

63211-6

63211-6

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 AUG 12 PM 1:13

NO. 63211-6-I

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

DENNIS AND BERNADENE DOCHNAHL,
APPELLANTS,
V.
INEZ SOMERVILLE PETERSEN
RESPONDENT.

APPELLANTS' OPENING BRIEF

Lee H. Rousso, WSBA #33340
The Law Office of Lee H. Rousso
1000 Second Avenue, 30th Floor
Seattle, Washington 98104
(206)623-3818

RECEIVED
COURT OF APPEALS
DIVISION ONE

AUG 12 2009

TABLE OF CONTENTS

INTRODUCTION	1
ASSIGNMENTS OF ERROR	3-5
STATEMENT OF THE CASE	5-11
ARGUMENT	11
A. STANDARD OF REVIEW	11
B. BUCK'S DELAY A COMPLETE BAR	12
C. DEFENSE FAILED TO MITIGATE	16
D. NOTICE FAILED IN THIS CASE	18
E. GREEN SHOULD BE AWARDED FEES	22
CONCLUSION	23

STATEMENT OF AUTHORITIES

CIVIL RULES

CR 11

passim

CASES

Biggs v. Vail, 124 Wn.2d 193, 876 P.2d 448 (1994)

12,14,15,16

Bryant v. Joseph Tree, 57 Wn.App. 107, 791 P.2d 537 (1990)

11,22

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

2,5,11,16,17,20,21

Miller v. Badgley, 51 Wn.App. 285, 753 P.2d 530 (1988)

1,4,17

North Coast Electric v. Selig, 136 Wn.App. 636, 151 P.3d 211 (2007)

1,4,12,13

INTRODUCTION

Robert S. Green, attorney for the plaintiffs in the underlying defamation suit, *Dochmahl v. Petersen*, King County Cause No. 07-2-17192-4, appeals an order of the King County Superior Court, the Honorable Laura Gene Middaugh presiding, imposing CR 11 sanctions on Green in the amount of \$75,166.53.

The record on appeal shows that the sanctions imposed against Green are the result of genuinely egregious errors of law committed by the lower court and therefore will not stand appellate scrutiny.

For example, the lower court turned a blind eye to the fact that the Buck Law Group (“Buck”) waited 391 days after obtaining all facts relevant to its CR 11 motion before it actually filed the motion. However, as this Court held in *North Coast Electric v Selig*, 136 Wn.App. 636, 649, 151 P.3d 211 (2007), “**a party should move for CR 11 sanctions as soon as it becomes aware they are warranted.**” There is simply no way to reconcile Buck’s conduct with the rule laid out in *North Coast Electric*.

On a related issue, the lower court also turned a blind eye to the fact that virtually all of the sanctions awarded in the case were *avoidable*. Thus, the award of sanctions is in conflict with this Court’s holding in *Miller v. Badgley*, 51 Wn.App. 285, 303, 753 P.2d 530 (1988), that “**a party resisting a motion that violates CR 11 has a duty to mitigate.**” It is,

frankly, hard to imagine a more gross dereliction of the duty to mitigate than that demonstrated by defense counsel in this case. Once again, the award of sanctions cannot stand.

The lower court turned yet another blind eye to the fact that there was a complete failure of notice in this case. While Buck's original CR 11 notice was sufficient, the subsequent conduct of Buck and co-counsel completely vitiated the effect of the notice. Specifically, defense counsels' conduct, individually and collectively, after September 17, 2007, should act as a complete bar to sanctions.

On September 17, 2007, Green filed a Second Amended Complaint. Eighteen days later, on October 5, 2007, Buck withdrew as counsel and was replaced by Davies Pearson. Prior to withdrawing, Buck did not answer the Second Amended Complaint and did not file a CR 11 motion. Thus, from October 5, 2007 forward, there was no attorney of record on the defense side of the case with an active CR 11 notice on the table. The requirement that substituting counsel give separate CR 11 notice is implicit in *MacDonald v. Korum Ford*, 80 Wn.App. 877, 893, 912 P.2d 1052 (1996). We merely ask this Court to make the rule explicit.

