. Mason clarified), but the court could also proceed with this simply as a temporary order request. Nothing in allowing my use of the \$200,000 prejudices the court's final power to characterize and distribute. The court, on 6/20/19, noted that it could force Nancy to sell the Post Falls Home (at p.7, lines 2-3), and so could it treat Eric equally, and allow him a home that he might later be forced to liquidate. It is equitable to treat the parties equally, and allow each to have a home (on the terms Eric expected and relief), even with the possibility of subsequently requiring liquidation.

5. *My House Plans*: The cost quote for the home I intended to build with my son is submitted as **Exhibit A**, which is a true and accurate copy of a home we intended to share. The price is \$558,983.00. Not only did I rely upon my agreement with Nancy, but my son and the builder relied upon that agreement. Even if the agreement is not found, I ask that I be allowed as a matter of temporary order to make a similar investment to Nancy's, and have a stable home as Nancy does. Although my house plans were not doubted by Nancy in her declaration, skepticism was raised in oral argument and by the court on page 9, esp. lines 12-17. **Exhibit A** is an answer to that concern (as are my sets of 24x36 inch plans that I am seeking to legibly reduce for submission to the court. Again on p.19, lines 16-17, of the 6/20/19, the court wanted more details about the home in which the \$200,000 at issue would be invested. The court said, "I don't know what those plans are...." The plans are being submitted.

6. *Other Security*: I am submitting in **Sealed Source "Exhibit B"** a \$137,000 *457 Frontline deferred compensation* (61k) and *Franklin-Templeton retirement fund* (76k) that I would be happy to offer as security against any final distribution. This was

offered to the court on 6/20/19 on p. 18, lines 1-8, but the court indicated that because it had not been before the commissioner that the trial judge should not consider it. (p. 18, lines 9-16) Therefore, this motion to revisit the matter now brings that option to the court commissioner, per the trial judge's indication.

7. Gross Mis-Representations to the Court Corrected:

"Trust for his grandkids" (p.13, line 12, VRP of 6/20/19): In Sealed Source "Exhibit C" I am submitting the one and only fund I have for my grandchildren; that is a college fund of **\$7,232.19, TOTAL**. The breathless oratory of Mr. Mack sounds as if I have pilfered tens of thousands, or even hundreds of thousands of dollars, to benefit my grandkids. I contribute \$100 per month for each grandchild – hence the \$200.00 per month deposit shown in Exhibit C. This "black hole" allegation of Nancy's counsel is intentionally misleading to the court. There is very little money in that college fund ("trust fund"), slowly accumulated. And recall I made about \$130,000 per year all this time, and so my ongoing contributions to Nancy's lifestyle were substantial.

\$10,000 in Firearms (p. 13, line 11, VPR of 6/20/19): I have been a trap-shooter all my life, and I do have a couple of expensive guns. They are not only a small fraction of the cost of Nancy's horses, they are a sliver of the cost of a horse trailer, or a vehicle to haul the trailer. Again, the implication of breathless scandal was profoundly misleading.

Nancy's Capacities and Consent to the Agreement: Nancy did repeat the agreement to me, and not because I "pounded" on her. I believe the circumstantial evidence is very clear. Nancy made the temporary order deal with me, and then her counsel advised her to breach it. She felt bad, and again reiterated the deal to me, and now her counsel has taken over repudiation of the deal. I still believe that my submitted authorities on oral agreements, reliance, estoppel, etc., should enforce this temporary order contract as formulated, and as Nancy has acted in terms of it. However, I also request this relief simply as a temporary order request, as well.

Nancy's Capacities Continued – vigorous and spent funds herself all the time: Nancy is a very vigorous woman. A false impression was given to the court that I "controlled" Nancy's money. I am submitting under Sealed Source (2018 bank statements) just *some* of Nancy's spending (at her volition,

uncontrolled by me) from our *joint account*. Nancy also spent funds from separate accounts to which I had no access. I did take over paying bills three years ago, but in no way was Nancy excluded from funds.

