

NO. 63211-6-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

DENNIS AND BERNADENE DOCHNAHL

Appellants,

v.

INEZ SOMERVILLE PETERSEN

Respondent.

SECOND CORRECTED BRIEF OF RESPONDENT

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I. INTRODUCTION

The only question before this Court is whether the trial court abused its discretion in awarding the Buck Law Group attorneys' fees pursuant to CR 11, where Appellant Robert Green filed and perpetuated a baseless defamation lawsuit against Inez Petersen, a retired community activist. The trial court's decision was amply justified by Mr. Green's actions and consistent with Washington state law.

II. STATEMENT OF ISSUES

There is only one issue before this Court: Did the trial court abuse its discretion in awarding attorneys' fees to the Buck Law Group pursuant to CR 11, where Appellant Robert Green filed and perpetuated a baseless lawsuit against Inez Petersen for the sole purpose of harassment? The answer is no.

III. STATEMENT OF THE CASE

A. The actors.

1. Defendant Inez Petersen was an anti-establishment advocate in the City of Renton.

Defendant Inez Petersen was a grass-roots participant in City of Renton municipal politics. She was an advocate for low income and disadvantaged persons against the Renton political establishment and various developers. CP 92-93.

Examples of Ms. Petersen's advocacy follow. In 2006, Ms. Petersen filed a SEPA appeal to delay adoption of high density zoning related to a planned Declaration of Blight, which would have resulted in the mass condemnation of homes belonging to low and middle income residents of the Highlands. Ms. Petersen was also one of a group of citizens who sued the City of Renton when it issued building permits for a large shopping center in violation of the City's own zoning laws. In 2007, Ms. Petersen filed a Petition for Review with the Puget Sound Growth Management Hearings Board, which was approved, relating to the lack of public participation in the approval of the city's thirteen Comprehensive Plan amendments. As a result of her advocacy, Ms. Petersen was not looked upon favorably by local business owners who make their living from endeavors associated with development. CP 93.

2. The Dochnahls were self-acknowledged members of the Renton "Establishment."

Plaintiffs Dennis and Bernadene Dochnahl are property developers in the Renton area. They had apparently been proponents of issues that Ms. Petersen opposed through her activism. CP 93.

Until Ms. Dochnahl launched a very public attack on Ms. Petersen in the fall of 2006, Ms. Petersen did not even know who Ms. Dochnahl

was. CP 94. As can be seen below, although Ms. Petersen did not realize it at the time, she had become an irritant to Ms. Dochnahl.

In the Fall of 2005, Jerrilynn Hadley, the founding partner of Hadley Green (the firm that initiated this lawsuit) was married to Russ Wilson, also a practicing attorney at the law firm. Mr. Wilson was running for Renton Municipal Court Judge. CP 93–94.

Both Ms. Hadley and Ms. Dochnahl supported Mr. Wilson's campaign. Ms. Petersen opposed Mr. Wilson's campaign. Ms. Petersen focused on a claim in Mr. Wilson's campaign materials related to his previous experience. Mr. Wilson's claim was subsequently investigated by the King County Bar Association, which determined that Ms. Petersen was correct that Mr. Wilson was making inaccurate claims regarding his background in his run for Renton Municipal Court Judge. This information was then published in The Seattle Times on September 26, 2005. Mr. Wilson lost that election. CP 94.

It later became clear through reported statements in Ms. Dochnahl's deposition that Ms. Dochnahl has strong roots in the Renton community, sees herself and the role she and her husband play in Renton's political and business arenas as a very positive one, and had become extremely annoyed by what she viewed to be negative general

commentary on Renton coming from Ms. Petersen in the form of letters to the editors and blog postings.

B. Ms. Petersen did not even know Ms. Dochnahl prior to September 25, 2006.

Ms. Petersen's first introduction to Ms. Dochnahl came on September 25, 2006, at a public meeting of the Renton City Council. From the podium, Ms. Dochnahl attacked Ms. Petersen by name on behalf of herself, her husband, and 12 friends, including participants in local politics and local business owners, who co-signed a letter she had written attacking Ms. Petersen. CP 94.

She encouraged the city council "to ignore the weekly rhetoric of Inez Petersen." She indicated that she was "tired of weekly tirades" and asked the Council to continue their business "without being intimidated by the rants and raves." In a letter that Ms. Dochnahl presented to the Council after her remarks, she wrote "It's time for you and the public to ignore her constant flow of rhetoric and criticism." CP 94. A copy of Ms. Dochnahl's letter is attached to this brief as Exhibit A. CP 101-02.

The meeting of the Renton City Council was videotaped, and these personal attacks against Ms. Petersen were rebroadcast multiple times daily over the following week. CP 95. This event came without warning and completely surprised Ms. Petersen. Ms. Petersen had never made any

kind of personal attack or comment about Ms. Dochnahl that could explain Ms. Dochnahl's actions toward her. CP 572–82.

C. The attack was so vicious that it back-fired on Ms. Dochnahl who was publicly criticized by the President of the Council for launching a “slanderous” ad hominem attack on Ms. Petersen.

The speech by Ms. Dochnahl at the Council meeting was such that the Renton Council President Randy Corman called Ms. Dochnahl's remarks “slanderous” after she spoke, making the following statement:

I think everybody's entitled to their opinion, but I don't feel comfortable with speakers coming out and singling out members of the community and effectively slandering them so that we have to have the sergeant of arms go and quiet down the speaker. Somehow this just didn't play out right. I just want to say that I would just request that people stick to issues in here. If there is an issue that Inez Petersen has brought up and you have a different opinion on the issue, would you please kindly speak to the issue and tell us the direction you want to go.

I don't think it is appropriate to pick other members of the community and have 16 people target that member and write a slanderous letter ... [his conclusion inaudible over the loud applause in response to his comments].

CP 95–95.

Though surprised by this attack, particularly because Ms. Petersen had not previously known of nor had any interaction with the Dochnahls, Ms. Petersen continued with her local activism, which involved participation in public meetings and public political processes, writing

letters or e-mails to the editor of the Renton Reporter (a local newspaper), maintaining websites, including her newsgroup, and continuing to make public disclosure requests. CP 96.

D. The lawsuit.

1. May 2007. In the words of Judge Middaugh, Ms. Dochnahl hires Hadley & Green to sue Ms. Petersen to “harass” her.

Ms. Dochnahl hired the partnership of Hadley and Green to bring the action. *See* CP 1–5. Judge Middaugh later found that Ms. Dochnahl had sued Ms. Petersen to “harass” her since she had been intervening in local issues. CP 460.

As noted above, Ms. Dochnahl hired a law firm which also carried a grudge against Ms. Petersen. Ms. Petersen had successfully exposed the inaccurate claims of Ms. Hadley’s husband through the King County Bar Association when he ran for Renton Municipal Court Judge. CP 93–94.

2. May 22, 2007. Mr. Green signs and files the complaint.

The suit alleged that Ms. Petersen was liable for libel and slander, defamation, invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress. CP 3–5. These claims were allegedly based on Ms. Petersen’s numerous personal attacks, both written and oral, including defamatory letters to the editor of a local newspaper and general internet commentary. CP 3–5.

3. June 12, 2007. BLG represents Ms. Petersen in a *pro bono* capacity.

Peter Buck, then of Buck & Gordon LLP, offered to defend Ms. Petersen on a *pro bono* basis. Mr. Buck filed a notice of appearance on June 12, 2007. CP 473–74. Shortly thereafter, Mr. Buck left Buck & Gordon, LLP to form The Buck Law Group, PLLC (“BLG”). A notice of withdrawal and substitution of counsel was filed on July 10, 2007. CP 475–76.

4. July 9, 2007. BLG answers and alerts Mr. Green that it will seek an award of costs and fees under RCW 4.84.

From the first of this case, Green was alerted to the danger of sanctions. In her answer, Ms. Petersen pled the right to an award of costs and attorneys fees under RCW 4.84. CP 16–19.

5. August 2, 2007. BLG makes an effort to end the case by revealing all the facts it can find and giving CR 11 notice that Mr. Green concedes was adequate.