By withdrawing without filing the motion, Buck turned the notice function of CR 11 upside down. Specifically, rather than deterring Green from going forward with an unworthy lawsuit, Buck's conduct had the

effect of inducing reliance on the part of Green, who after September 17, 2007, and especially after October 5, 2007, literally did not and could not know that he was operating under a cloud of potential CR 11 liability.

The scope of this appeal is limited. We do not appeal any of the lower court's rulings with respect to the merits of the underlying case or with respect to the conduct of Robert Green or his predecessor, Jerrilynn Hadley.¹

While the lower court proceedings focused almost exclusively on the conduct of plaintiffs' counsel, this appeal shifts the spotlight to the other side of the table, *i.e.*, to the inequitable conduct of defense counsel. A fair inquiry reveals that counsel on both sides of this case made serious mistakes, but that the lower court only held one side responsible for its errors. This one-sided administration of justice is both unfair on its face and contrary to established law. If this Court is to stay true to its previous rulings, it must reverse the lower court and vacate the award of sanctions in its entirety.

ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR

Where CR 11 requires a party to file its motion for sanctions "as soon as it becomes aware they are warranted," *North Coast Electric*

¹ The lower court left open the question of whether Jerrilynn Hadley should be held liable for all or part of the sanctions.

Company v. Selig, 136 Wn.App. 636, 649, 151 P.3d 211 (2007), and where Buck had possession of all facts relevant to the motion no later than August 31, 2007, and where Buck then waited the 391 days until September 25, 2008 before filing the motion, the lower court's ruling is in direct conflict with this Court's ruling in *North Coast Electric*. Where the lower court's ruling is in conflict with a ruling of this Court, the lower court has committed an error of law and has thereby abused its discretion.

SECOND ASSIGNMENT OF ERROR

Where CR 11 imposes a duty to mitigate on the complaining party, *Miller v. Badgley*, 51 Wn.App. 285, 303, 753 P.2d 530 (1988), and where the vast majority of the fees and costs awarded as sanctions could have been avoided, the lower court's ruling is in conflict with this court's ruling in *Miller*. Where the lower court's ruling is in conflict with a ruling of this Court, the lower court has committed an error of law and has thereby abused its discretion.

THIRD ASSIGNMENT OF ERROR

Where CR 11 imposes a duty to provide opposing counsel with notice of a potential claim, and where Buck withdrew as counsel of record without filing a CR 11 motion, and where both substitute counsel Davies Pearson and affiliated counsel Allied Law Group did not give CR 11

notice,² and where the law requires all counsel seeking sanctions to provide notice, *MacDonald v. Korum Ford*, 80 Wn.App. 877, 893-4, 912 P.2d 1052 (1996), the lower court's ruling is in conflict with the ruling of a higher court. Where the lower court ruling conflicts with the higher court, the lower court has committed an error of law and has thereby abused its discretion.

STATEMENT OF THE CASE

Dennis and Bernadene Dochnahl, plaintiffs in the underlying defamation action, are prominent in Renton business, political and social circles. In other words, they represent The Establishment in Renton.³ Inez Somerville Petersen, defendant, is by contrast a political "outsider" who is said to represent the common folk.⁴ Ms. Petersen's political activities have included the founding and feeding of the Renton Political Action Network ("RPAN"). In conjunction with her management of RPAN, Ms. Petersen maintained a web log or "blog" for the discussion of issues related to Renton business and politics.

For reasons that are fully known only by the parties, the Dochnahls and Ms. Petersen found themselves on opposite sides of a bitter City Hall

² The lower court did not award sanctions directly to Allied Law Group. Instead, Allied's CR 11 claim (\$22,466.32) was folded into Buck's, a transparent, and to this point successful, attempt to circumvent the notice requirement of CR 11.

³ See generally Declaration of Dennis Dochnahl, Clerk's Papers ("CP") 265-267.

