SUPREME COURT NO. 89696-8
COA NO. 68021-8-I

IN THE SUPREME COURT OF WASHINGTON

VLADIK BYKOV,

Petitioner,

v.

DAVID R. ADAMS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable James Doerty, Judge

PETITION FOR REVIEW

VLADIK BYKOV
Petitioner

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A. IDENTITY OF PETITIONER

Vladik Bykov, the appellant below, asks this Court to accept review of the Court of Appeal's decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Bykov requests review of the decision in Vladik Bykov v. David R. Adams, Court of Appeals No. 68021-8-I (slip op. filed September 16th, 2013), attached as Appendix A. The Court of Appeals denied Bykov's motion to reconsider on October 22nd, 2013. See Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a trial court judge can order CR11 sanctions against an offending party who did not receive proper notice of the alleged CR11 violation prior to the aggrieved party filing a court motion for CR11 sanctions?

2. Whether a trial court judge can order CR11 sanctions against an offending party where the aggrieved party did not incur any attorney fees?

3. Whether a trial court judge can order CR11 sanctions against an offending party where the judge failed to give notice of the alleged CR11 violations prior to ordering CR11 sanctions?

4. Whether a trial court judge can order CR11 sanctions against an offending party where the aggrieved party failed to mitigate and to take steps in order to limit or completely avoid attorney fees?

D. STATEMENT OF THE CASE

The facts relevant to the issues in this petition arise out of a brief filed in trial court by Petitioner (Vladik Bykov), in which the Respondent's attorney's (Brain Fresonke) social security number was unredacted in three places. Slip op. at 2. ("These documents contained Fresonke's unredacted social security number.") The brief was filed in King County Superior Court on November 5th, 2010. *Ibid.* ; CP 393-415.

When Fresonke received the brief, he did not notify Bykov of these three unredacted social security numbers.[1] Neither Respondent (David Adams), nor his attorney (Brian Fresonke), ever responded to that brief. See King County Superior Court Docket, Case # 10-2-15463-9. Thus, neither Adams, nor Fresonke, incurred any attorney fees.[2]

However, on November 3rd, 2011, Adams, through his attorney Fresonke, obtained an order to show cause so that, inter alia, these three social security numbers could be redacted and Bykov be sanctioned in the

[1] Fresonke does not dispute anywhere the fact that he knew of these unredacted social security numbers when he received the brief.

[2] In fact, Fresonke later on, explicitly, admitted that neither he nor his client incurred any attorney fees: "Bykov claims that the November 15th, 2011 judgment was for attorney's fees, but it was in fact a CR11 sanction. Judge Doerty adopted defendant's request to measure the sanction with reference to the value of the attorney time that went into preparing and arguing the motion to redact defense counsel's social security number from Bykov's pleadings." CP 432

amount of $731.50 in attorney fees[3] for a CR11 violation for failing to redact the three social scurity numbers from the November 5th, 2011 brief. *Ibid.*, CP 189-190.

Prior to obtaining the show cause order, neither Adams nor Fresonke informed Bykov that the three unredacted social security numbers were a potential CR11 violation, nor that they would be seeking CR11 sanctions against Bykov. In fact, Fresonke admitted that he did not inform Bykov that the unredacted social security numbers were a potential CR11 violation, nor that he would be seeking CR11 sanctions. Specifically, he stated:

> "Respondent Adams had no duty to notify Bykov of anything prior to serving him with the November 3, 2011 order to show cause [seeking CR11 sanctions]."

See Brief of Respondent, Page 20.

On November 15th, 2011 the trial court awarded in favor of Adams *and* Fresonke a sum of $731.50 in attorney fees againt Bykov as a CR11 sanction for having failed to redact three social security numbers from the brief filed on November 5th, 2010. Slip op. at 2-3; CP 318-322. The trial court, in relevant part, stated:

> "Plaintiff had no legitimate reason for including defense counsel's social security number in his pleading (Sub. No 102). Plaintiff intended to harass defendant's attorney by including the social security number in plaintiff's November 5, 2011 pleading."

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[3] Fresonke alleged that his client, Adams, had incurred attorney fees:

> "Bykov claims that David Adams should not be a judgment creditor. This is not true because Mr. Adams pays my attorney's fees for the work I do in this case." CP 432

CP 321.

The trial court did not find that the actual brief submitted was an act of harassment – only the specific failure to redact Fresonke's social security number from the brief. CP 321.

Shortly after the award of the CR11 attorney fees, Bykov filed a motion to vacate the judgment. Slip op. at 3; CP 323. The court denied the motion, and without having given Bykov prior notice of a potential CR11 violation, nor scheduling a hearing to determine the propriety of any CR11 sanctions, the trial Court, *sua sponte,* simply imposed additional attorney fees as CR11 sanction in the amount of $1000.00. *Ibid;* CP 434. However, neither Adams nor Fresonke actually incurred any attorney fees as a result of the motion filed by Bykov.

On appeal, and in his motion for reconsideration, Bykov argued that the trial court erred in awarding the $731.50 attorney fees because:

1. Neither Adams, nor Fresonke, gave Bykov notice of a potential CR11 violation, nor intent to seek CR11 sanctions, prior to filing a court motion to seek CR11 sanctions.

2. Neither Adams nor Fresonke incurred any actual attorney fees in seeking to redact Fresonke's social security numbers. Likewise, no attorney fees were incurred as a result of Bykov's motion to vacate.

3. Adams and Fresonke failed to mitigate alleged attorney fees by not notifying Bykov of the unredacted social security numbers prior to seeking CR11 sanctions. With notice, Bykov himself would have filed a motion to redact Fresonke's social security numbers.

