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No. 66678-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

LIN XIE, INDIVIDUALLY AND DBA
GIANT INTERNATIONAL
METAL RESOURCES, AND THE
MARITAL COMMUNITY,
Appellant,

v.

SEATTLE IRON & METALS
CORPORATION, A WASHINGTON
CORPORATION,
Respondent.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

Lin Xie, Ph.D.
Appellant/Defendant in Pro Per
Suite 3, 19280 11th PL. S.
SeaTac, WA 98148

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C SUMMARY INTRODUCTION

This appeal deals with a much more important issue than just the $500 fine, *CP 688*. It is about whether the trial court may dismiss all of the Defendant's new claims, *CP 687*, and, in essence, expel him from the court system, without following the well-established Court Rules, Case Laws and, most importantly, the current controlling Supreme Court ruling, especially when such ruling invalidated the trial court's prior judgment and affirmed the Defendant's "Vested Right" in the *consideration* it bargained for from the Plaintiff: Duly presentment of the payment documents.

This case is also about whether the Plaintiff can arbitrarily, without any legal basis, motion this court to deprive the Defendant's equal access right guaranteed by the first amendment. Such equal access right to voice grievance against the government may not be deprived without due process as is clearly defined by Court rules (*CR 56 (c)*) and *RAP* etc. The Plaintiff is trying to shift legal expenses to the Defendant, *Respondent's Brief* ("***RB***") *at 10,* at the time when the Plaintiff is continuing breaching the contract, such that the Defendant would be priced out of the court.

Contrary to the distortions by the Plaintiff, *RB at 4*, the Defendant's third party claims, *CP 622-629*, involved new parties, new legal claims and continuing contract breach claim, *AB 3, 7, 29, 30*, that were not adjudicated by any courts. Further more, the court of appeal's decision ("***Decision***") at 19 explicitly stated that the Defendant need to

initiate a separate review for the trial court order, *CP 588-589*, dismissing the Amend, *CP 566-574*. The order, *CP 588-589*, prejudicially affects the order to dismiss and sanction, *CP 687-688*, so it is proper for review by this court now, *RAP 2.4(b)*.

The trial court's Summary Judgment, *CP 265-266*, only dealt with a very narrow issue, the Plaintiff's cost of products. The trial court did not consider but rather deliberately left open, *CP 266, RP RP 33:18, RP 41:14, RP 42:2, RP 46:1,RP 47:3*, the issue of Defendant's cost in delivering the products. This is the damage and lost caused by the Plaintiff's failure to duly present the letter of credit documents. In an effort to divert the court's attention, the Plaintiff blamed the Letter of Credit applicant, Shanghai Qiangsheng, as the one who caused the damage, *RP 34:6*. Now the same Plaintiff, in order to hide its own liability, claimed that the Defendant shall have no right to claim against Shanghai Qiangsheng or anybody and shall forget about recover the Defendant's lost, *RB 4*.

Mere entry of a summary judgment, *CP 265-266*, based on an over-turned case law, *Alhadeff v. Meridian on Bainbridge Island, LLC (2008), 144 Wash.App. 928*, on a single narrow issue, will not preclude all future claims from the Defendant against other parties that were at fault in causing major financial loss to the Defendant. The liability of those parties was highlighted by the Supreme Court decision on *Alhadeff, 167 Wash.2d 601,* which approved that the Defendant has an accrued cause of action against the Plaintiff. In addition, no case laws support the argument that

the summary judgment may be used as immunity for the Plaintiff and its consul for their acts of perjury and misrepresentations occurred during the court proceedings.

Without providing any rational and legal basis, the trial court's order dismissed, *CP 687,* all of the Defendant's claims against parties that were not joined in the original law sue (Shanghai Qiangsheng and the 2nd beneficiary) and against acts that happened after the original business transaction (perjury and misrepresentations), *CP622-629.* The only legal reference cited (a RCW clause) in the court order, is a non-existent statute, *CP 687.* In addition, by applying a $500 sanction against the Defendant, the court essentially ruled that all of the Defendant's Claims are frivolous. The trial court failed to follow the well-established case law that "the action as a whole must be frivolous in order for fees to be awarded under *RCW 4.84.185*",*Biggs v. Vail, 119 Wn.2d 129, 830 P.2d 350 (1992) (Biggs I).*

The trial court obviously used evidences other then just the pleadings (it relied on the previous summary judgment order and other filings). So it is not a dismissal on the pleading (*CR 12 (c)*, Motion for Judgment on the Pleadings), but rather a dismissal under *CR 56 (c).* To summarily dismiss all of the Defendant's new claims, trial court would have to assume that the "allegation of perjury and misrepresentations" are true and make inferences most favorable to the Defendant. The court did not follow any of the *CR 56 (c)* rules.