Attorneys at BLG performed an extensive investigation into the factual allegations contained within Mr. Green’s complaint. Given the vague nature of the allegations, BLG took it upon itself to obtain any and all writings prepared or published by Ms. Petersen that could lend any support to Mr. Green’s claims. Finding none, BLG attempted to put an early end to the case.

On August 2, 2007, BLG provided Mr. Green with notice of potential CR 11 violations, based on the fact that BLG could not uncover any facts that would support Mr. Green's defamation claims. CP 164–65. BLG sent copies of all of the writings it reviewed to Mr. Green in an effort to educate him as to the frivolity of his claims. *See id.*

BLG even left open the possibility that it may have missed actionable facts in its document review, closing its CR 11 notice with the following request: "If you have conducted an investigation into the merits of your clients' claims, and if that investigation has uncovered facts not presented in this letter, please notify us immediately, and we will certainly change the tone of our approach." CP 165. Mr. Green never provided any response to that request.¹

Green, on appeal, acknowledged that the notice was adequate. Br. at 2 (BLG's "original notice was sufficient"), 7, and 18.

6. August 2, 2007. Ms. Petersen, hoping to reduce her stress and health problems, makes an offer of judgment that would have given the Dochnahls "bragging rights."

¹ Along similar lines, Mr. Green's responses to Ms. Petersen's first set of interrogatories and requests for admission suggested that the factual basis for Mr. Green's claims was lacking. *See* CP 458. Mr. Green issued a blanket objection to each interrogatory and request. *Id.* Mr. Green then failed to respond to those interrogatories asking that he state with specificity those portions of Ms. Petersen's allegedly defamatory statements that were untrue, the detail of any financial and non-financial loss claimed, and the emotional distress suffered and any treatment that plaintiffs received for such distress. *Id.*

Ms. Petersen had serious health problems and the lawsuit created tremendous stress and strain on her and was interfering with her attempt to be healed. CP 127.

As further efforts at allowing Plaintiffs an “out” to the litigation, Ms. Petersen also provided Plaintiffs with an offer of judgment that same day, which would have allowed entry of judgment against Ms. Petersen for the sum of two dollars and costs accrued to date. CP 126; CP 166.

7. August 2, 2007. Ms. Petersen, hoping to reduce health problems further, offers to never again speak or write about the Dochnahls.

On that same day, Ms. Petersen proposed a settlement that if Defendants dropped their suit, she would take down any website with reference to the Dochnahls and would thereafter never mention them. CP 126.

Any of these ways to settle would have ended the case and BLG would have been paid no money. CP 127. There was never an intent to receive an award for fees or sanctions. CP 127. There was every intent to get the case out of Ms. Petersen’s life and off the court’s crowded docket. CP 127.

8. August 13, 2007. Ms. Dochnahl’s deposition shows that there is no basis for the lawsuit.

In response to a line of questioning regarding whether Plaintiffs or Plaintiffs’ counsel conducted any inquiry or investigation into the

underlying facts of the case before bringing their claims, Ms. Dochnahl admitted that virtually no investigation occurred – she didn't provide her counsel with a copy or copies of the letters to the editor or the blog postings (as she didn't keep these herself). She did not even re-review these alleged defamatory written statements prior to bringing the lawsuit (only the weekend before her deposition). CP 79–80. Instead, she simply relied on her memory of the alleged defamatory statements, the first viewings of which she couldn't describe in any specific detail. *See* CP 66 (for example, in response to questioning about the alleged letters to the editor forming the basis of her complaint, Plaintiff answered “You know, there was one letter, I believe, that was in the Renton Reporter, and I don't have the details, but I think there was some reference that she made to our project in Renton.”).

In summary, during that deposition, Ms. Dochnahl was (1) unable to identify any false statement of fact made by Ms. Petersen that concerned the Dochnahls; (2) unable to identify any letter to the editor written by Ms. Petersen that specifically identified the Dochnahls; and (3) unable to identify any specific damages, including damages to her reputation, stemming from Ms. Petersen's alleged actions. *See* CP 61–91; CP 127–32.

Additionally, Ms. Dochnahl affirmatively stated that she was unaware of any oral statements by Ms. Petersen concerning the Dochnahls. CP 129. She also affirmatively stated that she had never sought any sort of medical diagnosis or treatment as a result of Ms. Petersen's actions. CP 131–32.

Before this Court, Mr. Green concedes that this deposition completely undermined the factual bases for his claims. *See Br.* at 7.

9. August 13, 2007. Ms. Petersen again attempts to settle the case and again raises the CR 11 issue.

Immediately following Ms. Dochnahl's deposition, Mr. Buck met with Mr. Green to reiterate his concerns regarding the merits of Mr. Green's case, concerns that were bolstered by Ms. Dochnahl's sworn deposition testimony. CP 127. During this meeting, Mr. Buck again raised the possibility of CR 11 violations and again attempted to settle the case. *Id.*

Mr. Buck raised the possibility of CR 11 sanctions for a third time in an e-mail to Mr. Green dated August 28, 2007. CP 495.

10. August 27, 2007. Mr. Green refuses to settle unless he can get possession of Ms. Petersen's computers.

Two weeks later, Mr. Green notified BLG that he was unwilling to settle without first being able to gain access to Ms. Petersen's personal computers. CP 355.

This particular request—to gain access to Ms. Petersen’s personal computers—was a recurring effort. *See* section III.B.15, *infra*.

11. September 4, 2007. Ms. Petersen shuts down her internet message boards, stops writing letters to the editor and leaves Renton.

By September 4, 2007 Ms. Petersen took what steps she could to end what Judge Middaugh found was “harassment” by the Dochnahls and Green. CP 477–82. Ms. Petersen was retired and without funds to fight this fight. Additionally, as noted above, Ms. Petersen had serious health problems and this lawsuit was creating tremendous stress and strain on her and was interfering with her attempt to be healed.

12. September 17, 2007. Mr. Green amends complaint but fails to remove claims contradicted by his client’s deposition testimony.

Mr. Green filed an amended complaint in September 2007. CP 20–22. In spite of both the numerous CR 11 notices and his client’s own sworn deposition testimony to the contrary, Mr. Green repeated his claims for defamation, libel and slander, invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress. *Id.*

Perhaps most surprisingly, Mr. Green re-alleged the existence of verbal personal attacks, re-claimed negligent infliction of emotional distress, and claimed (for the first time) that his clients had suffered harm

to their reputation, despite sworn testimony directly to the contrary. *Id.*;
CP 457.

13. October 2007. Insurance counsel takes over.

Shortly after Mr. Green filed his amended complaint, Ms. Petersen notified BLG of the existence of insurance counsel. On October 5, 2007, BLG withdrew as counsel of record, replaced by Davies Pearson, P.C. CP 483–84.

14. January to June 2008. Mr. Green continues to seek Ms. Petersen's computers. Davies Pearson notifies Mr. Green of the possibility of CR 11 sanctions.

On January 22, 2008, Mr. Green filed a motion to compel Ms. Petersen to turn over her personal computers and other electronic storage devices. CP 555–64. The court denied this request as an after-the-fact fishing expedition. CP 582–83. *See also* CP 457–60.

On June 30, 2008, Mr. Green tried again, filing a second motion to compel Ms. Petersen to turn over her personal computers and other electronic storage devices. CP 584–94. Eventually, insurance counsel agreed and the court granted Mr. Green's motion. CP 595–601. It was not revealed that the devices would be turned over to a former City of Renton police officer. CP 610–14.

Meanwhile, Davies Pearson notified Mr. Green that his lawsuit was frivolous on January 31, 2008. *See* CP 565–71. Davies Pearson

independently moved for CR 11 sanctions on August 8, 2008. *See* CP 621–42; CP 170–91. (Before the court could rule on Davies Pearson’s motion, Mr. Green took a voluntary nonsuit.)

15. July 31, 2008. Ms. Petersen learns of the order to turn over her computers right before leaving for law school.

The Court’s order issued on July 30, 2008, right before Ms. Petersen was to leave the state—with her computers—to begin law school. CP 610–14. Given the exigency of the situation, Ms. Petersen turned to BLG for immediate assistance. Because BLG did not have the capacity to re-enter the case at that time, Mr. Buck asked Allied Law Group to step in as associate counsel on an emergency basis, offering to pay Allied’s fees out of his own pocket. Allied filed a notice of association on August 6, 2008. CP 602–03.