In its opinion, the Court of Appeals did not properly address the issues. Instead, the Court of Appeals made a blank statement:

"These arguments are not supported by relevant authority and lack merit." Slip op. at 5.

And, the Court of Appeals went on to say that there was a history of harassment against Fresonke and that the trial court did not abuse its discretion "in concluding that Bykov's November 2010 filing warranted sanctions." Slip op. at 5. The Court of Appeals did not substantively address the arguments raised by Bykov. It even made a citation to a case that did not involve CR11 violations.[4] Slip op. at 7.

Interestingly, the Court of Appeals did mention that there was a declaration from Fresonke, "...describing the time he spent addressing the redaction of his social security number to support his request for $731.50..." *Ibid.* at 5. However, the Court of Appeals did not find that Adams had, in fact, incurred any attorney fees even though Fresonke spent time writing the

[4] Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 858 P.2d 1054, 122 Wn.2d 299 (Wash., 1993)

motion. In other words, Fresonke may have spent time authoring the motion for CR11 sanctions, but Fresonke never charged Adams for writing the motion.[5] Indeed, Fresonke explicitly admitted that there were, in fact, no attorney fees when he stated in one of his declarations:

> "Bykov claims that the November 15th, 2011 judgment was for attorney's fees, but it was in fact a CR11 sanction. Judge Doerty adopted defendant's request to measure the sanction with reference to the value of the attorney time that went into preparing and arguing the motion to redact defense counsel's social security number from Bykov's pleadings."

CP 432.

Lastly, the Court of Appeals said:

> "Bykov has not challenged the trial court's finding that he filed the tax documents in November 2010 with the social security number unredacted for the improper purpos of harassing Adam's attorney,"

Slip Op. at 5.

However, this statement is inaccurate. The trial court did not, in fact, find that the tax documents were filed for an improper purpose. The trial court only found that the unredacted social security numbers were harassing. CP 321.

Thus, the Court of Appeals never properly addressed the following decisive issues:

1. The fact that Adams and Fresonke did not give Bykov prior notice of

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[5] There is no reason why Mr. Adams would have paid anything to Brian Fresonke to redact Brian Fresonke's social security number. Adams had no standing to address his attorney's rights.

potential CR11 violations prior to seeking CR11 sanctions.

2. Adams and Fresonke, by not giving prior notice, failed to give Bykov an opportunity to redact the social security numbers so that any alleged attorney fees could be mitigated.

3. No actual attorney fees were incurred for redacting Fresonke's social security numbers. No actual attorney fees were incurred as a result of Bykov's motion to vacate.[6]

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW IS WARRANTED BECAUSE THE TRIAL COURT'S ISSUANCE OF MULTIPLE CR11 SANCTIONS AGAINST PETITIONER IS CONTRARY TO A DECISION OF THE SUPREME COURT, WHICH REQUIRES THAT A PARTY OR JUDGE TO GIVE PROMPT NOTICE OF CR11 VIOLATIONS AND INTENT TO SEEK CR11 SANCTIONS TO THE OFFENDING PARTY PRIOR TO ORDERING SANCTIONS.

The law is clear: "Both practitioners and judges who perceive a possible violation of CR11 must bring it to the offending party's attention as soon as possible. Without such notice, CR11 sanctions are unwarranted." Biggs v. Vail, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994) (citing Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 829 P.2d 1099 (Wash., 1992))

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[6] Regarding this matter, the Court of Appeals said:
"It is not necessary to remand in order for the trial court to [re]designate the sanction as "terms" rather than "attorney fees" Slip Op. at 7. This means the Court of Appeals agrees that there were no attorney fees incurred.

In Biggs, the Washington Supreme Court reviewed the contours of Civil Rule 11. The Court stated that: "[t]he purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system" *Ibid,* at 197. But, more importantly, the Court also stated that "...without prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper..." *Ibid,* at 198. It's clear that the purpose of giving notice is to avoid unnecessary litigation of a potential CR11 violation. The primary purpose of the rule is to deter abuses, not to litigate them. Biggs at 198.

In MacDonald v. Korum Ford, 912 P.2d 1052, 80 Wn.App. 877 (Wash.App. Div. 2, 1996) (citing Biggs, 124 Wash.2d at 201, 876 P.2d 448.) the Court stated that the award of CR11 sanctions should not include fees and expenses that were self imposed by a party or could reasonably have been avoided by notifying the opposing party of its concerns. MacDonald v. Korum Ford at 893. The trial court must consider whether fees and expenses could have been avoided or self-imposed. MacDonald at 891.

In other words, the aggrieved party must quickly inform the offending party of the alleged transgression and give him or her the opportunity to fix the problem, so that the aggrieved party does not incur,

or at least limits, the attorney fees. A potential CR11 violation is not an opportunity for the aggrieved party's attorney to enjoy and rack up additional attorney fees. Of course, if prior notice is given and the offending party fails to take action, CR11 sanctions can be sought and properly imposed.