The Respondent's Brief (***RB***) should "answer the brief of appellant" *RAP 10.3 (b).* But the Respondent did even attempt to answer many of the legal arguments raised in Appellant's Brief (***AB***) but instead he made many misleading statements that are nothing but character assassination. The Respondent's Brief did not have much that is not already in the Plaintiff's motion on the merit and for sanction. It is just a cut-and-paste of the original motion. So it is clear that the Plaintiff's request for 60 days extension to file a respondent's brief is nothing but a tactic for delay.

By deliberately withholding the fact that the appeal was accepted and perfected by one commissioner, the Plaintiff tried to trick another commissioner of this court to dismiss the current appeal without consideration of the merit by a panel.

D ARGUMENT

In dismissing all of the Defendant's new claims, the trial court obviously used evidences other then just the pleadings (relied on the previous summary judgment order and files in the court). So it is not a dismissal on the pleading (CR 12 (c), Motion for Judgment on the Pleadings), but rather a dismissal under CR 56 (c).

Summary judgment or dismissal is appropriate 'if the pleadings . . . together with the affidavits, if any, show that there is *no genuine issue* as

to any *material fact* and that the moving party is entitled to a judgment as a matter of law.' *CR 56(c).* Summary judgments should be reviewed *de novo*, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001).

When ruling on a motion for summary judgment, the court will view the evidence and all reasonable inferences froom the evidence in the light most favorable to the nonmoving party. *Roger Crane & Associates v. Felice*, 74 Wn.App. 769, 875 P.2d 705 (1994).

It has often been said that any doubts as to the existence of a genuine issue of material fact should be resolved against the moving party, and in favor of allowing the case to go to trial. See, e.g., *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62 (3d Cir. 1978).

a. The Plaintiff failed to dispute these key legal arguments in the open brief.

The Defendant raised several specific legal arguments and cited some binding case laws. The Plaintiff has made no attempt to dispute those case laws. As such, this court should consider that the Plaintiff has consented to those arguments/case laws. The Plaintiff's silence on these specific charges supported by record and overwhelming case laws is indicative of guilt on the part of the Plaintiff.

1. ***Failed to Establish "Bad Faith".***

First, the Plaintiff never addressed this issue raised in the Appellant's Open Brief ("***AB***") at 25-27. So this court should consider that the Plaintiff accepted these case laws on "bad faith" as binding. For example, *In re Recall of Pearsall-Stipek, 136 Wn.2d 255, 267 & n.6, 961 P.2d 343 (1998),* While recognizing that the court's "inherent equitable powers authorize the award of attorney fees in cases of bad faith," the Supreme Court reversed the fee award because there was no finding of "bad faith" and there was no finding of improper motive, the trial court abused its discretion in awarding fees.

Second, the Respondent's Brief did not dispute that it failed to comply with *RAP 18.9(a)* and case laws on "*frivolous appeal*". *RAP 18.9(a)* provides that the appellate court, on its own initiative or on motion of a party, may assess terms or compensatory damages against a party, counsel, or court reporter. The grounds for such sanctions are listed in the rule as (1) using the rules for the purpose of delay, (2) filing a frivolous appeal, or (3) failing to comply with the rules. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Green River Community College Dist. No. 10 v. Higher Education Personnel Board, 107 Wn.2d 427, 730 P.2d 653 (1986).* When determining whether an appeal is frivolous, justifying the imposition of terms and compensatory damages, the court will consider: (1) that a civil appellant has a right to appeal under *RAP 2.2, (2)* that all doubts as to

whether the appeal is frivolous should be resolved in favor of the appellant, (3) that the record should be considered as a whole, (4) that an appeal that is affirmed simply because the arguments are rejected is not frivolous, and (5) that an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. *Public Employees Mutual Insurance Company v. Rash, 48 Wn.App. 701, 740 P.2d 370 (1987).* The Respondent's brief did not pass these tests.