⁴ See generally Declaration of Inez Somerville Petersen, CP 92-100.

feud. The conflict between the parties escalated sharply at a September 25, 2006 meeting of the Renton City Council when Bernadene Dochnahl sharply criticized Ms. Petersen from the podium.⁵

In early 2007 the Dochnahls contacted Renton attorney Jerrilynn Hadley to discuss a possible defamation action against Petersen.⁶ In addition to being the Dochnahls' lawyer, Hadley was also a personal friend of and leased office space from the Dochnahls. Hadley was also hostile to Ms. Petersen, as Ms. Petersen had opposed the candidacy of Russell Wilson, Hadley's husband, when Wilson ran unsuccessfully for the office of Renton Municipal Court Judge.⁷

Jerrilynn Hadley conducted extensive research on defamation law and, based on the facts presented by the Dochnahls, concluded that the Dochnahls had actionable claims against Petersen.⁸ Hadley then drafted the Complaint. However, because Hadley was planning on leaving Washington shortly after the Complaint was filed, she did not sign the Complaint. Instead, Hadley handed the matter over to Robert S. Green.⁹ Green reviewed Hadley's notes and materials and, before filing the

⁵ *Id.* at 94.

⁶ Declaration of Jerrilynn Hadley, CP 241-243.

⁷ Declaration of Inez Somerville Petersen, CP at 93-4.

⁸ Declaration of Jerrilynn Hadley, CP 241-243. The lower court found Hadley's affidavit insufficient, a finding that is not challenged on appeal.

⁹ Declaration of Robert S. Green, CP at 244.

Complaints, consulted additional authorities.¹⁰ Like Hadley, Green concluded that the Dochnahls had actionable claims.¹¹

On May 24, 2007, the Dochnahls initiated the action by filing a Summons & Complaint King County Superior Court, Cause No. 07-2-17192-4.¹² On June 12, 2007, attorney Peter Buck, then of Buck & Gordon, appeared on behalf of Ms. Petersen.

On August 2, 2007, Buck served Green with a Notice of Intent to File Motion for CR 11 Sanctions.¹³ We do not challenge the sufficiency of this initial notice.

Rather than promptly filing the CR 11 motion, Buck noted the deposition of Bernadene Dochnahl.

On August 13, 2007, the defense took the deposition of Bernadene Dochnahl.¹⁴ The deposition did not go well for Ms. Dochnahl, who could not specifically identify any false statements of fact made by Petersen. Ms. Dochnahl was also unable to credibly identify any specific damages she had suffered as a result of Petersen's alleged defamatory statements.¹⁵

¹⁰ *Id.* at CP 244.

¹¹ *Id.* at CP 245.

¹² CP at 1-5.

¹³ Declaration of Peter Buck, CP at 126, 164-65.

¹⁴ *Id.* at CP 127.

¹⁵ See generally excerpts from Deposition of Bernadene Dochnahl, Exhibit A to Declaration of Heather Pearce, CP at 63-91. We believe Buck had full knowledge of all facts relevant to the CR 11 motion at the conclusion of Bernadene Dochnahl's deposition, which would put Buck's delay at 409 days. However, out of an abundance of caution, we

After Buck took the deposition of Bernadene Dochnahl, Green attempted to address Buck's CR 11 concerns by amending the Complaint and on August 31, 2007 Green filed a Motion to Amend Complaint. Attached to the Motion to Amend Complaint was a copy of the Second Amended Complaint.¹⁶ The CR 11 motion in this case is based entirely on the deficiencies of the Second Amended Complaint. In other words, *as of August 31, 2007, at the latest, Buck had full possession of all facts relevant to the CR 11 motion.*

The Second Amended Complaint was filed on September 17, 2007. In response to the amendment Buck did.....nothing. Buck did not inform Green that the Second Amended Complaint contained the same CR 11 deficiencies as its predecessors. Buck did not file a CR 11 motion. Buck did not even bother to answer the Second Amended Complaint. Instead, Buck did nothing. Green, of course, took this inaction to mean that the CR 11 dispute had been settled.