That is why the federal court has a strict "safe harbor" privision, whereby any motion for sanctions must be served on the offending party at least 21 days before the motion is filed with the court. See Islamic Shura Council of So. Cal. v. Fed. Bureau of Investigation (9th Cir., 2013) The purpose of the safe harbor provision is to give the offending party an opportunity to correct or withdraw its problematic pleading, and "*thereby escape sanctions.*" *Ibid,* citing Barber v. Miller, 146 F.3d 707, 710 (9th Cir. 1998) (emphasis in original). Because CR 11 was modeled upon and is substantially similar to federal rule 11, Washington courts look to the federal courts for guidance in construing CR11. See Miller v. Badgley, 753 P.2d 530, 51 Wn.App. 285 (Wash. App., 1988) (citing Harding v. Will, 81 Wash.2d 132, 135 n. 2, 500 P.2d 91 (1972))

However, in the case herein, the trial court granted CR11 sanctions even though the Petitioner, Bykov, was never given any notice of the potential CR11 violations prior to Adams filing a motion seeking CR11 sanctions, thereyby precluding the opportunity to mitigate. By failing to

give prior notice, Adams, through his attorney, unnecesarily imposed upon himself any *alleged* additional attorney fees and time spent authoring a motion. The trial court failed to consider the fact that Bykov had no opportunity to mitigate.

Said otherwise, had Bykov been given prior notice of the unredacted social security numbers, he would have moved the Court to redact them. Adams would have avoided any *alleged* additional attorney fees. But, instead, Brian Fresonke, knowing that the offending brief contained his unredacted social security numbers long before seeking CR11 sanctions, decided that he would not inform Bykov thereof and then, a year later, decided to file the motion and litigate the issue.

Without prior notice and without an opportunity to mitigate, the trial court's award of CR11 sanctions was contrary to Biggs. Court of Appeal's decision to affirm the award in favor of Adams stands contrary to Biggs.

Likewise, the trial court violated Biggs when it, *sua sponte,* issued an order awarding attorney fees in the amount of $1000 as CR11 sanction, without giving Bykov prior notice of the alleged CR11 violation. Yet, according to Biggs: "Both practitioners and *judges* who perceive a possible violation of CR11 must bring it to the offending party's attention as soon as possible. Without such notice, CR11 sanctions are

unwarranted." (italicised for emphasis) Biggs at 198. Bykov was not given an opportunity to amend or withdraw the offending brief. Yet, judge Doerty, just like Adams, had an obligation to provide Bykov with an opportunity to mitigate.

Since the trial court did not give Bykov prior notice of the alleged CR11 violation, CR11 sanctions were, in the language of Biggs, "unwarranted." Subsequently, the Court of Appeal's decision to affirm the award of $1000 in attorney fees as CR11 sanction against Bykov was also contrary to Biggs.

2. REVIEW IS WARRANTED BECAUSE THE TRIAL COURT'S ISSUANCE OF MULTIPLE CR11 SANCTIONS AGAINST PETITIONER IS CONTRARY TO A DECISION OF THE SUPREME COURT, WHICH REQUIRES A COURT TO LIMIT FEES TO THE AMOUNTS REASONABLY EXPENDED IN RESPONDING TO SANCTIONABLE FILINGS.

According to Biggs v. Vail, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994) should a court decide that the appropriate sanction under CR11 is an award of attorney fees, it must limit those fees to the amounts reasonably expended in responding to the sanctionable filings. Biggs at 201. This award of reasonable fees should not exceed those fees which would have been incurred had notice of the violation been brought promptly. *Ibid.*

Here, the trial court failed to take into consideration the fact that neither Adams nor Fresonke incurred any attorney fees. The term

"incurred" generally means to "become liable or subject to" Koch v. Mutual of Enumclaw Ins. Co., 31 P.3d 698, 108 Wash. App. 500 (Wash. App., 2001) (citing State v. Goodrich, 47 Wash.App. 114, 117, 733 P.2d 1000 (1987)) CR 11 does indicate that a court may issue "...an order to pay to other party or parties the amount of the reasonable expenses *incurred* because of the filing of the pleading, motion, or legal memorandum, including attorney fees." See CR 11. (italicised for emphasis) It would be contrary to CR11 to award attorney fees that were not incurred.

Brian Fresonke explicitly admitted that there were no attorney fees when he declared:

> "Bykov claims that the November 15th, 2011 judgment was for attorney's fees, but it was in fact a CR11 sanction. Judge Doerty adopted defendant's request to measure the sanction with reference to the value of the attorney time that went into preparing and arguing the motion to redact defense counsel's social security number from Bykov's pleadings."
> CP 432

Importantly, had there been actual attorney fees incurred, there would not have been the odd request "to measure the sanctions with reference to the value of the attorney time that went into preparing and arguing the motion to redact social security numbers." CP432. The request would simply have been for attorney fees. The only reason why the odd request was made was because there were no actual attorney fees incurred.

And, even if Adams had incurred actual attorney fees, the trial court failed (as already explained *supra*) to take into consideration the fact that Adams and Fresonke failed to give Bykov prior notice so that he could mitigate.

Had Bykov been given prompt notice, he would have filed the motion to redact Fresonke's social security numbers and any actual, or alleged, attorney fees by Adams would have been avoided. If Adams and Fresonke had given Bykov prior notice, the sanctions, "measured with reference to the value of the attorney time that went into preparing and arguing the motion to redact social security numbers" would have been zero. After all, under Biggs, a party is required to give the opposing side an opportunity to mitigate sanctions – no matter how they may be labeled later on.

Thus, because no actual attorney fees were expended, nor incurred, and Adams and Fresonke failed to give prior notice to Bykov (in order to limit alleged attorney fees) the trial court's award of $731.50 in attorney fees as CR11 sanctions is contrary to Biggs. Likewise, the Court of Appeal's decision to affirm the award is contrary to Biggs.

Likewise, the trial court violated Biggs when it, *sua sponte,* issued an order for attorney fees in the amount of $1000.00 as CR11 sanctions. CP 434. No prior notice was given before the trial court entered the order.

No chance to mitigate. Had Bykov been properly notified, he would have had a chance to amend or withdraw the offensive brief, in order to mitigate any attorney fees that may have been incurred.