*Nancy's Capacities Continued – Kamitomo is a Litigator, not a doctor:* There is no substantial evidence in the record that Nancy has any disability. She drove vehicles, rode horses, and directed her life for years after the 1997 “care plan” that was submitted, and Mr. Kamitomo is a personal friend of Nancy. Nancy has always had to have “the best,” and so she has spent large amounts of money, and my funds have been drawn down substantially in support of Nancy’s preferred lifestyle. (See Sealed Source Templeton Funds.) In Sealed Source you can see true and accurate copies of my contributions, for example in the 4/25/16 fund, I withdrew \$37,000 from my Nationwide account, with \$24,000 going to the Rockford property Nancy wanted, and then did not want (and we sold) and \$13,000 went into one of our joint accounts. Nancy is capable, and she was not in any way controlled by me, regarding finances or anything else. Mr. Kamitomo is submitted a “double-decker” of litigation along with Mr. Mack, but the impression is false.

8. My prior declarations are incorporated, and they state how I have foregone realtor fees in our transactions, and I have shown my many other contributions from my own substantial salary.

9. *Equity and Tax Consequences:* If I were to withdraw my \$137,000 from *Frontline deferred compensation* (61k) and *Franklin-Templeton retirement fund* (76k) my marginal tax rate would be 25%. That is prohibitive, and keeps me from being able to build my home with my son. I need to be able to use the \$200,000, per this request, to procure housing for myself.

10. *Nancy's “Go Slow” on Discovery:* After Nancy had my requests for discovery for 30 days, Mr. Mack responded to the discovery inquiry by stating that he would need at least another 90 days. **Exhibit D** is a true and accurate copy.

11. *Additional Request:* Nancy wants to keep the RV and its debt, and want her to keep the RV and its debt, and so I would ask that we transfer that, now, to improve my income to debt ratio.

12. *Conclusion and Relief Requested:* Nancy’s home could be liquidated, as the court said, for distribution, so could any interest I have in a home. Or, I could invest without tax consequences,

and then borrow against the asset to make any post-trial pay-out. I should be able to have the same home-security that Nancy achieved when she made our agreement. Again, even if the court is not enforcing the agreement, it is an equitable temporary order. I am happy to secure those funds with the home I will build with my son and with my \$137,000 in my two retirement accounts (See Exhibit B in Sealed Source). The current situation is not defensible, now that the factual and procedural posture have been clarified in the 6/20/19 hearing, and through the presentation of these facts.

13. I ask the court for an order that we will be free to transfer the R.V. and to allow me to invest the \$200,000 in a new home with my son, with funds secured by my \$137,000 in retirement accounts.

CP:197-201.

In response, Nancy brought her motion to strike and for CR 11 sanctions, with declarations of Nancy and Mr. Mack. CP: 392-403. Eric argued that the motion for sanction was itself frivolous. CP:491-97.

#### **5. Court's Rulings and Findings on 8/29/19 (Order filed 8/31/19)**

The transcript of the 8/29/19 hearing is at CP:600-631. Again, the trial judge's rulings and findings were extensive and superseded the commissioner's order, even though revision was denied, the court made its own findings, and reserved issues were addressed by the trial court upon which the commissioner had not ruled. For example, CR 11 had been fully reserved by the commissioner on 7/31/19, and so that finding is entirely the trial court's original ruling without being a revision.

Mr. Mason presented that the 6/20/19 transcript showed that Eric's first motion for the use of funds might have been misunderstood, and how the 6/20/19 hearing with the trial judge had allowed Eric to sharpen the issues in the motion to revisit. CP:604.

The 8/29/19 trial court jumped in to revisit the agreement issue from the 6/20/19 hearing. CP:605-06. The contempt was also discussed through these pages in that Eric will argue (below) that either there is an agreement, or there is not, and it would be unfair for the court to allow Nancy to further take benefits from the alleged agreement, while denying Eric any benefits from that agreement. Id.

Then Eric was given whiplash by the court. As cited above, on 6/20/19 the court used as a basis of its denial of the first motion that Eric had not provided any "plans." At CP:190, on 6/20/19, the court had said: "...he's made plans. I don't know what those plans are..."

Despite the court's ruling on 6/20/19 that it wanted plans before it as necessary information, then the court on 8/29/19 used the existence of those plans against Eric (implying that it proved contempt, even though the court said it wanted plans before it on 6/20/19). CP:608.

Eric had also offered the security of his retirement account on 8/29/19, based upon the court's ruling on 6/20/19, at which the trial court had said: "And if Mr. Olson wants to offer some sort of guarantee, that's

maybe a different kettle of fish.” CP:188. This statement by the court was an independent basis for a motion to revisit the use of funds for Eric to get himself a home.