Ms. Petersen received a copy of the Protective Order on Friday July 31, 2008. CP 610–14. Technically her computers were to be turned over that very day, assuming that the forensic expert, E3, had signed the agreement with the Court. *Id.* She did not know if the agreement had been signed or not. *Id.* There has never been any evidence that the agreement, which was a condition precedent, was ever signed. CP 595–601; CP 616–19.

16. August 1, 2008. Ms. Petersen discovers that her computers were to be turned over to a former adversary from the Renton City Police Department.

Ms. Petersen was not previously aware that the designated forensic examiner, E3, was a sole proprietorship of a former adversary within the City of Renton. Brett Shavers, the sole proprietor of E3 Discovery, was a former Renton Police Officer. Ms. Petersen's activist and litigation activity had placed her directly adverse to the Renton Police Department and Mr. Shavers. The Renton Police Department had been used to intimidate Ms. Petersen at public hearings. CP 616-19. It is respectfully noted that this was during a previous City administration – there should be no implication that this is a problem for activists in the City of Renton today.

Ms. Petersen was frightened of the consequences of putting her computer hardware in the hands of a former adversary, a tangential participant in an action that she felt was aimed at muzzling her.

She and other attorneys were not afforded notice that their privileged and protected communications would be ordered disclosed.

Making things more complicated, she was leaving the following Monday to drive to Ann Arbor, Michigan, having just been admitted as a first year law student.

17. August 1, 2008. Over a weekend the memory devices are turned over to a totally independent forensic expert to keep them within the jurisdiction of the court while motions for a stay and reconsideration are prepared.

To put her in a position to comply with the Court's order, Mr. Buck hired David Stenhouse, who neither Mr. Buck nor Ms. Petersen knew, but who is a qualified forensic computer expert. CP 616–19. Mr. Stenhouse went to her apartment and took every piece of hardware she had, as well as her DVDs. CP 610–14. More importantly, he retained control of the hardware so it could be turned over upon the Expert signing the agreement or the Court appointing an independent expert pursuant to a motion to reconsider. CP 610–14. Although it is inconvenient, intrusive, and expensive, Ms. Petersen bought a new lap top for law school so everything could be left in King County. CP 610–14.

18. August 6, 2008. The Allied Law Group is associated as counsel.

Two days after entering the case, Allied filed a motion to stay the court's order to compel until the court reached a decision on Davies Pearson's motion for summary judgment, which was filed the same day. CP 605–08; CP 621–42. Allied also filed a motion for reconsideration. CP 644–54. Allied Law Group was paid by BLG.

19. August 12, 2008. Green files an unsuccessful motion for contempt and sanctions, including CR 11 sanctions.

Unhappy that Ms. Petersen had not yet relinquished her personal computers and other electronic storage devices to his selected forensic examiner, Mr. Green filed a motion to declare Ms. Petersen in contempt of the court's order on August 12, 2008. CP 656–64. Mr. Green did so despite the fact that he himself had failed to comply with the conditions precedent expressly set forth in the court's order to compel. CP 616–19. *See also* CP 374–75.

20. August 18, 2008. The trial court issues three non-substantive orders in Ms. Petersen's favor.

Shortly thereafter, the court issued an order requesting that Mr. Green file a response to Ms. Petersen's motion for reconsideration. CP 665. Second, the court issued an order granting Ms. Petersen's motion to stay the order to compel. CP 666–67. Third, the court issued an order denying Mr. Green's motion to declare Ms. Petersen in contempt of court. CP 668–69.

21. August 22, 2008. Mr. Green moves to dismiss his case, describing Judge Middaugh as "prejudiced."

Despite the court's request, Mr. Green never filed a response to Ms. Petersen's motion for reconsideration. (Perhaps Mr. Green saw the writing on the wall: that the court was unlikely to ever allow his clients' access to Ms. Petersen's personal computers and other electronic storage devices.)

Instead, Green sought to voluntarily dismiss his clients' case, claiming that the court's August 18 ruling was highly prejudiced. CP 192; CP 670–71. The court granted Mr. Green's motion to voluntarily dismiss on August 26, 2008. CP 23–24.

22. September 25, 2008. Ms. Petersen seeks sanctions pursuant to RCW 4.84 and CR 11.

Three days after filing a notice of association of counsel and re-entering the case, BLG filed its motion for attorneys' fees pursuant to RCW 4.84.185 and sanctions pursuant to CR 11. CP 672–74; CP 197–208. This motion was supported by numerous declarations justifying BLG's fee request. *See* CP 25–193. These declarations made it clear that BLG was not seeking recovery of all fees associated with its representation of Ms. Petersen. *See* CP 139–40.

23. October 8, 2008. Mr. Green files a response which does not challenge the amount of the fee request and raises only one of the grounds that it now asserts at the appellate level.

Mr. Green filed a response to BLG's motion on October 8. CP 230–40. In that response, Mr. Green did not challenge the amount of the fee request. *See id.* Additionally, he did not in that motion or in the motion for reconsideration raise most of the issues he now asserts on appeal.

24. December 16, 2008. Judge Middaugh awards CR 11 sanctions of \$75,166.53.

The trial court heard oral argument on BLG's motion on December 16, 2008. That same day, the court granted BLG's motion, awarding \$75,166.53 in sanctions against Mr. Green. CP 335–37.

Such sanctions were allocated as follows: (1) \$13,854.35 to be paid to Farmers Insurance Company; (2) \$60,472.92 to be paid to BLG; and (3) \$839.26 to be paid to Ms. Petersen to cover the costs associated with replacing a laptop computer. *Id.*

25. December 26, 2009. Mr. Green seeks reconsideration, for the first time questioning the amount of fees.

Green then sought reconsideration of the court's order imposing sanctions. CP 339–50. In his motion, Mr. Green raised a number of arguments that he had failed to make in his response to BLG's motion for CR 11 sanctions, including the argument that BLG's fees were excessive. *See* CP 339–50; CP 460. Mr. Green provided no evidence in support of this argument. *See* CP 339–50.

26. January 23, 2009. During the pendency of the motion for reconsideration proceedings Mr. Green turns down a no-strings-attached offer to have the award reduced by \$20,000 if he would write a letter of apology.

In its response to Mr. Green's motion for reconsideration, BLG went so far as to propose a \$20,000.00 reduction in sanctions if Mr. Green would simply issue Ms. Petersen a written apology. Mr. Green was not

asked to abandon his motion for reconsideration or to give up appeal rights. CP 375–76. Mr. Green declined to do so.

27. February 26, 2009. The court denies reconsideration and enters six pages of findings including a finding that the suit was not based on reasonable inquiry and was interposed for the sole purpose of “harassment.”

Judge Middaugh prepared her own written findings in support of the award of attorneys’ fees pursuant to CR 11. CP 456–60. Among the many findings entered, the following offers a good summary of the court’s understanding of what occurred in the matter:

[T]he Court found that the plaintiffs’ attorney did not make a reasonable inquiry into the facts to establish exactly what the words allegedly said or written by the defendant were that formed the basis of the complaint, or the law in regards to those statements. While it is possible that discovery might have disclosed additional statements, this does not relieve the plaintiff from having a basis for the complaint at the time of filing. In addition, after discovery revealed that there was not even an arguable basis for a complaint based on oral statement[s] or negligent infliction of emotion[al] distress, the complaint was amended, yet these claims remained intact. The only apparent reason for the lawsuit, given the lack of damages and the consistent statements by plaintiffs as to how annoyed they are by the defendant’s intervention into local issues, is for harassment. However, it was the responsibility of the plaintiffs’ attorney to inform [his] clients that while the statements of the defendant may have been annoying, they were not actionable.

CP 459–60.

28. March 19, 2008. The court enters judgments against Mr. Green.

Judgments were subsequently filed on March 19, 2008. CP 461–63; CP 464–66.

29. June 24, 2009. During supplemental proceedings Mr. Green seeks to disqualify Judge Middaugh with an affidavit of prejudice.

On June 24, 2009 during supplemental proceedings, Green sought to disqualify Judge Middaugh with an affidavit of prejudice. CP 677.