But, there is also nothing in the record to establish that anyone had incurred $1000 in attorney fees as a result of Bykov's motion to vacate. Neither Adams, nor Fresonke, sought CR11 sanctions. Yet, according to Biggs, should a court decide that the appropriate sanction under CR11 is an award of attorney fees, it *must* limit those fees to the amounts reasonably expended in responding to the sanctionable filings. (italicised for emphasis) Biggs at 201. And, an award of attorney fees must be supported by findings of fact and conclusions of law so that, on review, it can be determined whether the award ($1000 in this case) was reasonable. See Berryman v. Metcalf (Wash. App., 2013) and Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (Wash., 1998) Due to the lack of substantive findings of fact and conclusions of law, it's simply impossible to tell how the trial court judge came up with $1000.00 in attorney fees. The amount is conclusory.

Without any evidence that attorney fees were incurred, nor the amount thereof, the trial court could not arbitrarily impose them. Consequently, the trial court had no authority to grant them.

The trial court's decision to grant attorney fees as CR11 sanction in the amount of $1,000.00 was arbitrary and capricious, in violation of Biggs. The Court of Appeal's decision to affirm them was likewise contrary to Biggs.

F. CONCLUSION

For the reasons stated above, Bykov respectfully requests that this Court grant review and vacate the trial court's two orders imposing CR11 sanctions on Bykov.

G. APPENDIX

APPENDIX A – Copy of the Court of Appeals decision.

APPENDIX B – Copy of denial and Motion for Reconsideration.

APPENDIX C – Copy of CR11

DATED this 21st day of November, 2013

Respectfully Submitted,

Vladik Bykov

Vladik Bykov
14156 91st CT NE
Kirkland, WA 98034

CERTIFICATE OF SERVICE

I cerify, under penalty of perjury under the laws of the State of Washington, that I mailed a copy of the foregoing "PETITION FOR REVIEW" to Brian K. Fresonke, Respondent's attorney, at 1001 4th Ave., Ste. 3200 in Seatttle, WA, postage prepaid on November 21st, 2013.

Dated at Kirkland, Washington this 21st day of November, 2013.

Vladik Bykov

Vladik Bykov, Appellant
14156 91st CT NE
Kirkland, WA 98034

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

VLADIK BYKOV, Appellant, v. DAVID R. ADAMS, and his marital community, Respondent.	)	No. 68021-8-I DIVISION ONE UNPUBLISHED OPINION FILED: September 16, 2013

APPELWICK, J. — Bykov appeals from a judgment awarding postjudgment interest, CR 11 sanctions, and additional CR 11 sanctions imposed as a result of his reconsideration motion. Bykov fails to establish any error or abuse of discretion by the trial court. We affirm.

FACTS

In April 2010, Vladik Bykov filed a nuisance action against his neighbor David Adams. Adams filed an answer with a counterclaim for costs and attorney fees for defending a frivolous lawsuit. The trial court granted Bykov's motion to dismiss his claims against Adams in June 2010. In July 2010, the trial court dismissed Adams's counterclaim for attorney fees against Bykov, but stated in the order, "However, this dismissal does not preclude Defendants from pursuing such relief pursuant to the provisions of RCW 4.84.185." In August 2010, the trial court granted Adams $1,600 in attorney fees based on its finding that "plaintiff's claims against defendant are frivolous and advanced without reasonable cause contrary to RCW 4.84.185." The trial court entered judgment against Bykov in September 2010. This court dismissed Bykov's appeal of the judgment, Order

Terminating Review, Bykov v. Adams, No. 65920-1-I (Wash. Ct. App. Dec. 3, 2010), and issued the mandate in May 2011.

While his initial appeal was pending in this court, Bykov continued to file motions in the trial court. Bykov sought reconsideration of the $1,600 award, repeatedly arguing that the trial court failed to sufficiently explain its analysis of his complaint under RCW 4.84.185, or to specifically address each claim in the complaint. On November 5, 2010, Bykov filed a motion to admit additional evidence for appeal, to which he attached documents referring to notices of federal tax liens in the name of Brian K. Fresonke, Adams's attorney, as well as printout of property tax information referring to a parcel of real estate listed under the name "Fresonke K G." In his motion, Bykov explained his submission of the evidence of Fresonke's "potential or actual criminal activity for the purpose of impeaching him and his declarations." These documents contained Fresonke's unredacted social security number. Over the following year, the interactions between Fresonke and Bykov were troubled, culminating in Bykov's conviction in Seattle Municipal Court in October 2011 for criminally harassing Fresonke.

On November 3, 2011, Adams obtained an order requiring Bykov to appear at a show cause hearing where Adams would seek the following relief: (1) disbursement of $1,600 in the court registry to Adams; (2) interest on the September 2010 judgment; (3) redaction of Fresonke's social security number from Bykov's November 2010 filing; and (4) CR 11 sanctions of $731.50 for filing "a pleading intended as an act of harassment against defendant's counsel that needlessly increased the cost of this litigation." On November 15, after a hearing,

the trial court ordered the relief requested by Adams. It awarded postjudgment interest in the amount of $224.00 and entered a judgment against Bykov for the $731.50 sanction. The court specifically found that Bykov "had no legitimate reason for including" Fresonke's social security number in his filing but "intended to harass" him and "caused a needless increase in the cost of this litigation . . . because defendant has had to move the Court to redact his attorney's social security number."

Bykov filed a motion to vacate the November 15 judgment. The trial court denied the motion, finding that it failed "to conform to the show cause requirements of CR 60 and fails to meet the substantive requirements for relief. The court ordered an additional CR 11 sanction of $1000 "because this motion is not well grounded in fact and is not warranted by existing law."