2. ***The Plaintiff and its consul violated CR 11 by signing the motion for sanction without reasonable inquiry.***

The Plaintiff is silent on below specific legal arguments raised in ***AB*** at 27-28. 1) It cited a non-existent statute, *RCWA 4.84.105, CP 687,* as its only legal basis for sanction; 2) the Plaintiff did not specify all elements required by **CR** 11 sanction; 3) The Plaintiff's statements, describing the Defendant's claim against Shanghai Qiangsheng as "too late" and "frivolous" contradicted his prior statement to the trial court that, ***RP*** 34, "He (Giant) has six years to sue his buyer"; 4) The Plaintiff's consul failed to declare under oath that he did not perform those acts that the Defendant describe as perjury and misrepresentations; 5) The Plaintiff's sanction claim is just to shift its legal fee to the Defendant.

As such, this court should consider such silent in the face of specific allegations/claims as admission of guilt.

3. ***The Code of Judicial Conduct requires disqualification of the trial judge.***

The Plaintiff provide no case laws to controvert the cases cited by the Defendant, *JONES v. HALVORSON-BERG, 69 Wn. App. 117, 847 P.2d 945*, *State v. Graham, 91 Wn. App. 663, 960, P.2d 457 (1998)*, that the trial judge should excuse himself form post trial matters after the appeal when the impartiality might reasonably be questioned because during the appeal the Defendant raised the issue of judicial indiscretion.

4. ***The Superior Court erred in dismissing the Defendant's claims without following either CR 56 (c) or CR 12 (c).***

The Plaintiff did not dispute the fact that because matters outside the pleading, CP 622-629, were considered by the court, so this should be converted to summary judgment. But the court did not follow *CR 56 (c)* including the 28 day notice, ***AB*** 31.

5. ***The Superior Court erred in ignoring the Supreme Court's controlling ruling.***

The Plaintiff did not dispute the fact that at the time of the post trial motion for sanction, *Alhadeff, 167 Wash.2d 601*, is the controlling case law and the trial court was wrong in rule against the law, ***AB***, *31-33*.

6. ***The Plaintiff's breach of contract is continuing.***

The Plaintiff did not dispute our argument made numerous times, *AB 3,7,29,30*, that that all original documents in clause 5 of the sales contract, *CP 8*, are required and shall be given to the Defendant who so far has paid almost $200,000. This never happen and the documents are still in Plaintiff's possession. So this is continuing breach of the contract.

7. ***The Plaintiff's consul lied to the panel in the last oral argument.***

The Plaintiff's consul made no effort to dispute the fact that it lied to the panel in the last oral argument on a very crucial issue. Details in ***AB*** 47. Such misrepresentation directly affected the court of appeal's decision because it was incorporated into the court of appeal decision ("***Decision***") at 14 ("it is already late"). This is a very serious and specific allegation supported by detailed record. The consul had the chance in his motion on the merit to declare under oath that what he said in the oral argument is true. But he did not want to make such statement under oath to clear his name. We have filed the grievance to the Washington Bar Association for investigation.

So the Appellant believe that it will be beneficial for this court to have a chance in the oral argument to question the Plaintiff's consul "did you lie or misrepresent to the panel in the last appeal?"

b. The Trial court erred in ignoring the Supreme Court's controlling ruling.

The Plaintiff's argument that the trial court's judgment, instead of the Supreme Court's controlling law, shall be binding on future claims is invalid. The Plaintiff cannot produce any case laws to counter the well established doctrine of res judicata and Law of the Case.

1. ***res judicata does not apply here.***

res judicata ensures the finality of decisions. The rule is stated as follows: "In Washington res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *MELLOR v. CHAMBERLIN, 100 Wn.2d 643.* Clearly, the Defendant's claims in *CP 622-629* are very different in terms of (2), (3) and (4).

2. ***Commissioners' ruling on Scope is Law of the Case.***

Law of the case is a doctrine that derives from both *RAP 2.5(c)(2)* and common law. In addition, law of the case also refers to the principle that jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal. *Hickman, 135 Wn.2d at 101-02.*

In the case at bar, the Appellant filed a motion to this court to define the scope of the appeal and the schedule on March 8, 2011. The