On July 14, 2009, Mr. Green posted with the clerk of the court a \$125,000 cash deposit to secure that judgment during the appeal. CP 678–79.

IV. ARGUMENT

A. This Court reviews the trial court’s CR 11 sanctions under the abuse of discretion standard.

This Court reviews a trial court’s decision to impose attorneys’ fees pursuant to CR 11 for an abuse of discretion. *See, e.g., Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 114, 791 P.2d 537, 542 (1990) (citations omitted). A trial court abuses its discretion only where its decision is manifestly unreasonable or based on untenable grounds. *Id.*

The appellant bears the burden of demonstrating that the trial court abused its discretion. *See, e.g., Lewis v. Simpson Timber Co.*, 145 Wn.

App. 302, 328, 189 P.3d 178, 193 (2008); *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71, 76 (1994).

Even at this late date, Mr. Green does not seem to take CR 11 seriously enough to read the cases carefully. He claims that the “deference owed to the lower court is further tempered by the fact that the burden of proof is at all times on the party seeking sanctions.” Br. at 11–12 (citing *Biggs*, 124 Wn.2d 193, 876 P.2d 448 (1994)). He is wrong, and his reliance on *Biggs* is misplaced. In that case, the court was simply stating that on remand to the trial court, the burden would be on the party seeking CR 11 sanctions to justify such sanctions. *Biggs*, 124 Wn.2d at 202, 876 P.2d at 453–54. The court was not referring to the burden on appeal.

B. The trial court’s decision to award attorneys’ fees under CR 11 was not manifestly unreasonable or based on untenable grounds, especially given the deterrent, punitive, compensatory, and educational purposes of CR 11 sanctions.

Where CR 11 has been violated, a trial court may impose “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.” CR 11.

In fashioning such sanctions, the trial court “must of necessity determine priorities in light of the deterrent, punitive, compensatory, and educational aspects of sanctions as required by the particular circumstances. . . . Resolution of these matters lies within the informed discretion of the trial court.” *Miller v. Badgley*, 51 Wn. App. 258, 303–04, 753 P.2d 530, 540 (1988).

1. The trial court entered findings specifically identifying Appellant’s sanctionable conduct based on not just one, but both grounds justifying the imposition of sanctions.

In imposing attorneys’ fees pursuant to CR 11, “it is incumbent upon the court to specify the sanctionable conduct in its order.” *Biggs*, 124 Wn.2d at 201, 876 P.2d at 453. The court “must make a finding that either [(1)] the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or [(2)] the paper was filed for an improper purpose.” *Id.* (emphasis in original). Either of the two grounds is sufficient to justify sanctions.

Here, the trial court entered findings relating to both the frivolous nature of Mr. Green’s claims and the fact that the complaint was filed for an improper purpose. **These findings were drafted by Judge Middaugh; they were not proposed by counsel.** As to the first element, the court specifically found that:

[T]he plaintiffs' attorney did not make a reasonable inquiry into the facts to establish exactly what the words allegedly said or written by the defendant were that formed the basis of the complaint, or the law in regards to those statements. While it is possible that discovery might have disclosed *additional* statements, this does not relieve the plaintiff from having a basis for the complaint at the time of filing.

CP 459–60 (italics in original).

As to the second element, the court specifically found that the Dochnahls, who resented Ms. Petersen's involvement in local Renton issues, filed the lawsuit solely to harass Ms. Petersen:

[A]fter discovery revealed that there was not even an arguable basis for a complaint based on oral statement[s] or negligent infliction of emotion[al] distress, the complaint was amended, yet these claims remained intact. The only apparent reason for the lawsuit, given the lack of damages and the consistent statements by plaintiffs as to how annoyed they are by the defendant's intervention into local issues, is for harassment. However, it was the responsibility of the plaintiffs' attorney to inform [his] clients that while the statements of the defendant may have been annoying, they were not actionable.

CP 460 (emphasis added).

Such findings are more than sufficient to justify the trial court's award of attorneys' fees and demonstrate that there was no abuse of discretion.²

² Additionally, it should be noted that Ms. Petersen, who was in ill health at the time of the litigation, was not in a position to absorb the kind of harassment that was perpetuated by Mr. Green.

2. The trial court awarded attorneys' fees in an amount less than what was required to respond to Appellant's sanctionable conduct.

The trial court ultimately awarded BLG \$60,472.92 in attorneys' fees as a result of Mr. Green's sanctionable conduct. CP 337. The remainder of the judgment against Mr. Green is comprised of \$13,854.35 in attorneys' fees payable to Davies Pearson and \$839.26 payable to Ms. Petersen to cover the costs associated with her laptop computer (which had to be left within the jurisdiction of the court as she was leaving for law school). *Id.*

While the trial court awarded all of the fees requested by BLG, that is only half the story. The other half is that BLG carefully examined and then preemptively reduced its fee request in order to account for internal inefficiencies and redundant efforts. *See* CP 139–40. As Mr. Buck, the attorney overseeing the Petersen matter, indicated in his declaration to the trial court, “[m]uch of the cost of [Ms. Petersen’s] defense is not reflected in our fees statement[,] which significantly understates the work that was done.” CP 139.³

Indeed, in her findings, Judge Middaugh found that “the sanctions requested did not include all the [attorneys’] fees incurred in defending

³ In that declaration, Mr. Buck goes on to specifically identify at least \$25,000 in attorneys' fees, generated by BLG in direct response to Mr. Green's sanctionable conduct that BLG did not attempt to recover. *See* CP 139–40.

against the plaintiffs' lawsuit. There is nothing to indicate that the fees were excessive or included fees incurred for matters other than responding to the plaintiffs' frivolous complaint." CP 460.

Moreover, BLG's fee request was supported by detailed fee statements and numerous declarations. *See* CP 25–60; CP 122–93.

Mr. Green provided no evidence whatsoever to refute BLG's fee request. As Judge Middaugh found, "The plaintiffs did not file anything until the Motion for Reconsideration averring that the fees charged by the defense attorney and sanctions requested were excessive. . . . There is nothing to indicate that the fees were excessive or included fees incurred for matters other than responding to the plaintiffs' frivolous complaint." CP 460.

Continuing his pattern of assigning blame to anyone other than himself, Mr. Green time and again expresses indignation at the size of the fees that were generated in this matter. *See* Br. at 9 ("astonishing display of profligate spending"), 10 ("tens of thousands of dollars had been poured down the black hole of discovery"), and 17 ("it is simply outrageous that the lower court passed this completely avoidable \$22,477.32 expense on to Green."). What the unrepentant Mr. Green fails to accept is that these fees were the direct consequence of his own harassing actions. Given the ferocity with which Mr. Green pursued his clients' frivolous claims,

including a prolonged discovery battle that the trial court concluded was completely pointless,⁴ the fees generated in this case could have been much larger.

Again, it should be noted that BLG defended Ms. Petersen on a *pro bono* basis, and that BLG hired Allied Law Group and Mr. Stenhouse at its own expense to protect Ms. Petersen from Mr. Green's overreaching discovery attempts. These are not the sorts of actions that generate excessive billings on the part of defense counsel.

3. The trial court did not abuse its discretion in concluding that such attorneys' fees could not have been further avoided or mitigated.

In her findings, Judge Middaugh expressly concluded that Ms. Petersen did not violate her duty to mitigate: "Nor does it appear that the defendant prolonged litigation unnecessarily." CP 460. As discussed throughout this brief, *see* sections B.3.a–e, *infra*, BLG took all necessary and appropriate steps to deter Mr. Green from pursuing his clients' frivolous claims. Mr. Green ignored these warnings.

a. BLG gave prompt CR 11 notice, as required by Biggs.

Pursuant to *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994), a party seeking CR 11 sanctions is generally required to give informal

⁴ See CP 459–60 (Judge Middaugh concluding that "[w]hile it is possible that discovery might have disclosed additional statements, this does not relieve the plaintiff from having a basis for the complaint at the time of filing." (emphasis in original)).

notice to the offending party of a potential CR 11 violation before filing a CR 11 motion. *Id.* at 198 n.2, 876 P.2d at 452 n.2. Such notice provides “the offending party with an opportunity to mitigate the sanction by withdrawing or amending the offending paper.” *MacDonald v. Korum Ford*, 80 Wn. App. 877, 891, 912 P.2d 1052, 1061 (1996) (citations omitted).