Bykov appeals the November 15 order and judgment, as well as the December 8 order denying the motion to vacate judgment and imposing the additional $1000 sanction.

DECISION

CR 11 permits a court to impose a sanction, including attorney fees, when a filing is (1) not well grounded in fact; (2) unwarranted by existing law; or (3) for any improper purpose, such as harassment or delay. "To impose sanctions for a baseless filing, the trial court must find not only that the claim was without a factual or legal basis, but also that the attorney who signed the filing did not conduct a reasonable inquiry into the factual and legal basis of the claim." West v. Wash. Ass'n of County Officials, 162 Wn. App. 120, 135, 252 P.3d 406 (2011).

The reasonableness of an attorney's inquiry is evaluated by an objective standard, that is, "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

Courts impose sanctions under CR 11 "to deter, to punish, to compensate and to educate." Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 356, 858 P.2d 1054 (1993). When fashioning appropriate sanctions, courts may consider whether a party bringing a CR 11 motion gave prior, timely, informal notice of the potential violation to the offending party, but laches or waiver principles do not apply "because a CR 11 motion is not a 'cause of action' as contemplated by those doctrines." Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

Although Bykov filed his lawsuit pro se, "pro se litigants are bound by the same rules of procedure and substantive law as attorneys." Westberg v. All-Purpose Structures, Inc., 86 Wn. App. 405, 411, 936 P.2d 1175 (1997).

We review a trial court's order to pay attorney fees under CR 11, as well as the amount of any such fees, for an abuse of discretion. Biggs, 124 Wn.2d at 197. The trial court must make specific findings indicating which filings violate the rule and how such filings violate the rule or demonstrate bad faith. Id. at 201-02. Unchallenged findings are verities on appeal. Cowiche Canyon Conservatory v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

Bykov first challenges the $731.50 sanction, arguing (1) he was entitled to notice of a possible CR 11 violation before Adams filed a motion for sanctions;

(2) neither Adams or Fresonke incurred costs or fees in filing the motion to redact the social security number; (3) Adams had no standing to assert Fresonke's legal rights and Fresonke as a non-party cannot be compensated under CR 11; (4) the motion for sanctions was filed too late; and (5) CR 11 does not allow the court to penalize a party. These arguments are not supported by relevant authority and lack merit.

Bykov has not challenged the trial court's finding that he filed the tax documents in November 2010 with the social security number unredacted for the improper purpose of harassing Adams's attorney. In support of his motion for sanctions, Adams submitted briefing and exhibits describing Bykov's pattern of harassment of Fresonke and ultimate criminal conviction. In response to Adams's motion to show cause and for sanctions, Bykov argued at length that Fresonke's history of tax evasion demonstrated his dishonesty and was therefore relevant to the lawsuit. Bykov's briefing also contains extensive arguments challenging the basis for the September 2010 judgment and attributing CR 11 violations to Fresonke. We cannot say the trial court abused its discretion in concluding that Bykov's November 2010 filing warranted sanctions.

As to the amount of the award, Adams submitted the declaration of his attorney describing the time he spent addressing the redaction of his social security number to support his request for $731.50, or 2.66 hours times his hourly rate of $275.00. Bykov fails to demonstrate any abuse of discretion in the trial court's decision to impose that amount as a sanction.

Bykov also challenges the trial court's December 8 order imposing $1000 as a CR 11 sanction for filing his motion to vacate the original $731.50 sanction. Bykov contends that the trial court failed to sufficiently explain how the motion was not well grounded in fact or warranted by existing law. He claims that the imposition of the sanction without prior notice was an error of law and a violation of his due process rights. Bykov also challenges the amount, arguing that there is no evidence that Adams incurred $1000 in attorney fees in responding to Bykov's motion.

But, based on our review of the record and the particular circumstances of this case, remand to the trial court for additional findings is unnecessary. Where, as here, the trial court imposed sanctions based on a factual record consisting entirely of affidavits, this court may independently review the evidence for support for the required findings. Bryant, 119 Wn.2d at 222-23. The trial court found that Bykov's motion to vacate was not well grounded in fact or warranted by existing law, but did not specifically find that he failed to conduct a proper inquiry. However, the record is devoid of any evidence from which the trial court could have determined that Bykov conducted any reasonable inquiry.

His pleadings speak for themselves. In his motion to vacate the judgment, Bykov did not cite CR 60 or argue any legally recognized grounds for vacating a judgment. He presented arguments as to jurisdiction obviously contradicted by the record. Bykov repeatedly attributed wrongdoing to Fresonke and justified his own actions, arguing for the first time that he has a First Amendment right to submit public documents displaying Fresonke's social security number to the

court in order to demonstrate Fresonke's dishonesty. Bykov also complained about the evidence Adams offered to support his request for $731.50 and requested an additional evidentiary hearing. But, Bykov's motion did not include or identify any new facts or relevant authority to cogently support his claims. Because the record would support a finding that Bykov did not conduct a reasonable inquiry into the factual or legal bases of his claims before filing his motion to vacate the judgment, we conclude that the trial court did not abuse its discretion in determining that Bykov violated CR 11 by filing the motion and that an additional sanction was warranted.