Appellant argued that (1) post-judgment orders, *CP 684-688*,would be appealable under, *RAP 2.2 (a)(1)*, *RAP 2.2 (a)(3)* and *RAP 2.2(a)(9)*; (2) CR 11sanctions will bring up the final judgment for review pursuant to *RAP 2.4(b)*; (3) *RAP 12.9* also gives the party claiming noncompliance the option of initiating a new review proceeding to test whether the judgment entered by the trial court after the appeal, or other action by the trial court, complies with the appellate court's opinion. On March 23, 2011, Commissioner James Verellen of the court entered a ruling: "The appeal may proceed and appellant should comply with the schedule contained in the clerk's letter of March 8, 2011. It is up to the appellant to determine what issues are properly raised in his appeal". So this court essentially perfected the appeal and asked the Appellant to follow the RAP rule. This was exactly what we did in the Open Brief to follow the order of this court. The Appellant should not be in anyway sanctioned simply for following the order of this court. The Respondent did not submit an answer to the motion. After the Commissioner James Verellen's ruling, the Respondent did not file any motion to modify the ruling under *RAP 17.7* within 30 days. In the Respondent's Brief, the Plaintiff did not challenge the RAP rules cited. So it waived the right to challenge the Open Brief on the issue of scope and the Commissioner's ruling became the law of this case. The issue of appropriate scope is not a proper issue for this court to consider now. So there should be no sanction for discussing the merits of the case because the Defendant followed the spirit of the Commissioner's ruling and RAP.

3. ***RAP rules allow reviewing earlier appellate court decision.***

First, *RAP 2.5(c)(2)* also codified certain restrictions on the law of the case, "(2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served; decide the case on the basis of the appellate court's opinion of the law at the time of the later review."

Second, application of the law of the case doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party. See, e.g., *First Small Bus. Inv. Co. of Cal. v. Intercapital Corp. of Or., 108 Wn.2d 324, 333, 738 P.2d 263 (1987).* This common sense formulation of the doctrine assures that an appellate court is not obliged to perpetuate its own error. Here the trial court's judgment was clearly erroneous because it was against the controlling Ruling of *Alhadeff, 167 Wash.2d 601.*

Third, application of the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial and appeal. See *RAP 2.5(c)(2)* (authorizing appellate courts to review prior decisions on the basis of the law "at the time of the later review"). This exception to the law of the case doctrine also comports with federal law. *1B JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE 0.404 1, at*

II-6-II-7 (2d ed.1996) ("It is clear, for example, that a decision of the Supreme Court directly in point, irreconcilable with the decision on the first appeal, and rendered in the interim, must be followed on the second appeal, despite the doctrine of the law of the case.") (footnote omitted); cf. *Crane Co. v. Am. Standard, Inc., 603 F.2d 244, 249 (2d Cir. 1979)* (concluding that law of case did not preclude trial court reconsideration of whether plaintiff had a cause of action when reexamination is appropriate in light of an intervening United States Supreme Court decision). An appellate court's discretion to disregard the law of the case doctrine is at its ***apex*** when there has been a subsequent change in controlling precedent on appeal.

c. Genuine Issues of Material Facts Exist for the Defendant's Claims

The most effective way to counter the Plaintiff's argument that the whole appeal is frivolous is to list the merits of the appeal. The Plaintiff failed to disputes the following merits in the Defendants claims that were explicitly supported by the Supreme Court decision.

1. ***Alhadeff, 167 Wash.2d 601 Affirmed the Defendant's "Vested Right".***

The Plaintiff is silent on our argument that *Alhadeff, 167 Wash.2d 601* is the controlling law in this appeal. He is therefore considered in

consent of this point. This is understandable because the Supreme Court has invalidated the key argument of the trial court in reaching its summary judgment, namely the integrated contract must be considered in a piece meal fashion to cut out the Letter of Credit terms.

Alhadeff, 167 Wash.2d 601 corrected the misuse of the "independent principle" in the judgment and essentially confirmed that the Letter of Credit terms are part of the contract.

In *CARITAS SERVICES v. DSHS, 123 Wn.2d 391*, the Supreme Court said:

> "Once a party has completed performance in accordance with the terms of a public contract, the party has a vested right to the consideration due for that performance under the contract".

As such the Defendant has "vested right" in the *considerations* due for performing his contract duties, issuing a conforming Letter of Credit, *CP 508-513*, according to terms agreed by both parties. The *considerations* from the Plaintiff include **duly presentment** of the payment documents so that Defendant would get paid for its shipping cost. An accrued cause of action is a ***vested right*** when it " 'springs from contract or from the principles of the common law.' " *Robinson v. McHugh , 158 Wash. 157 , 163, 291 P. 330 (1930)* (emphasis omitted) (quoting *Pritchard v. Norton , 106 U.S. 124, 132, 1 S. Ct. 102, 27 L. Ed. 104 (1882)*).