Here, BLG gave Mr. Green informal notice of its intent to seek CR 11 sanctions on August 2, 2007, within three months of Mr. Green’s initial complaint. *See* CP 163–64. That notice spelled out BLG’s significant concerns regarding the absence of any factual and legal bases for Mr. Green’s claims as well as BLG’s concerns that the lawsuit was being pursued for improper purposes. *Id.* BLG went on to notify Mr. Green of the possibility of CR 11 sanctions at least twice more following the initial notice of August 2, 2007. *See* CP 127; CP 477–82. These numerous notices are more than sufficient to satisfy the notice requirement set forth in *Biggs*.

b. Appellant’s argument that BLG’s CR 11 notice lapsed when BLG was substituted by Davies Pearson was never raised before the trial court. Further, it is not supported by the law.

Mr. Green argues that BLG’s CR 11 notice lapsed by virtue of the fact that BLG did not file a CR 11 motion before originally withdrawing

from the case. *See* Br. at 20. Mr. Green’s argument fails for two alternative reasons. First, Mr. Green failed to raise this argument before the trial court. *See* CP 230–40; CP 339–50. Consequently, Mr. Green waived this argument for purposes of appeal. *See, e.g., Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447, 457 (2001).

Second, as Mr. Green concedes, “[t]here does not appear to be a recorded decision addressing the requirement that a lawyer file a CR 11 motion prior to withdrawing as counsel.” Br. at 20. (Respondent is similarly unaware of any such case.) Because this Court must review the trial court’s imposition of CR 11 sanctions for an abuse of discretion, this absence of authority is fatal to Mr. Green’s argument. Simply stated, it is not an abuse of discretion for a trial court not to follow a rule that does not exist.

Mr. Green also points out that BLG neither filed an answer to plaintiffs’ second amended complaint prior to withdrawing as counsel, nor notified Mr. Green that that complaint was still deficient. Br. at 19.

BLG was under no obligation to file an answer before it withdrew as counsel: The answer was not due until October 8, 2007—three days after BLG withdrew. *See* CR 12; CP 483–84. Moreover, as discussed above, it was Mr. Green’s responsibility to ensure that the second amended complaint was well grounded in fact, warranted by existing law

or a good faith argument for the extension of existing law, and not interposed for any improper purpose. *See* CR 11. At the time that Mr. Green amended his complaint, he knew that his client:

1. Was unable to articulate any amount of damages caused by Ms. Petersen;
2. Was unable to identify or recall any statements by Ms. Petersen that formed the basis of the complaint;
3. Had affirmatively stated that Ms. Petersen had not made any oral statements concerning the plaintiffs;
4. Sought no medical treatment and received no medical diagnosis in response to Ms. Petersen's allegedly defamatory statements; and
5. Recognized Ms. Petersen's various statements to be nothing more than opinions.

See CP 457. Despite this knowledge, which was explicitly referenced in Judge Middaugh's findings, Mr. Green's amended complaint retained claims relating to allegedly defamatory oral statements (contrary to his client's own admissions) and negligent infliction of emotional distress (contrary to the fact that his client never sought medical treatment or diagnosis). *See id.*

c. Substitute counsel was under no obligation to supplement BLG's CR 11 notice.

Mr. Green asserts that substitute counsel was required to provide independent notice of its intent to seek CR 11 sanctions, arguing that the failure to do so violated a rule that was "implicit" in the holding of

MacDonald v. Korum Ford, 80 Wn. App. 877, 912 P.2d 1052 (1996). Mr. Green is wrong.

First, substitute counsel notified Mr. Green on January 31, 2008 that his claims were frivolous. *See* CP 565–71. Substitute counsel also independently moved for CR 11 sanctions on August 8, 2008. CP 621–42; CP 170–91. (But for Mr. Green’s nonsuit, the court may have ruled on substitute counsel’s motion.)

Second and contrary to Mr. Green’s assertions, it is hardly “implicit” in the holding of *MacDonald* that substitute counsel must give independent notice of possible CR 11 violations. *See* Br. at 21.⁵ And even if such a rule were implicit, its application to the instant facts would be significantly undermined by the fact that Mr. Green failed to take any meaningful action to correct the sanctionable conduct described in detail in BLG’s CR 11 notice.

It is true that the *MacDonald* court cited substitute counsel’s failure to notify plaintiff’s counsel of her intent to seek CR 11 sanctions as one of several factors in its decision to remand the matter for a recalculation of

⁵ Mr. Green requests that this Court “articulate the common sense rule that substitute counsel *must* give CR 11 notice as a prerequisite to seeking CR 11 sanctions.” Br. at 21 (emphasis in original). Mr. Green’s request proves too much. As discussed elsewhere in this brief, this Court must review the trial court’s imposition of CR 11 sanctions for an abuse of discretion, (*i.e.*, the decision must be manifestly unreasonable or based on untenable grounds). Accordingly, the absence of a rule requiring substitute counsel to provide notice is fatal to Mr. Green’s argument.

sanctions. *See* 80 Wn. App. at 892, 912 P.2d at 1061.⁶ However, when the *MacDonald* court’s reference to substitute counsel’s failure to give notice is reviewed in context, it is apparent that the court was less concerned with who gave notice, than whether notice was given at all.

That is not the case here. BLG notified Mr. Green at least three times during the earliest stages of the lawsuit that plaintiffs’ claims—in *their entirety*—were frivolous and interposed solely to harass the defendant. *See* CP 126–27; CP 164–65; CP 495–96. Mr. Green never heeded the CR 11 warnings, and he never mitigated the sanction. Yes, Mr. Green amended his complaint. *See* CP 20–22. But, as Judge Middaugh concluded, those amendments were wholly inadequate to remedy the deficiencies contained within the initial complaint. *See* CP 457. In fact, Mr. Green retained several of the frivolous claims and introduced new factual allegations that were directly contradicted by his own client’s sworn testimony. *See id.* (“In September, 2007 the Complaint was again amended to ‘clarify’ prior allegations. Claims based on oral statements were not removed from the complaint nor were claims

⁶ Mr. Green contends that the *MacDonald* court remanded the matter “for a substantial reduction in damages based primarily on the complaining party’s failure to mitigate.” Br. at 20 (emphasis added). Mr. Green provides no citation for this statement. In fact, the court did not specify the amount by which the fees were to be reduced, or if they were to be reduced at all. Instead, the court simply remanded “for a recalculation of the appropriate amount of fees consistent with this opinion.” *MacDonald*, 80 Wn. App. at 893, 912 P.2d at 1062.

for Negligent Infliction of Emotional Distress, which require medical testimony.”).

Neither BLG nor substitute counsel should be held liable for Mr. Green’s failure to appropriately mitigate the sanction by adequately amending the offending pleading.

d. Appellant’s argument that associate counsel was required to supplement BLG’s CR 11 notice was never raised before the trial court. Further, it is not supported by the law.

Mr. Green never argued before the trial court that associate counsel was obligated to provide CR 11 notice. *See* CP 230–40; CP 339–50.

Thus, he waived this argument for purposes of appeal. *See, e.g., Demelash*, 105 Wn. App. at 527, 20 P.3d at 457. Even if he had preserved the issue for appeal, Mr. Green provides absolutely no authority in support of his argument. *See* Br. at 21–22.⁷ Accordingly, this Court should reject the claim.

e. Appellant’s argument that BLG’s CR 11 motion was not timely was never raised before the trial court. Further, it is not supported by the law.

Mr. Green argues that BLG’s motion was not timely. Mr. Green never raised this argument before the trial court, not even in his motion for

⁷ Mr. Green asks “by what legal authority can [BLG] claim sanctions on Allied Law Group’s behalf?” Because Mr. Green bears the burden on appeal, this is the wrong question to ask. That said, BLG is not aware of any authority (and Mr. Green provides none) that would preclude an attorney from including those fees generated by associate counsel with its request for fees pursuant to CR 11. That is especially so where, as here, BLG paid associate counsel’s fees on behalf of a low-income, *pro bono* client.

reconsideration. *See* CP 230–40; CP 339–50.⁸ Accordingly, Mr. Green waived this argument for purposes of appeal. *See, e.g., Demelash*, 105 Wn. App. at 527, 20 P.3d at 457 (“We generally will not review an issue, theory or argument not presented at the trial court level. The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials.”). *See also* RAP 2.5(a). However, even if he had preserved this argument, it fails.