Similarly, in view of the record here, remand for the trial court to provide additional findings to explain the amount of the sanction is also unnecessary. The matter began with a frivolous lawsuit that resulted in sanctions. It detoured into a criminal harassment proceeding. The appeal was dismissed. Harrassing pleadings were filed. Following the entry of a clear order describing Bykov's CR 11 violation and imposing a sanction designed in part to compensate Adams, Bykov filed his baseless motion asserting a constitutional right to commit the sanctioned act. We cannot say the trial court abused its discretion by imposing a sanction severe enough to deter Bykov from continuing to litigate the matter without reasonable grounds. Given the wide latitude afforded trial courts in fashioning appropriate sanctions, it is not necessary to remand in order for the trial court to designate the sanction as "terms" rather than "attorney fees." See Fisons Corp., 122 Wn2d at 355-56.

Finally, Bykov assigns error to the trial court's finding that he did not notify Adams's attorney that he had deposited $1,600 in the court registry in November 2010. Bykov does not identify the prejudice resulting from the trial court's resolution of this contested fact in Adams's favor. However, like Adams, we assume his alleged error is the award of postjudgment interest. Bykov asserts he gave Fresonke notice of deposit of the funds to satisfy the original judgment when he served a December 2010 motion. The record does not establish that he notified the clerk or Fresonke that disbursement of the funds was authorized rather than mere deposit pending further proceedings. We find no error in the award of postjudgment interest accruing until the funds were disbursed.

Bykov requests attorney fees and costs. Because Bykov has not prevailed, he is not entitled to fees or costs.

Affirmed.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

VLADIK BYKOV, Appellant, v. DAVID R. ADAMS, and his marital community, Respondent.	)	No. 68021-8-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Vladik Bykov, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 22nd day of October, 2013.

Judge

FILED
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STATE OF WASHINGTON
2013 OCT 22 PM 4:01

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

VLADIK BYKOV, Appellant, vs. DAVID R. ADAMS, and his marital community, Respondent	)	No. 68021-8-I MOTION TO RECONSIDER

I. IDENTITY OF MOVING PARTY

Appellant, Vladik Bykov, requests the relief stated in part II.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.4, Mr. Bykov requests that this Court reconsider its opinion filed September 16th, 2013 (attached as Appendix A to this motion) and vacate the trial court's two CR 11 sanctions against Mr. Bykov.

III. FACTS RELEVANT TO MOTION

The substantive facts are set forth in the Brief of Appellant at pages 3-10, incorporated herein by reference.

Of additional relevance, Bykov was never given notice of a possible CR11 violation, prior to Brian Fresonke, the Respondent's attorney, filing a motion for CR11 sanctions and the trial court entering an order granting CR11 sanctions in the amount of $731.50. Likewise, Bykov was never given notice of a possible CR11 violation prior to the trial court entering an order of CR11 sanctions in the amount of $1000.00.

In the Brief of Appellant, Bykov pointed out these facts. Brief of Appellant at 8,10. Brian Fresonke, the attorney for Adams, admitted that he did not provide any notice of a CR11 violation to Bykov prior to filing the motion for CR11 sanctions:

> "Bykov fails to explain how Adam's failure to provide him notice that he was violating CR11 in November 2010 would have made any difference in the amount of the CR11 sanction he was assessed in this case."[1]
>
> Brief of Respondent at 23.

The Court of Appeals did not find that Bykov was given prior notice of a potential CR11 violation prior to Brian Fresonke filing a motion for CR11 sanctions and likewise, did not find that Bykov was given notice prior to the trial court *sua sponte* awarding a CR11 sanction. See Slip Op., Appendix A.

IV. GROUNDS FOR RELIEF AND ARGUMENT

[1] Of course, it was Brian Fresonke who failed to provide prior notice of a potential CR 11 violation, not David R. Adams.

The law is clear. "Both practitioners and judges who perceive a possible violation of CR11 must bring it to the offending party's attention as soon as possible. Without such notice, CR11 sanctions are unwarranted." Biggs v. Vail, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994) (citing *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (Wash., 1992))

Here, the Court of Appeals, in its decision, did not find that the Respondent's attorney, Brian Fresonke, gave Bykov prior notice of a CR11 violation before filing a motion of CR11 sanctiion. See Slip Op., Appendix A. Brian Fresonke admitted that he had not given Bykov notice. See Brief of Respondent at 23.

Yet, contrary to *Biggs*, the Court of Appeals affirmed the award and surprisingly, wrote:

> "When fashioning appropriate sanctions, courts may consider whether a party bringing a CR11 motion gave prior, timely, informal notice of the potential violation to the offending party, but laches or waiver principles do not apply "because a CR11 motion is not a 'cause of action' as contemplated by those doctrines." Citing Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994)

Slip Op. at 4.

In other words, the Court of Appeals asserted that a failure to provide prior, timely, and informal notice of a potential violation is simply a "consideration". However, after rereading *Biggs v. Vail*, 124 Wn.2d 193,

876 P.2d 448 (Wash., 1994) the undersigned has not found any such language, nor holding. The *Biggs* court did not state that a failure to provide prior notice is simply a "consideration" in whether to grant CR11 sanctions. The Biggs court found that:

> "Both practitioners and judges who perceive a possible violation of CR11 must bring it to the offending party's attention as soon as possible. Without such notice, CR11 sanctions are unwarranted." Biggs v. Vail, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994)

Thus, a failure to provide a prior and timely notice of a potential CR11 violation is not just a "consideration" in whether to grant CR11 sanctions, but, in fact, according to *Biggs*, constitutes a bar to granting CR11 sanctions.

For example, in *Stiles v. Kearney*, 168 Wash.App. 250, 277 P.3d 9 (Wash. App., 2012), the Court of Appeals, in considering the appellant's argument that she was not given prior notice, specifically found that the appellant therein *was* given prior notice and that therefore, the trial court had authority to grant CR11 sanctions. *Ibid.*, at 277 P.3d 16. Here, the trial court, nor the Court of Appeals, did not find that Bykov was given prior notice.