We therefore would ask this court to consider our "vested right" and find that the Plaintiff and others breached these contract terms.

The court should recall the mandate to compliant with the Supreme Court's decision which was issued after the parties' briefs in the last appeal were filed. *RAP 12.7(d)* and *RAP 2.5(c)(2)* permit the recall of a mandate so that a case already decided on appeal may be reconsidered in light of an intervening change in the law, *State v. Schwab, 134 Wn. App. 635, Aug. 2006*, "law of case did not preclude trial court from reconsidering whether plaintiff had a cause of action when there has been an intervening United States Supreme Court decision", *Roberson , 156 Wn.2d at 42*. The Plaintiff's argument that the trial court's judgment should be preserved over the Supreme Court's to the point and controlling ruling is invalid.

At least, this court should reject the Plaintiff's request to use the trial court's summary judgment as the sole basis to dismiss the Defendant's claims and to apply sanction.

2. ***Contract Related Claims are now displaced by the article 5 claims.***

The Plaintiff did not dispute that the Supreme Court's controlling decision, *Alhadeff, 167 Wash.2d 601,* clearly states that the common law claim for the underlying contract has been displaced by the Article 5 claims. Therefore, as stated in the Open Brief, ***AB*** 24, that the sales

contract and the Letter of Credit must be read together to understand the parties agreement. These controlling Supreme Court decisions would then invalidate the foundation of the trial court's judgment.

3. ***Alhadeff Vindicates the Defendant's Claim on Laches.***

The common law claim for the underlying contract has been displaced by the Article 5 claims and the one-year statute of limitation of *RCW 62A.5-115* applies to the contract claims. Therefore, *Alhadeff, 167 Wash.2d 601* vindicates the Defense's prior claim on Laches and disproves the assertion by Plaintiff "notice after one-year is still seasonable", *CP 347.* Here the Plaintiff did not provide the seasonable notice under *RCW 2-325* and his late action/claim destroyed the Defense's interest. This issue was clearly considered by the trial judge, *RP 47:3*, and therefore it was a proper issue for this court to consider.

In *JAMES K. AMENDE v. PIERCE COUNTY, 70 Wn.2d 391*, the Supreme Court said:

> "We find no merit in plaintiff's contention that we cannot consider the doctrine of laches because it was not specifically pleaded by name. Rule of Pleading, Practice and Procedure 15(b) provides in part: When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. This rule is to be liberally construed." *Burlingham-Meeker Co. v. Thomas, 58 Wn.2d 79, 360 P.2d 1033, 3 Orland, Wash. Prac. 525.*

4. ***Real Party of Interest Claim Implicates Trial Court Jurisdiction.***

The second beneficiary, *CP 517:59*, is the real party of interest who failed to duly present the payment documents and caused damages to both the Plaintiff and the Defendant. This is about the Standing of the Plaintiff in this case and it implicates the Jurisdiction of the trial court to enter judgment. "Standing to assert a particular claim is a jurisdictional issue that may be raised for the first time on appeal", *FIREFIGHTERS v. SPOKANE AIRPORTS, 146 Wn.2d 207.* There should be more discoveries into the dissolution agreement to fully understand the Plaintiff's standing because the Plaintiff withheld such information in violation of the discovery rule.

d. The Plaintiff should be sanctioned for using frivolous sanction motion for the purpose of harassment and delay.

The Appellant should not be in anyway sanctioned simply for following the order of this court. Respondent's motion for sanction was totally devoid of any relevant authorities to support its arguments and its claims did not have any basis in law.

1. ***The Plaintiff has Demonstrated Extreme Arrogant and Disrespectful toward Court and Court Rules.***

First of all, the Plaintiff tried to get the appeal dismissed for discussion the merits of the case in appellant's open brief by withholding

information from Commissioner Mary Neel. It was only after the Defendant pointed to the court that the appeal scope has been ruled upon and the perfection schedule has been set by Commissioner James Verellen. Then, commissioner Mary Neel had to issue another order on July 26, 2011 stating that she was unaware of the prior commissioner's ruling giving the appeal a go ahead. Therefore, she had the hearing on appealability stricken. This is total waste of the court's resources and also in violation of the code of professional conduct.