As a preliminary matter, it is worth noting that CR 11 does not prescribe a specific timeframe for CR 11 motions. *See* CR 11 (“the court, upon motion . . . may impose . . . an appropriate sanction”).

Correspondingly, Washington courts have refused to establish a bright-line rule establishing precisely when a party must file a CR 11 motion, instead evaluating each case on its particular facts. In doing so, Washington courts have routinely upheld sanctions where a party files a CR 11 motion more than a year after becoming aware of the offending party’s sanctionable conduct.

For instance, in *Biggs v. Vail*, the Washington State Supreme court declined to reverse the imposition of CR 11 sanctions even though the

⁸ The closest Mr. Green got to arguing timeliness is a single, conclusory statement in his motion for reconsideration. *See* CP 345 (“Had defense counsel filed a CR11 Motion in September of 2007, when he threatened to, this matter would have been resolved and would have involved \$2,500.00 in claimed sanctions at most.”). Mr. Green failed, however, to make any legal arguments or cite any authority in support of this statement.

moving party did not file its CR 11 motion until nearly five years after the sanctionable conduct occurred. 124 Wn.2d at 202, 876 P.2d at 453; *id.* at 203, 876 P.2d at 454 (Anderson, C.J., dissenting) (“the motion for sanctions at issue was not even brought until nearly 5 years after the offending pleadings were filed.” (emphasis in original)).

In *Biggs*, the respondent had originally sought attorneys’ fees under the frivolous claims statute, RCW 4.84.185. *Id.* at 195, 876 P.2d at 450. When that award was reversed, the respondent refashioned his claim based on CR 11. *Id.* at 196, 876 P.2d at 450. While the *Biggs* court was initially troubled by the respondent’s failure to give notice that explicitly referenced CR 11, it upheld the award of attorneys’ fees because the appellant had been “provided with general notice that sanctions were contemplated under RCW 4.84.185.” *Id.* at 199, 876 P.2d at 452. The court reasoned that “[a]lthough the better practice is to inform counsel specifically of the nature of his or her misconduct and the possibility of CR 11 sanctions, we find that notice in general that sanctions are contemplated is sufficient for the later imposition of CR 11 sanctions.” *Id.*

Like the respondent in *Biggs*, BLG provided prompt notice that sanctions were contemplated. *See* CP 126–27; CP 164–65; CP 495–96. Unlike the respondent in *Biggs*, BLG’s notice explicitly referenced CR 11. *See id.* Thus, BLG’s notice was more than sufficient to fulfill the primary

purpose of CR 11, which is to deter litigation abuses. *See Biggs*, 124 Wn.2d at 198, 876 P.2d at 451. BLG's subsequent motion for CR 11 sanctions, which was filed within a year of Mr. Green's amended complaint, falls well within the timeframe permitted by the Washington State Supreme Court.

Mr. Green attempts to downplay the result in *Biggs* by selectively quoting portions of the court's opinion. Mr. Green states that "the *Biggs* court took great pains to emphasize that its holding was narrowly limited to the facts of the case and would not provide a rule for general application." Br. at 15. To support this assertion, Mr. Green leans on the following quote: "Normally, such late entry of a CR 11 motion would be impermissible." *Id.* (citing *Biggs*, 124 Wn.2d at 198, 876 P.2d at 451). Were that all the court said, it might support Mr. Green's assertion. In fact, the full quotation is as follows: "Normally, such late entry of a CR 11 motion would be impermissible, since 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." *Biggs*, 124 Wn.2d at 198, 876 P.2d at 451 (emphasis added). The court goes on to say that "[p]rompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses." *Id.* (emphasis added). The court concludes that "[w]ithout such notice, CR 11

sanctions are unwarranted.” *Id.*, 876 P.2d at 452 (emphasis added). BLG gave timely (and repeated) notice of its intent to seek sanctions under CR 11.⁹ Mr. Green had the opportunity to mitigate those sanctions. Mr. Green failed to do so. Mr. Green cannot get around this fact, or the result in *Biggs*, through the selective and misleading use of quotations.¹⁰

Another case that upheld sanctions where the moving party filed its CR 11 motion more than a year after becoming aware of the sanctionable conduct is *MacDonald v. Korum Ford*, 80 Wn. App. 877, 912 P.2d 1052 (1996). In that case, the court of appeals upheld CR 11 sanctions even though defense counsel sought such sanctions some 19 months (approximately 570 days) after the sanctionable conduct occurred. *See id.* at 881–82, 912 P.2d at 1056.

⁹ Mr. Green’s discussion of deterrence and his claim that the “evil described by the *Biggs* court describes exactly the facts of this case,” Br. at 16, demonstrates a fundamental misunderstanding of CR 11 and of *Biggs*. As the *Biggs* court made abundantly clear, “prompt notice of the possibility of sanctions fulfills the primary purpose of [CR 11], which is to deter litigation abuses.” 124 Wn.2d at 198, 876 P.2d at 451. It is hardly fair to claim that BLG abused the legal process where BLG provided prompt and repeated notice of the possibility of CR 11 violations, thus satisfying its obligation to deter Mr. Green’s litigation abuses. This is simply one more example of Mr. Green’s head-in-the-sand mentality. The Court should reject Mr. Green’s transparent attempts to shift responsibility for his own failure to live up to the standards set forth in CR 11.

¹⁰ Mr. Green’s second selected quotation is similarly misleading. Mr. Green states that “the *Biggs* court acknowledged the general principle that ‘Rule 11 sanctions must be brought as soon as possible to avoid waste and delay.’” Br. at 15 (citing *Biggs*, 124 Wn.2d at 199, 876 P.2d at 451). The *Biggs* court acknowledged no such thing. To begin with, the *Biggs* court upheld sanctions even though the CR 11 motion was not filed until nearly five years after the sanctionable conduct. *See Biggs*, 124 Wn.2d at 202, 876 P.2d at 453; *id.* at 203, 876 P.2d at 454 (Anderson, C.J., dissenting). Moreover, the language Mr. Green quotes is actually from a parenthetical in a string cite. *See id.* at 199, 876 P.2d at 451. If anything, the *Biggs* court simply recognized that the cited source (an article by William Schwarzer) stood for the quoted proposition.

The facts of *MacDonald* are remarkably similar to those at issue here. In that case, the plaintiff provided deposition testimony “that severely undermined the factual bases for her claims.” *Id.* at 881, 912 P.2d at 1056. In spite of this testimony, the plaintiff’s counsel perpetuated his client’s claims, moving to amend the pleadings, conducting depositions, and seeking additional discovery. *Id.* Nineteen months after plaintiff’s deposition, the defendant moved for summary judgment, relying in large part on plaintiff’s deposition testimony. *Id.* at 881–82, 912 P.2d at 1056. After the trial court granted summary judgment for the defendant, the defendant moved for attorneys’ fees pursuant to CR 11. *Id.* at 882, 912 P.2d at 1056. The trial court granted the motion, concluding that after the plaintiff’s deposition, plaintiff’s counsel knew or should have known that his client’s claims were frivolous. *Id.* The court of appeals upheld the imposition of sanctions. *Id.* at 893, 912 P.2d at 1061.¹¹

Similar to *MacDonald*, Ms. Dochnahl’s testimony undermined the factual bases for her claims. CP 457. In spite of Ms. Dochnahl’s testimony, Mr. Green perpetuated these claims, moving to amend the pleadings, conducting depositions, and seeking additional discovery. CP 457–58. Following the dismissal of all claims, BLG moved for attorneys’

¹¹ The rationale for the *MacDonald* court’s decision to remand for recalculation is discussed in section B.3.c of this brief.

fees pursuant to CR 11. CP 197–208. The trial court granted that motion, concluding that Mr. Green failed to perform the requisite inquiry into the law or the facts and interposed the lawsuit solely to harass Ms. Petersen. *See* CP 459–60. Consistent with *MacDonald*, this court should uphold the trial court’s award of attorneys’ fees in favor of BLG.