On October 5, 2008, Buck withdrew as counsel and was replaced by Davies Pearson. Davies Pearson also did not answer the Second Amended Complaint. Likewise, Davies Pearson did not give Green notice that it intended to seek sanctions under CR 11. Davies Pearson has in fact

are dating the delay from Buck's first exposure to the text of the Second Amended Complaint.

¹⁶ Second Amended Complaint, CP 20-22/

never given such notice. Accordingly, *as of October 6, 2008 defendant's sole counsel of record did not have a CR 11 notice in place*, a state of affairs that continued for the duration of the litigation.¹⁷

After Buck departed, the lawsuit descended (as they often do) into a battle over discovery. An expensive battle over discovery. *A completely avoidable battle over discovery*. Still, Buck did nothing. Day after day, week after week, month after month, Buck did nothing.

The discovery battle reached its costly apex in August, 2008. There, in an astonishing display of profligate spending, the Allied Law Group, which has never been counsel of record in this case and which has never given CR 11 notice to Green, racked up \$22,477.32 in discovery-related expenses in a mere three week period, August 4 to August 25, 2008.¹⁸ It goes without saying that every penny of this sum was completely avoidable, and would have been avoided, if Buck had merely filed its motion on a timely basis.

On August 8, 2008, after a delay of more than ten months, the defense answered the Second Amended Complaint.¹⁹

¹⁷ When Buck filed the Motion for Sanctions on September 25, 2008, there was no additional filing to restore Buck to "counsel of record" status.

¹⁸ See Exhibit B to Declaration of Peter Buck, CP 155-62.

¹⁹ Appellant will file a supplemental designation of clerk's papers to include this document.

On September 25, 2008, or 391 days after Buck was exposed to the contents of the Second Amended Complaint, and after tens of thousands of dollars had been poured down the black hole of discovery, Buck finally filed the Motion for Sanctions.²⁰ On December 16, 2008, the Motion for Sanctions was granted with respect to CR 11 violations, but not as to allegations against the Dochnahls under RCW 4.84.185. Judge Middaugh then ordered Green to pay every penny sought by defense counsel, *i.e.*, \$75,166.53.²¹

In response to Green's Motion for Reconsideration, the lower court entered Findings on February 24, 2009.²² Included in Paragraph 13 of the Findings are two statements that are completely contrary to the record. First, the lower court stated that "There is nothing to indicate that the fees were excessive or *included fees incurred for matters other than responding to plaintiffs' frivolous complaint.*"²³ This is statement is clearly false as the sums spent battling over discovery were not spent *responding* to the complaint. Second, the lower court stated, "Nor does it appear that the defendant prolonged litigation unnecessarily."²⁴ This statement invites a response of jaw dropping disbelief. Buck sat on a fully

²⁰ CP 197-208.

²¹ CP 335-337.

²² CP 456-460.

²³ CP 460.

²⁴ *Id.*

ripe CR 11 motion for over one year. By what possible measure was this delay *necessary*?

The judgment against Green was entered on March 20, 2009,²⁵ and this appeal followed.²⁶

ARGUMENT

A. STANDARD OF REVIEW.

A trial court's decision to impose CR 11 sanctions is reviewed for an abuse of discretion. *Bryant v. Joseph Tree, Inc.*, 57 Wn.App. 107, 114, 791 P.2d 537 (1990)(additional cites omitted). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Id.* Given that the lower court's rulings contradict this Court's previous CR 11 jurisprudence, the rulings are both manifestly unreasonable and based on untenable grounds. Additionally, the deference due the lower court is tempered by the extreme nature of the sanctions awarded here. "If the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous." *MacDonald v. Korum Ford*, 80 Wn.App. 877, 892, 912 P.2d 1052 (1996), citing *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 883 (5th Cir. 1988). The deference owed the lower court is further tempered by the fact that the burden of proof is at all times on the

²⁵ CP 461-463.

²⁶ CP 467-8.

party seeking sanctions. *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994).