Next, without any evidence or declaration to this effect by Nancy, the court accused Eric of simply wanting the money for an investment, and not a home. CP:608. The court ignored Eric’s declarations in support of both motions that Nancy got a \$500,000 home with no mortgage, and without the use of funds Eric was unable to have his own home. The only evidence in the court file was that Eric wanted to purchase a shared home with his son as preparation for Eric’s old age.

The court proceeded to construe Eric making plans for a home with his son as contemptuous, when Eric was simply responding to the court’s basis for its ruling of 6/20/19. Again, it bears repeating, the court denied Eric’s first motion on 6/20/19, in part, because: “...he’s made plans. I don’t know what those plans are...” CP:190. Eric spend not a dime of the money at issue. Planning is not doing.

There is no sanctionable conduct on the part of Eric or his counsel to respond in good faith to the court’s ruling of 6/20/19 by revisiting the issue addressing the court’s prior (6/20/19) concerns.

Mr. Mason reminded the court also that the only facts before the court were that Eric was going to share the home with his son in old age.

CP:609 & 610. The court continued to insist that this was only an “investment” for Eric without any such evidence before it. CP:610.

Mr. Mason then indicated to the court that Eric had returned to court based upon the “opening” in the ruling of 6/20/19 (the plans, the guarantees, and the reformulation as a temporary use of funds – a “different kettle of fish”). Mr. Mason proceeded to argue that this was a good faith understanding of the court’s ruling of 6/20/19. CP:611.

Mr. Mack argued that Mr. Mason had just performed “D minus sophistry.” CP:612-13. Mr. Mack argued that a motion to revisit (even on new terms) is an “abuse of the system.” CP:618.

Mr. Mason had filed the case law, and mentioned the cases orally, for example, the *Chaffee* and *Washburn* cases which state that motions to revisit are explicitly authorized as all orders short of final orders are interlocutory and may be revisited. See, e.g., *Chaffee v. Keller Rohrback LLP*, 200 Wash. App. 66, 76–78, 401 P.3d 418, 423–25 (2017); *Alwood v. Aukeen Dist. Court*, 94 Wash. App. 396, 400–01, 973 P.2d 12, 14 (1999); and *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 300–01, 840 P.2d 860, 890 (1992).

The court’s 8/29/19 ruling then begins at CP:620. The trial court reinterpreted its transcript of 6/20/19 to only say that the court is going to “preserve assets,” and nothing else. CP:621. The court then re-formulated

Eric's 8/29/19 motion back into his 6/20/19 motion, and essentially ignored the differences, presuming them to be the same motion. CP:622. The court then denied what Eric took to be a reasonable interpretation of the court saying on 6/20/19:

And if Mr. Olson wants to offer some sort of guarantee, that's maybe a different kettle of fish.

CP:188.

Eric offered his \$136,000 retirement account as a "guarantee" (as security for the \$200,000) in his good faith attempt to create that "different kettle of fish."

The court then spun Mr. Mason's rhetoric (not in any declaration or part of any motion) of the moral outrage that Nancy had a home and he did not (due to her breach of the alleged promise) into something that became the basis of the CR 11 sanction. CP:624.

Again, the promise issue was not raised by Eric in his motion to revisit, which was simply a request for a temporary (non-characterizing/non-final) distribution of the \$200,000 so that Eric could buy a home and have a place to live as Nancy did, and Eric allowed as his home would still be an asset that could be sold or distributed differently in any final decree.

The court then ignored the *Alwood*, *Chaffee* and *Washburn* cases (cited above) to accuse Mr. Mason of the motion to revisit as Mr. Mason's "new creation," as if Mr. Mason simply made it up. CP:625. This is a clear error of law that was harmful error in producing the CR 11 sanction.

The appellate court is asked to reverse the CR 11 sanctions against Eric Olson and Craig Mason (counsel) as having issued under legal error, without substantial evidence, and as manifestly unreasonable.

#### **6. Court's Written Order of 11/15/19 on CR 11 Sanctions**

The written order is at CP:730-31, and the magnitude of the CR 11 "wrong" was to be established in the order; however, the attorney fee award appeared to be simply that, a fee award. \$2500 to be paid by Eric and \$1000 to be paid by Mr. Mason.

Mr. Mason had asked the court to establish a lodestar amount of any fee award the trial court might make. See the Memo on Fees filed by Mr. Mason on 8/5/19 (CP:522-23) and as amended on 8/7/19 at CP:527-33. And see Mr. Mason's declaration of 8/9/19, at CP:534-39. See also Mr. Mason's declaration of 9/11/19 at CP:593-99, again citing *Alwood*, *Chaffee*, and *Washburn* to the court.