Second, the Plaintiff's request for 60 day extension is purely for delay and intimidation. The Plaintiff wanted to use the sanction request to threaten the Defendant into backing out of the appeal. If we just compare the "Plaintiff's Motion on the Merit and for sanction" and "the Respondent's Brief", we will find out that the two documents are almost identical except for page rearrangement. You simply don't need 60 days to change the page numbers. As such the Plaintiff was not making a good faith argument for extension but for delay purpose.

Third, the Respondent's Brief did not have a table of authorities and did not cite any case laws to support its "***extraordinary request***", *RB at 10*, even though some RAP rules were mentioned in the content, *RB 1 and 6*. This is clearly in violation of *RAP 10.3*.

Fourth, the Plaintiff placed himself above the law by refusing to even list the Supreme Court decision, *Alhadeff, 167 Wash.2d 601*, as a case law even though the open brief clearly cited this case as the

controlling law for this appeal and many associated issues was never ruled upon by the trial court and the court of appeal.

Fifth, the Plaintiff still refused to deliver all contract required original payment document, *CP 8*, to the Defendant who has paid almost $200,000 so far without seeing any products or title documents. As such, the contract breaching is continuing.

Finally, the Plaintiff did not issue any explanation, correction and apology for citing a non-existent statute in the Order, *CP 687,* which it prepared and signed.

2. ***It is frivolous to Request Sanction without discussing all grounds of a "frivolous appeal".***

First of all, the Plaintiff did not even mention any of the five key elements of a "frivolous appeal" as listed in *Public Employees Mutual Insurance Company v. Rash, 48 Wn.App. 701, 740 P.2d 370 (1987).*

Second, the Plaintiff failed to consider the record as a whole and did not demonstrate that the Defendant's every single claim is frivolous. The Plaintiff has abandoned the argument to justify the trial court's $500 sanction for frivolous motion/appeal and tried hard to prevent this court from considering the merit of the case because that will expose his liability.

Third, the Plaintiff is basically arguing that if a legal theory in an appeal is rejected, then appeal itself will be frivolous and sanction shall be

applied. But it failed to cite any case law to demonstrate that Res judicata and Law of the Case Doctrine applied to all of the Defendants claims.

Last, the only well explained reason for the Plaintiff's request for sanction is that to file a respondent's brief will reduce his in-pocket judgment from the trial court, *RB 4*. Attorney fees and costs on appeal are not justified by fact that failure to award these costs will effectively erode the trial court's award; such sanctions are authorized only if the appeal is frivolous or brought for the purpose of delay. *In re Cooke, 93 Wn.App. 526, 969 P.2d 127 (1999).*

3. ***Plaintiff's Sanction Request Implicates the Defendant's First Amendment Right.***

The respondent is essentially asking this court to kick the Respondent out of the court system by imposing an extraordinary heavy fine on him. If he cannot afford the fine then he should not have access to the court system.

Such delay or blocking altogether the Defendant's ability to file the underlying lawsuit authorized by Right of Access to Courts under 42 U.S.C. § 1983 would be in violation of the constitutional right of access to the courts, as an aspect of the First Amendment right to petition government for the redress of grievances. *MUSSOESCUDE v. EDWARDS , 101 Wn. App. 560.*

The Due Process/First Amendment right includes the right to petition the government for redress of grievances. This right includes meaningful access to the courts. *GIG HARBOR MARINA v. GIG HARBOR ,94 Wn. App. 789.*

4. ***Plaintiff's Sanction is an Affirmative Relief in Disguise.***

First, the Plaintiff is not simply asking this court to confirm the trial court's orders. Instead, it is seeking to recover the attorney fee/cost that the trial court rejected many times before. We have documented, *Answers to the Respondent's Motion for Sanction at 7-9*, that the Plaintiff requested sanctions many times before without legal justifications and has a history of obstruction, harassment and false statements throughout this case.

Second, the Plaintiff made its intension clear that it wants this court to ban all future claims from the Defendants. For such "affirmative relief", timely filed cross appeal and bond is necessary because this court would need to re-exam the trial court's previous decisions that refused to award sanctions. Otherwise, this court lacks of jurisdiction to consider. ***Party may not prosecute appeal from judgment after accepting fruits of judgment***. *Department of Labor and Industries v. Stone, 190 Wash. 145, 67 P.2d 320 (1937), opinion nullified 192 Wash. 699, 72 P.2d 605.* A notice of cross appeal is essential if the respondent seeks affirmative relief as distinguished from the urging of an additional ground for affirmance.