Mr. Green bases his entire timeliness argument on *North Coast Electric Co. v. Selig*, 136 Wn. App. 636, 151 P.3d 211 (2007), a case he never discussed at the trial level. *See* CP 230–40; CP 339–50. He contends that *North Coast Electric Co.* stands for the proposition that BLG had an affirmative duty to file a CR 11 motion in something less than 391 days and that the failure to do so serves as a complete bar to any imposition of sanctions. Br. at 12–14. Mr. Green is wrong.

North Coast Electric Co. was decided on very different facts and does not command the outcome sought by Mr. Green. In that case, the plaintiff sought attorneys’ fees against defendant based on what it considered to be a number of frivolous counterclaims. *See* 136 Wn. App. 636, 642, 151 P.3d 211, 214–15. There is no indication, however, that plaintiff ever notified defendant of the possible CR 11 violations, contrary to the rule set forth in *Biggs*. Moreover, the trial court failed to make explicit findings as to which of defendant’s pleadings violated CR 11 and how those pleadings violated CR 11, again in violation of the rule set forth

in *Biggs*. *Id.* at 649, 151 P.3d at 218. In light of those shortcomings, the court of appeals properly reversed the trial court’s imposition of sanctions.

It is true that the *North Coast Electric Co.* court cited the timing of the plaintiff’s CR 11 motion as one of several factors weighing against the imposition of sanctions. *See id.* at 649–50, 151 P.3d at 218. The plaintiff’s failure to give CR 11 notice and the trial court’s failure to enter appropriate findings, however, render this factor immaterial to the outcome. *See Biggs v. Vail*, 124 Wn.2d 193, 198, 876 P.2d 448, 452 (“Without such notice, CR 11 sanctions are unwarranted.”). In short, *North Coast Electric Co.* does not require this Court to reverse the trial court’s imposition of attorneys’ fees.

Even Mr. Green recognizes that *North Coast Electric Co.* does not lead to his desired conclusion. In his request for relief, Mr. Green concedes that he is “asking the Court to articulate a slightly firmer rule with respect to the requirement prompt [*sic*] filing of CR 11 motions.” Br. at 14.¹² Implicit in his request is the fact that the *North Coast Electric Co.* “rule” upon which he relies does not exist. Given that this Court must review the trial court’s ruling for abuse of discretion (*i.e.*, the decision

¹² It is worth noting that in his first assignment of error, Mr. Green states that the trial court’s ruling was “in direct conflict” with *North Coast Electric Co.* Br. at 4. Such a statement cannot be reconciled with his request for a “slightly firmer rule.”

must be manifestly unreasonable or based on untenable grounds), the fact that Mr. Green’s rule does not exist is fatal to his claim.

Because BLG filed its CR 11 motion well within the timeframe permitted under Washington law, this Court should uphold the trial court’s imposition of attorneys’ fees.¹³ Moreover, this is not the case to articulate a “firmer” rule, especially since the issue was never raised before the trial court. Rather, this is a case best left of the discretion of the trial judge, who was with the case from start to finish.

C. Appellant is not entitled to attorneys’ fees on appeal.

Mr. Green makes a plea for attorneys’ fees based on BLG’s pursuit of CR 11 sanctions. Br. at 22–23. This plea illustrates the continuing failure of even \$75,000 in sanctions to convey the necessary message to Mr. Green to take responsibility for his conduct, as is required of all other attorneys in this state.

Mr. Green cannot credibly argue that BLG’s motion for CR 11 sanctions is legally or factually frivolous when the trial court expressly concluded that Mr. Green failed to make a reasonable inquiry into the facts underlying his clients’ claims, failed to make a reasonable inquiry

¹³ Mr. Green’s bootstrap argument—that BLG’s failure to timely file its CR 11 motion constitutes a failure to mitigate—can be similarly rejected since BLG’s CR 11 motion was timely.

into the law underlying his clients' claims, and pursued the lawsuit solely to harass Ms. Petersen. *See* CP 459–60.

And indeed, Mr. Green cites no authority in support of his argument. *See* Br. at 22–23. Rather he simply suggests that this court “should” recognize the sanctionable nature of BLG’s actions. *See* Br. at 22. This Court should do no such thing. As evidenced throughout this brief, BLG’s CR 11 motion was well-grounded in law and fact.¹⁴

Moreover, it was necessary in light of Mr. Green’s conduct.

D. BLG can abide all of Appellant’s rhetoric, except for the military analogy.

As mentioned in the following section, Mr. Green continues to resist taking responsibility for his actions. Mr. Buck, who sought to protect an older citizen activist on a *pro bono* basis from what he saw as

¹⁴ Mr. Green’s passing reference to dicta from *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 791 P.2d 537 (1990) has no bearing on this appeal. First, while Mr. Green’s quotation is accurate, it should be noted that the *Bryant* court did not actually impose sanctions against the respondent (the party that prevailed before the trial court). *See id.* at 121, 791 P.2d at 546. (Indeed, BLG is not aware of any case in which an appellate court has imposed such sanctions.) Second, RAP 18.7, on which the appellant relied in moving for sanctions, was amended in 1994 to no longer incorporate CR 11. *See* RAP 18.7. Third, the only reason the *Bryant* court even considered the appellants’ request for sanctions on appeal was the “apparent factual and legal merit to [appellants’ client’s] claim.” Given the “apparent factual and legal merit” to the appellants’ client’s claims, the *Bryant* court concluded that respondents’ counsels’ conduct in initially pursuing CR 11 sanctions was questionable (though not sanctionable). 57 Wn. App. at 121, 791 P.2d at 546. Unlike the situation in *Bryant*, however, Mr. Green’s clients’ claims were utterly devoid of any merit—legal or factual—and interposed solely for the purpose of harassment. *See* CP 459–60. *Bryant* is simply off point.

persecution, seems to be the primary villain in Mr. Green's appellate script.

On one page there are three unique attacks: "Green didn't know that Buck would be sandbagging him. Green didn't know that Buck would be hiding its cards and dealing from the bottom of the deck. Green didn't know that Buck would be engaging in stealth litigation tactics." Br. at 19.

On the next page there are four new characterizations, bringing the total to seven: "Green was bushwhacked, ambushed, and shot in the back. That Buck would engage in such underhanded litigation tactics is beyond the pale." Br. at 20.

Later, we learn that Mr. Green was "put through the wringer both personally and professionally by this misconduct." Br. at 23.

Mr. Buck can abide all of these. It is the submarine analogy that warrants a response. *See* Br. at 19–20. Although not a matter of record, Mr. Buck comes from a family that has proudly served in the U.S. Army since WWII. Further, the U.S.A. is lucky that former Lt. Buck was not in the Navy as a submariner. As the facts of Mr. Green's analogy demonstrate, a submarine career would have been a disaster.

Mr. Green suggests that Mr. Buck had a dastardly strategy to lurk at the bottom of the ocean as a submarine only to arise and shoot Mr.

Green in the back. Br. at 20. There are two flaws in the analogy. First, it is a matter of common knowledge that submarines rarely shoot people; to be effective they use torpedoes. Second, it is matter of common knowledge that a submariner's target is generally the full length of a ship's hull as the ship passes perpendicular to the submarine. The ship's hull presents a much larger target. This is different from the Army's targeting, which would indeed be from either the front or back in a narrow traverse and search engagement.¹⁵ Mr. Green chose to use a submarine analogy that does not make any sense.

Most importantly, Mr. Buck has never shot anyone, let alone a fellow attorney. He, like most of us, was taught to be civil. Shooting an attorney would be a violation of RPC 8.4, not to mention any number of criminal statutes. Rather than shooting Mr. Green, Mr. Buck used the judicial process as it was intended.

In a more direct vein, it should be noted that Mr. Green's analogy suggests a well thought out strategy and business plan to allow fees to mount, only to seek them when they are at the highest amount. There is ample evidence that BLG had no such business plan. Mr. Green is bold to suggest that this was a planned lucrative opportunity. To wit:

¹⁵ Army Field Manual 23-14, Fig. 071-010-0006-12.