The written order of 11/15/19 states that Mr. Mason's request for a lodestar determination by the court is defective because Mr. Mason "entirely fails to suggest a number." CP:731.

A lodestar is to be set by the court in the following manner:

A determination of reasonable attorney fees begins with a calculation of the “lodestar,” which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Mahler*, 135 Wash.2d at 433–34, 957 P.2d 632.

A lodestar fee must comply with the ethical rules for attorneys, including the general rule that a lawyer shall not charge an unreasonable fee. RPC 1.5; *Fetzer*, 122 Wash.2d at 149–50, 859 P.2d 1210. This consideration applies whether one's fee is being paid by a client or the opposing party. *Fetzer*, 122 Wash.2d at 156, 859 P.2d 1210.

*Berryman v. Metcalf*, 177 Wash. App. 644, 660, 312 P.3d 745, 755 (2013).

No CR 11 sanctions should have issued against Mr. Mason and against Eric Olson. Moreover, the sanction was simply a fee-shifting award, without reference to the case law of CR 11 sanctions and their purpose, even if the CR 11 sanction had a sufficient basis in evidence or law, which it did not.

### **7. Conclusion and Relief Requested**

The court is asked to reverse the finding of CR 11 violation against Eric and Mr. Mason, and to reverse the fee awards. As there should be no sanction, a remand for recalculation should not be needed.

There is no evidence to support CR 11 sanctions, and the trial court made significant errors of law. Reversal is requested.

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### **C. Argument That Contempt Finding Against Eric Was Erroneous**

Eric and Nancy filed reciprocal motions for contempt on violations of the automatic temporary restraining order once the 6/20/19 Order established that there was no enforceable agreement. Without any agreement, the only governing order on use of funds was the court's automatic temporary restraining order. CP:9-11.

Eric's motion (at CP:164-69) was based upon Nancy spending \$25,789.00 that could only have been appropriate for her to spend if the agreement described by Eric existed. Eric said that the agreement was that each could have  $\frac{1}{2}$  of the residual funds from the sale of their \$800,000 home, minus \$200,000 to Eric, or roughly \$50,000 each. Once Nancy repudiated the pre-filing agreement and denied its existence, that was news to Eric, but it was something Nancy would have known all along.

In other words, Eric was shocked by Nancy saying there was no agreement, but Nancy could not have been surprised if this was her original understanding, and therefore she knew not to spend any additional funds on non-essential items from the outset (by definition of her own testimony). By her own repudiation of the financial agreement alleged by Eric, Nancy was in contempt. To reiterate, Eric notes that the final decree of dissolution was entered on exactly the terms that he had described the parties as having reached when Eric left Nancy in possession of their new

\$500,000 home in Post Falls before Nancy hired counsel to file her divorce.

Also, Nancy brought a contempt against Eric (at CP:388-89 & 362-66) for Eric's admitted transferring of \$50,000 from a joint account to a separate account as Nancy was continuing to spend funds, even after repudiating the agreement that would have authorized some expenditure of funds had Nancy acknowledged the agreement.

*Nothing in Nancy's declaration in support of contempt claims that Eric spent a dime of either the \$50,000 he transferred to protect, nor that he spent a penny of the \$200,000 of which he had previously been given control by Nancy. See CP:362-66. This was purely an allegation of a technical contempt with no allegation of prejudice, with no showing of bad faith, and with no showing of the purpose of the automatic temporary restraining order having been thwarted by Eric. Consistent with Nancy's lack of allegation of Eric spending the money, Eric confirmed in declaration and documents that he had spent nothing. CP:433-36, esp.434.*

Again, in Nancy's Reply on her contempt motion (at CP:498-99), Nancy never alleges that Eric spent any of the money, and she never alleges that she had been prejudiced in any way.

Meanwhile, Eric had been clear that his sole intention was to protect the funds from dissipation. CP:433-36. There was no bad faith or violation of the purpose of the order in Eric's actions.