Nord v. Phipps, 18 Wn.App. 262, 566 P.2d 1294 (1977). Purpose of rule providing that party accepting benefits of trial court decision loses right to appeal is to ensure that party seeking review will be able to make restitution if decision is reversed or modified on appeal. *Scott v. Cascade Structures, 100 Wn.2d 537, 673 P.2d 179 (1983).*

5. ***The Respondent's other Contentions are without Merits.***

1) "Conduct prejudicial to the administration of justice", ***RB*** 4. The Defendant is not a lawyer and may not use the exact words. "Although inexpert pleading is permitted, insufficient pleading is not", *Christensen v. Swedish Hosp., 59 Wn.2d 545, 548,368 P.2d 897 (1962).* "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." Id. (citing *Williams v. W. Sur. Co., 6 Wn. App. 300, 492 P.2d 596 (1972)*). Here, we provided the Plaintiff with sufficient notice that "perjury and fraudulent misrepresentations" are to be punished under common law.

2) "Devoted exclusively to issues already adjudicated in the First Appeal", *RB 6*. This statement is not correct. Issues of claim against Shanghai Qiangsheng (the applicant), real party of interest affect trial court's jurisdiction and Plaintiff consul's misrepresentation, *CP 622-629*, were not adjudicated before. The last appeal was decided on the narrow issue of Summary Judgment on contract breach claim and did not deal with many issues brought up by the Supreme Court's ruling.

3) "Defendant may have a claim for damage related to the allegedly wrongful failure to present the documents", *RB 8.* To the best knowledge of the pro se Defendant, the court of appeal clearly cited this paragraph with approval. In addition, this would clearly be the conclusion if we just follow the controlling law, *Alhadeff, 167 Wash.2d 601.* So we were simply follow the law and court's thinking. The Court of Appeal correctly stated that the Defendant has the right "to controvert the opposition party's prima facie case as determined by applicable substantive law"

4) "Mentioned that Defendant should raise issues to the trial court", *RB 8.* The court of appeal made it very clear that the issue of Amend was not considered because it should be reviewed under another appeal, ***Decision*** *18-19.* On the issue of *RCW 62A.5-115*, the court of appeal said that we need to raise it below first. Now both issues were raised in court below as well as perfected for appeal for this court. The Plaintiff's motion for sanction in the trial court provided such opportunity; the Defendant had the right to inform the trial court that it has deviated from the Supreme Courts controlling ruling

E CONCLUSION

The Plaintiff posted this question, *RB* 10, "when is this going to end". The answer is: 1) only when the Defendant's "Vested Right" as affirmed by law of the land in this case, the supreme court's controlling

ruling in *Alhadeff, 167 Wash.2d 601,* has been protected; 2) The Plaintiff's liability exposed by *Alhadeff, Id,* has been made up for in the judgment; 3) The Plaintiff and its consul have been punished for their Perjury and misrepresentations employed to obtain court judgment. We therefore respectfully request this court to

1) rule that the Plaintiff is liable for the cost of freight and other expenses as stated in *CP654*;
2) rule that the Plaintiff is responsible for failure of consideration (duly present the payment documents) which in turn resulted in the nonpayment by Bank;
3) Remand the case to trial court to for outstanding issues.

Respectfully submitted this 28th
day of September, 2011,

Lin Xie, Ph.D.
Appellant in Pro Per
Suite 3, 19280 11th PL. S.
SeaTac, WA 98148

F APPENDIX

a. Errata

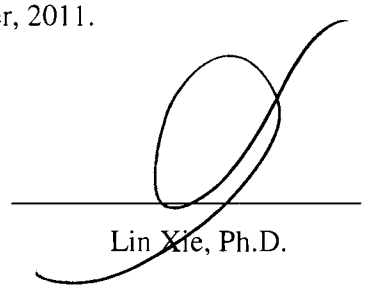
In the Appellant's Open Brief
Page 45, line 12, The try court -> The trial court
Page 31,line 2, The Supreme Court -> The superior court

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the Laws of the State of Washington, that a copy of the foregoing Brief has been served, by email and first class mail, upon

Wright A. Noel, WSBA No. 25264;
Todd W. Wyatt, WSBA No. 31608
Carson & Noel, PLLC,
20 Six Avenue, NE,
Issaquah, Washington 98027
Phone: (425) 837-4717,
Fax:(425) 837-5396
Email: wright@carsonnoel.com
todd@carsonnoel.com

on this 28th day of September, 2011.



Lin Xie, Ph.D.

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