1. BLG's defense was *pro bono*. That is hardly a wise strategic and business plan.
2. BLG took this pro bono case in order to represent an older citizen activist who was in ill health and who, in the opinion of BLG, was the victim of a private SLAPP suit.
3. In an attempt to end the matter without cost to anyone, BLG made an offer of judgment for \$2. Again, that is hardly a way to get rich. There would have been no chance to lie on the bottom and watch fees rise.
4. In an attempt to end the matter without further cost to anyone, BLG also offered to settle by having Ms. Petersen cease any activity. Again, that would hardly get BLG any money. There would have been no chance to lie on the bottom and watch fees rise.
5. BLG, at its own out-of-pocket cost, hired the Allied Law Group to help at the critical moment that Mr. Green attempted to get all of Ms. Petersen's hard drives the day before she was ready to leave for her first year of law school. Paying another law firm \$22,000 to help a pro bono client again does not seem like the move of a crafty attorney out to enrich himself.
6. BLG, at its own out-of-pocket cost, hired a forensic expert to work over the weekend to secure all of Ms. Petersen's hard drives so they would stay within the court's jurisdiction when Ms. Petersen left for law school. Paying an expert \$3,000 to help your pro bono defendant client and still risk a contempt motion from Mr. Green again just does not seem like the move of a crafty attorney out to enrich himself.
7. BLG's counsel did not even bother to record much of his time and in total did not seek at least \$25,000 in fees for work done.
8. BLG did not aggressively seek a multiplier under accepted case law, although it seems today like a good idea. As noted by Ms. Petersen, a multiplier would have created a nice fund to help other needy defendants. CP 208.

E. Green has consistently shown that even \$75,000 in sanctions is not enough to educate and deter him from filing frivolous pleadings.

At the end of his brief, Mr. Green complains that he “has been put through the wringer both personally and professionally by this misconduct.” Br. at 23. By “this misconduct,” Mr. Green is referring to everyone but himself. No other statement so encapsulates Mr. Green’s victim mentality and absolute unwillingness to accept any responsibility for his own actions in the underlying litigation. Indeed, ever since BLG filed its CR 11 motion, Mr. Green has engaged in a blame game, trying to pin the blame on someone—anyone—other than himself. His attempts to deflect blame continue through the filing of his opening brief before this court.

Mr. Green’s first target was his former law partner, Ms. Hadley. Pinning the blame on her would not be easy since she had stepped out of the case before the initial complaint was filed. Mr. Green’s only option was to blame her for doing a shoddy job in the pre-filing investigation. And that is precisely what he did.

First, he tried the “don’t shoot the messenger” approach, claiming that he had nothing to do with the pre-filing investigation and that he had simply signed the complaint. *See* CP 231–32. This approach failed. *See* CP 335–37.

Next, he tried the “throw her under the bus” approach. He described Ms. Hadley as the Dochnahls’ “primary attorney,” CP 340, even though she never signed any of the pleadings and stepped out of the picture before the lawsuit was filed. He claimed that he had filed the complaint based on her “assurances” of the law and the facts. CP 343. He then boldly proclaimed that “Ms. Hadley’s actions resulted in this matter commencing,” and that “she should bear the responsibility” for the CR 11 violations, CP 344, even though he was the attorney to sign and file the complaint and then perpetuate the lawsuit. This approach also failed. *See* CP 456–60.

On appeal, Mr. Green has increased the number of potential targets.

Rest assured, he still blames Ms. Hadley.¹⁶ Indeed, in his opening brief, Mr. Green portrays Ms. Hadley as an attorney motivated more by personal animus than professional objectivity. *See* Br. at 6 (citing for the first time on appeal Ms. Petersen’s role in Ms. Hadley’s husband’s

¹⁶ Mr. Green’s claim that the court “left open the question of whether [Ms.] Hadley should be held liable for all or part of the sanctions” is a mischaracterization of the court’s decision and intended to introduce unnecessary confusion. *See* Br. at 3, n.1. Simply put, the court did no such thing. Mr. Green did not raise the issue of Ms. Hadley’s liability until his motion for reconsideration. *See* CP 460. The court declined to reconsider its ruling on that basis. In fact, it specifically indicated that it would only “hear reconsideration of the amount of sanctions and to whom owed.” CP 366 (emphasis added). It would not reconsider against whom the sanctions were imposed. Mr. Green is free to pursue contribution against Ms. Hadley in a separate proceeding. But there is no reason for this Court to consider Ms. Hadley’s liability or lack thereof in ruling on this appeal.

unsuccessful bid for Renton Municipal Court Judge). Of course, one has to wonder why Mr. Green—who surely knew of Ms. Hadley’s hostility toward Ms. Petersen back in 2007—did not take this hostility into account in deciding whether or not to pursue the case. At the very least, his knowledge of this hostility seriously undermines any notion that his reliance on Ms. Hadley’s pre-filing investigation was reasonable.

But Mr. Green now also blames BLG, Davies Pearson, and Allied Law Group. He blames BLG for failing to inform him that his second amended complaint was still deficient, Br. at 19, even though that complaint contained the same baseless claims and allegations as his initial complaint. He blames BLG for failing to file its CR 11 motion soon enough, Br. at 10–11, even though he knew that BLG was replaced by insurance counsel. He blames Davies Pearson for not supplementing BLG’s CR 11 notice, Br. at 8–9, even though he never appropriately remedied the deficiencies detailed in BLG’s CR 11 notice. Lastly, he blames Allied Law Group for its “astonishing display of profligate spending,” Br. at 9, even though Allied’s fees were directly and proportionately related to his attempt to use a former Renton police officer to obtain Ms. Petersen’s personal computers, including numerous attorney-client privileged documents, health records, and personal data.

Mr. Green even blames Judge Middaugh for his troubles. All Judge Middaugh did in January 2008 was agree to consider Allied's request for reconsideration of the order turning over Ms. Petersen's personal computers to a former Renton police officer. Nonetheless, Mr. Green saw this as "highly prejudicial" and took a voluntary nonsuit with a vow to find a less biased judge. *See* CP 192.

Then, during supplemental proceedings, Mr. Green filed an affidavit of prejudice against Judge Middaugh. CP 677. This became irrelevant when he posted a \$125,000.00 supersedeas bond.

Insofar as CR 11 seeks to educate, sanctions of \$75,000 are certainly not excessive. If anything, Mr. Green has shown that they are inadequate for education or to modify his behavior. He filed the lawsuit; he perpetuated the lawsuit after the deposition of Ms. Dochnahl showed it was without basis; he turned down a no strings attached offer to reduce his risk by \$20,000 if he would simply write a letter of apology; and he now asks this court to award him sanctions. Even as the parties reach this Court, he blames everyone else.

V. CONCLUSION

Appellant states that his appeal "does no more than ask the Court to be true to its previous jurisprudence" claiming that that is "literally the smallest favor any appellant can ask." Br. at 23. Mr. Green does not seek

a small favor, but a large one. Green is asking this Court to reverse a trial court, entitled to deference, on legal grounds that are not yet recognized in Washington (or elsewhere).

As personal counsel for Respondent and judgment creditor Inez Petersen and judgment creditor The Buck Law Group, we respectfully ask this Court not for a favor, but simply to affirm the trial court.

DATED this 8th day of October, 2009.

THE BUCK LAW GROUP

A handwritten signature in black ink, appearing to read "Peter L. Buck". The signature is written in a cursive style with a horizontal line extending from the end of the name.

Peter L. Buck, WSBA #5060

Matthew J. Stock, WSBA #40223

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Group

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

DENNIS AND BERNADENE
DOCHNAHL,

Appellants,

v.

INEZ SOMERVILLE PETERSEN

Respondent.

No. 63211-6-I

CERTIFICATE OF
SERVICE

I, Sharon Kendall, hereby certify that I am employed at The Buck Law Group, PLLC, over the age of 18 years, and a citizen of the United States. On the date indicated below, I caused a copy of the SECOND CORRECTED BRIEF OF RESPONDENT and CERTIFICATE OF SERVICE to be served upon the following counsel of record by first class U.S. mail, properly addressed with postage prepaid:

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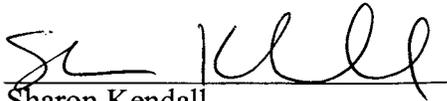
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