While Eric's contempt was denied, he did not appeal it, as the abuse of discretion standard is unlikely to be met regarding a denial of a contempt. However, in granting a contempt, there are multiple bases for appealing an abuse of discretion. For example, the order must be strictly construed in favor of the alleged contemnor, *In re Marriage of Humphreys*, 79 Wash. App. 596, 599, 903 P.2d 1012, 1013 (1995), and Eric must have acted with a bad motive, per *In re Marriage of Hooper & Zduniak*, 158 Wash. App. 1052 (2010). Eric's motive was to preserve funds from dissipation, consistent with the purpose of the automatic temporary restraining order. CP:433-36. Eric was not "recreant" to any obligations under *Tyler v. Grange Ins. Ass'n*, 3 Wash. App. 167, 173, 473 P.2d 193, 197 (1970). Nothing in Eric's preserving the funds was contrary to the purpose of the automatic restraining order. See, e.g., *Graves v. Duerden*, 51 Wash. App. 642, 647-48, 754 P.2d 1027, 1030 (1988).

It is a long-standing rule that one alleging contempt must show prejudice to themselves or to the administration of justice, as merely technical contempt will not be punished. There must be bad faith (noted above) and prejudice (emphasis added):

But the better view is that one will not be punished for a technical contempt. The matter charged must have a reasonable tendency to cause substantial prejudice to a party in the conduct of the action, or to substantially interfere with the due administration of justice. Hunt v. Clarke, 58 L. J. (Q. B.) 490. The basis of this rule is that a proceeding for constructive contempt is quasi criminal, and every reasonable doubt will be resolved in favor of the accused. Hutton v. Superior Court, supra.

*State v. Hazeltine*, 82 Wash. 81, 88–89, 143 P. 436, 439 (1914).

Nancy not only presented no substantial evidence of prejudice, but she did not even allege prejudice in her motion for contempt. (Please again note: After Nancy Olson fired Paul Mack and he back-dated his withdrawal, the final decree matched exactly what Eric alleged had been their pre-attorney agreement.)

Eric Olson asks the court to reverse the finding of contempt and to reverse the fee award of \$1800 for the contempt. The contempt order and judgment of 9/25/19 (oral hearing of 8/29/19) is at CP:635-37.

#### **D. Chilling Effect of the CR 11 Sanction**

Nancy requested a trial continuance in the fall of 2019. CP:670. An unsigned reply “declaration” purported to be from Nancy was also filed in reply, after Eric responded. CP:708-09.

The issue is that Eric should have been able to make another request for relief (use of the funds for housing) when faced with delay of the trial, but any rational person would fear more CR 11 sanctions.

Eric Olson opposed the trial continuance, pointing out that his life was “on hold,” while Nancy’s life was proceeding without impediment. CP:677-80. This trial continuance hearing would have been a time for Eric to again request use of funds to get his own home as a condition of trial continuance. However, the CR 11 sanctions, and the court’s misconstruing his second motion for use of funds in such a hostile manner, “chilled” Eric from making a third request to revisit the issue on the facts of Nancy seeking trial continuance.

Mr. Mason also documented bad faith and dilatory tactics by Nancy or her counsel in detail at CP:681-707, and Mr. Mason reiterated the prejudice to Eric Olson, given his inability to move on with his life. *Id.*

It is rational to infer that Mr. Mason would have made another motion for relief for Eric to access some funds, as Nancy was sitting on, and using, the community wealth, had not Mr. Mason been chilled in representing Eric by the CR 11 sanctions at issue in this appeal. See *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d 210, 219, 829 P.2d 1099, 1104 (1992).

## **V. CONCLUSION**

For the foregoing reasons, Eric Olson and his counsel, Craig A. Mason, ask the court to reverse the CR 11 sanction and fee awards, and

Eric asks the court to reverse the finding of contempt against him, and to reverse that fee award, as well.

Respectfully submitted on 5/11/20,



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Division III No. 371638

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**Nancy Olson, Respondent**

**v.**

**Eric Olson,  
(and Craig Mason as to CR 11)  
Appellants.**

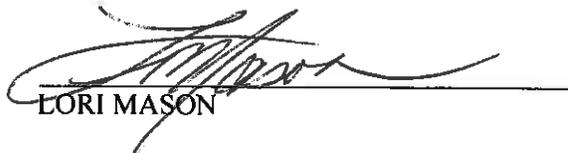
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**DECLARATION OF SERVICE**

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I, Lori Mason, declare under penalty of perjury under the laws of the State of Washington, that on May 11, 2020, I caused a true and correct copy of Appellant's Opening Brief to be mailed, via USPS, first class postage paid, to the following:

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