In sum, even the abuse of discretion standard of review does not dictate blind deference to the lower court, especially when the errors committed are so stark that they cannot be tolerated under *any* standard of review.

B. BUCK'S 391 DAY DELAY IN FILING THE MOTION FOR CR 11 SANCTIONS IS A COMPLETE BAR TO ANY AWARD OF SANCTIONS.

CR 11 imposes an affirmative duty to act on the part of complaining counsel. This duty to act has two components: the duty to give notice and the duty to file the motion for sanctions as soon as it is practical to do so.²⁷ Defense counsel, individually and collectively, completely breached both of these duties, thereby terminating any right to claim CR 11 sanctions. We will first discuss the duty to file.

The duty to promptly file a motion for CR 11 sanctions was addressed by this Court in *North Coast Electric Co. v. Selig*, 136 Wn.App. 636, 151 P.2d 211 (2007).

In *North Coast Electric*, the plaintiff supplied light fixtures and related items to the defendant owner of an office building and sued for nonpayment of contract amounts. *North Coast Electric*, 136 Wn.App. at

²⁷ The duty to file promptly is closely related to the duty to mitigate, as untimely filing often causes a failure to mitigate.

640. The building owner counterclaimed alleging various business torts as well as a violation of RCW 60.04.081. *Id.*

North Coast prevailed on summary judgment of most of its contract claims and was also awarded its attorneys' fees under the contract. *Id.* at 642. Shortly thereafter, Selig voluntarily dismissed his counterclaims under CR 41. *Id.* After the dismissal of the counterclaims, North Coast once again moved the court for attorneys' fees, this time under CR 11. *Id.* The court awarded North Coast \$53,861.29 in fees and costs related to the defense of the failed counterclaims. *Id.* Selig appealed the award of CR 11 sanctions.

In reviewing the award of CR 11 sanctions against Selig, this Court found that the lower court had not created a sufficient record to uphold the award. *Id.* at 649. However, rather than remand for the purpose of creating a more complete record, this Court disposed of the sanctions on the grounds that the motion for sanctions had not been filed on a timely basis. *Id.* at 650.

In vacating the award of sanctions, this Court said, "Additionally, a party should move for CR 11 sanctions as soon as it becomes aware they are warranted." *Id.* at 649. "Here, ***North Coast did not move for sanctions until Selig dismissed his counterclaims, which was over a year***

after his original pleadings. We hold the award is not supported as a CR 11 sanction.” *Id.* at 649-50 (emphasis added).

On this appeal we are merely asking the Court to articulate a slightly firmer rule with respect to the requirement prompt filing of CR 11 motions. Specifically, we ask the Court to hold that a party “must” rather than “should” file the motion for sanctions as soon as it becomes aware they are warranted. However, even under the “should” standard, the facts of this case compel a reversal of the lower court’s order.

We anticipate that Buck will argue that *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994), stands for the proposition that an attorney can sit on a CR 11 motion indefinitely, or for at least five years. This argument will be dead on arrival.

In *Biggs*, a dispute between attorneys over the rights to certain attorneys’ fees, Vail filed his CR 11 motion some four and one half years after trial and only after the Supreme Court of Washington had reversed an award of attorneys’ fees under RCW 4.84.185. *Biggs*, 124 Wn.2d at 196. On remand, the trial court awarded CR 11 sanctions in the same amount as the RCW 4.84.185 sanction that had been vacated by the Supreme Court. *Id.* *Biggs* appealed, arguing that the trial court no longer had the jurisdiction necessary to impose CR 11 sanctions. *Id.* at 195. The Supreme Court disagreed, holding that “under the circumstances of this

case, the trial court had authority to consider and impose CR 11 sanctions even after the substantive issues had been decided.” *Id.* *Biggs* was then remanded for a second time with instructions to the trial court to, *inter alia*, reduce the award of sanctions to reflect the failure of Vail to mitigate his damages. “Further, if the trial court finds that attorney fees are appropriate, they are to be limited to *at most* the fees actually expended in responding to the sanctionable conduct, ***and should be further limited by the apparent absence of any attempts at mitigation on the part of Vail.***” *Id.* at 201 (emphasis added).