Also, the noticing party has a duty to mitigate. CR 11 authorizes only the award of reasonable attorney fees. *Miller v. Badgley*, 753 P.2d 530, 51 Wn.App. 285 (Wash. App., 1988) A party resisting a motion that violates

CR 11 has a duty to mitigate and may not recover excessive expenditures. Ibid at 303. The WA Supreme Court requires opportunity to mitigate. See *Biggs* at 198. There, the Washington Supreme Court said:

"...without prompt notice regarding a potential violation of the [CR11] rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper."

In its opinion, this Court of Appeals wrote:

"Given the wide latitude afforded trial courts in fashioning appropriate sanctions, it is not necessary to remand in order for the trial court to designate the sanction as "terms" rather than "attorney fees.""

Slip Op. at 7.

In support, this Court of Appeals cited *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 122 Wn.2d 299 (Wash., 1993) for this proposition. However, *Fisons* is not appropriate because it did not involve CR11 violations and sanctions. *Fisons* involved CR26(g) violations and sanctions. See Fisons at 339-340.

Moreover, in *MacDonald v. Korum Ford*, 912 P.2d 1052, 80 Wn.App. 877 (Wash.App. Div. 2, 1996) (citing *Biggs*, 124 Wash.2d at 201, 876 P.2d 448.) the Court stated that the award of CR11 sanctions should not include fees and expenses that were self imposed by a party or could reasonably have been avoided by notifying the opposing party of its concerns. *MacDonald v. Korum Ford* at 893. Mitigation embodies this

principle. Had Fresonke notified Bykov of the unredacted social security # prior to filing the motion to redact, Bykov would have moved to redact it and there would not have been any alleged attorney fees. Fresonke had a duty to mitigate. The trial court and likewise, the Court of Appeals, did not find that Fresonke had mitigated. Thus, both courts erred in awarding and affirming CR11 sanctions.

Furthermore, when attorney fees are granted under CR 11, the trial court "must limit those fees to the amounts reasonably expended in responding to the sanctionable filings." *MacDonald v. Korum Ford*, 912 P.2d 1052, 80 Wn.App. 877 (Wash.App., 1996) (citing *Biggs*, 124 Wash.2d at 198 n. 2, 876 P.2d 448.) Attorney fee sanctions should not exceed the amount expended by the non-offending party in responding to the sanctionable conduct. *Ibid.* (citing *Biggs*, 124 Wash.2d at 202, 876 P.2d 448.) Here, there were no actual expenses incurred by David Adams. David Adams did not respond to the motion which contained his lawyer's unredacted social security # and did not incur any expenses when Brian Fresonke filed a motion to redact his social security #. Brian Fresonke also did not incur any actual attorney fees.

In *McDonalnd v. Korum*, the Court of Appeals opined that the trial court's imposition of CR11 sanctions was unreasonable because the award was not limited to actual expenses in responding to sanctionable filings.

Ibid, at 892. Herein, the Respondent never responded to the motion, which contained his attorney's unredacted social security number. Even though Brian Fresonke filed a motion to redact his social security number, no actual attorney fees were actually *expended.* Furthermore, the record shows that Brian Fresonke allegedly spent only .66 of an hour on the motion, relating to the redaction of the social security #. CP 145. This would only equal $181.50 (.66 x $275). Yet, the trial court entered $731.50 in sanctions. Of course, there is no evidence that David Adams paid any amount to Brian Fresonke for redacting Brian Fresonke's social security number. Brian Fresonke did not allege that he had to somehow forego other attorney fees as a result of the time he spent on the motion relating to redaction of his social security number. The trail court erred. The Court of Appeals erred in affirming the trial court.

Confusingly, the Court of Appeals also alleged that:

"Bykov has not challenged the trial court's finding that he filed the tax documents in November 2010 with the social security number redacted for the improper purpose of harassing Adam's attorney."
Slip Op. at Page 5.

However, this allegation is not true. The trial court did not find that the tax documents were filed for the improper purpose of harassing Adam's attorney. Specifically, the trial court only found that the failure to

redact the social security # was an act of harassment. CP 321.

Specifically, the order said:

"Plaintiff intended to harass defendant's attorney by including the social security number in plaintiff's November 5, 2011 pleading." CP 321.

Thus, contrary to the Court of Appeal's assertion, Bykov did not have to challenge the trial court, because the trial court did not find that the motion itself was an act of harassment, only the specific failure to redact. Decidedly, Fresonke did not challenge the trial court's finding.

The case law is clear. To impose sanctions for a baseless filing, the trial court must find not only that the claim was without a factual or legal basis, but also that the attorney who signed the filing did not conduct a reasonable inquiry into the factual and legal basis of the claim. *Arthur West v. Wash. State*, 162 Wash.App. 120, 252 P.3d 406 (Wash. App., 2011.) (citing *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (Wash., 1992)) Here, the trial court did not find that the motion, which contained Fresonke's unredacted social security #, was without factual or legal basis.

The motion itself was not act of harassment, but evidence of Brian Fresonke's failure to pay federal income tax, relevant to his credibility. Also, there was no need to challenge the trial court's determination that the unredacted social security number was allegedly harassment because it

was not relevant to whether CR11 sanctions could be granted. Importantly, the failure of Brian Fresonke to provide prior notice of a potential CR11 violation precluded the trial court from being able to order CR11 sanctions. Any dispute as to existence of an actual CR11 violation was irrelevant to whether the trial court could grant CR11 sanctions.

Indeed, since the trial court did not find that the brief itself violated CR11, it was error for the trial court to order CR11 sanctions and error of the Court of Appeals to uphold the decision.

To explain, the trial court had to make specific findings, indicating which filings violated the rule and how such filings violated the rule or demonstrate bad faith. See *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994.) It made specific findings. It found the failure to redact an alleged CR11 violation. But, it did not find the brief to be a violation. But, according to *Biggs*, CR11 sanctions are appropriate only, relevant to this situation, "...if the paper was filed for an improper purpose" *Biggs* at 202. Since the trial court did not find that the paper was filed for an improper purpose, it was error to order CR11 sanctions for a failure to redact a social security number. There is simply no case law that CR11 sanctions apply to an unredacted social security number. The respondent, nor the Court of Appeals, have not cited any case law that would support the argument that an unredacted social security number violates CR11.

There were also no attorney fees. The sanction was simply a "measure" of the attorney fees that may have accrued. It was not an award of actual attorney fees. But, CR11 sanctions can only be for actual attorney fees paid by a client to his attorney, as explained *supra*. There is nothing in case law to suggest that a sanction can be a "measure" and not constitute actual attorney fees. Significantly, there was no declaration from David R. Adams that he had paid anything to Brian Fresonke for filing the motion to redact Brian Fresonke's social security number. As already discussed *supra*, this Court of Appeal's citation to *Fisons,* for the assertion that "terms" can constitute a sanction, is error. In fact, this Court of Appeals has not defined "terms"

The case law is clear. As already explained, if a trial court grants fees under CR 11, it "must limit those fees to the amounts reasonably expended in responding to the sanctionable filings." *Just Dirt, Inc. v. Knight Excavating, Inc.*, 157 P.3d 431, 138 Wn. App. 409 (Wash. App., 2007) (citing *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994.) However, in this case, David Adams never responded to the motion, which contained his attorney's unredacted social security number. David Adams did not, in fact, incur any attorney fees.

In any case, the filing of the motion for CR11 sanctions was untimely, as required by *Biggs,* since it was filed a year after the alleged

CR11 violation. The trial court did not, nor the Court of Appeals, find that the motion for CR11 sanctions was timely.

Furthermore, the same errors apply to the Court of Appeal's decision to affirm the trial court's *sua sponte* issuance of a CR11 sanction in the amount of $1000. The trial court did not give prior notice of the alleged potential violation of CR11 prior to issuing the sanction. However, "Both practitioners and judges who perceive a possible violation of CR11 must bring it to the offending party's attention as soon as possible. Without such notice, CR11 sanctions are unwarranted." *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994.) The Court of Appeals did not find that the trial court had given prior notice and consequently, it was error to affirm the sanction.

The case law is clear. If a trial court grants fees under CR 11, it "must limit those fees to the amounts reasonably expended in responding to the sanctionable filings." *Just Dirt, Inc. v. Knight Excavating, Inc.*, 157 P.3d 431, 138 Wn. App. 409 (Wash. App., 2007) (citing *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (Wash., 1994.) After determining that sanctions are appropriate, the trial court *must* limit attorney fees to the amount reasonably *expended* in response to the sanctionable claims. (italicized for emphasis) *Manteufel v. Safeco Ins. Co. of America*, 117 Wn. App. 168, 68

P.3d 1093, 117 Wash.App. 168 (Wash. App., 2003) (citing *Biggs*, 124 Wash.2d at 201, 876 P.2d 448.)

In this case, the Respondent, David R. Adams, likewise did not respond to the allegedly sanctionable motion (on which the $1000 sanction was based) and did not incur any attorney fees. Brian Fresonke did not incur any actual attorney fees. Thus it was error for the trial court to grant $1000 in CR11 sanctions and error of the Court of Appeals to affirm the sanctions because no fees were *expended*. And, as explained *supra*, "terms" is not a sanction under CR11.

Of course, remand for recalculation is appropriate where a trial court does not limit an attorney fee award to amounts reasonably expended in responding to specified sanctionable conduct. See *Biggs*, 124 Wash.2d at 201-02, 876 P.2d 448; *MacDonald v. Korum Ford*, 80 Wash.App. 877, 892-93, 912 P.2d 1052 (1996). However, in this case, there were no actual attorney fees, and thus, remand is not necessary.

The Court of Appeals misinterpreted and misapplied the law. It should have reversed the trial court's award of CR11 sanctions against Bykov.

V. CONCLUSION

Mr. Bykov respectfully requests that this Court grant the motion to reconsider and vacate the trial court's imposition of double CR11 sanctions.

DATED this 7th day of October, 2013.

Respectfully submitted,

Vladik Bykov

Vladik Bykov

CERTIFICATE OF SERVICE

I, Vladik Bykov, under penalty of perjury under the laws of the State of Washington hereby declare that I have served a copy of the foregoing motion on the Court of Appeals by delivering by hand this copy to the clerk at the Court of Appeals at 600 University Street in Seattle, Washington. Likewise, I have mailed a copy of the foregoing motion to Brian Fresonke at 1001 4th Avenue in Seattle, Washington on October 7th, 2013 by delivering the motion, in a sealed envelope with prepaid postage, to a U.S. Postal Office in Kirkland, WA.

DATED this 7th of October, 2013.

Vladik Bykov

Vladik Bykov

APPENDIX C

RULE CR 11
SIGNING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) 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; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact, (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, (3) 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, and (4)

the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

[Amended effective January 1, 1974; September 1, 1985; September 1, 1990; September 17, 1993; October 15, 2002; September 1, 2005.]

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