Buck should take little solace from the fact that the *Biggs* court upheld the lower court’s authority to enter CR 11 sanctions. For one thing, 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. “*Normally*, such late entry of a CR 11 motion would be impermissible.” *Biggs*, 124 Wn.2d at 198. Indeed, the *Biggs* court acknowledged the general principle that “***Rule 11 sanctions must be brought as soon as possible to avoid waste and delay.***” *Id.* at 199, citing William D. Schwarzer, *Sanctions Under the New Federal Rule 11*, 104 F.R.D. 181, 197-198 (1985)(emphasis added).

The *Biggs* court further noted that primary purpose of CR 11 “is to deter litigation abuses,” and further noting that “Deterrence is not well

served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end,” *Biggs*, 124 Wn.2d at 198. The evil described by the *Biggs* court describes exactly the facts of this case. Defense counsel knowingly tolerated Green’s CR 11 violation for over a year, and then sought to punish Green at the conclusion of the case. This is an abuse of the legal process, but by defense counsel, not by Green.

C. BUCK’S FAILURE TO TIMELY FILE THE CR 11 MOTION ALSO CONSTITUTES A FAILURE TO MITIGATE.

Closely related to the duty to promptly file the motion, and perhaps inseparable from it, is the duty on complaining counsel to mitigate its damages. Where one failure is found, the other failure is likely to be found as well. That is exactly the case here.

Given that the duty to mitigate damages applies to almost all claims made in all cases (for obvious policy reasons), it should be no surprise that the duty to mitigate is recognized in the context of CR 11 motions. The *Biggs* court made this clear in its instructions on remand. *Biggs*, 124 Wn.2d at 198. The duty to mitigate was also recognized by Division Two in *MacDonald v. Korum Ford*, 80 Wn.App. 877, 891, 912 P.2d 1052 (1996): “Cain argues that the trial court should have considered the extent to which Korum Ford could have mitigated or avoided its

expenses and fees. We agree.” This Court recognized the duty to mitigate with respect to CR 11 sanctions in *Miller v. Badgley*, 51 Wn.App. 285, 303, 753 P.3d 530 (1988): “A party resisting a motion that violates CR 11 has a duty to mitigate and may not recover excessive expenditures.”

In addition to reinforcing the requirement that CR 11 motions be filed sooner rather than later, the duty to mitigate also encompasses the principle that sanctions must be limited to the amount that complaining counsel was forced to spend in response to the offending pleading.

MacDonald, 80 Wn.App. at 891.

Returning to the facts of this case, it is hard to imagine a more grotesque failure to mitigate. By far the biggest expense in the case was the battle over discovery. While this battle was ongoing, Buck held the keys to the case and could have brought it to a halt on any given day. Day after day, given the choice between allowing the parties to hemorrhage cash or filing the motion, Buck chose to let the bleeding continue. Buck’s *choice* to recklessly spend money is most evident from the facts surrounding the retention of the Allied Law Group. Allied was retained on August 4, 2008, more than a year after Buck served Green with CR 11 notice. Rather than file the motion, Buck paid Allied Law Group \$22,477.32 to fight a completely unnecessary discovery battle. We are not feigning indignation when we say that it is simply outrageous that the

lower court passed this completely avoidable \$22,477.32 expense on to Green.

Given Buck's 391 day delay in filing the motion, and the complete failure of notice on the part of defense counsel, we do not believe that one penny of the lower court's award should stand. Accordingly, we are not offering a calculation of what we believe the amount of sanctions should be after the reduction for failure to mitigate.

D. WHERE BUCK WITHDREW AS COUNSEL OF RECORD WITHOUT ANSWERING THE SECOND AMENDED COMPLAINT AND WITHOUT FILING THE MOTION FOR CR 11 SANCTIONS, AND WHERE DAVIES PEARSON AND ALLIED LAW GROUP NEVER GAVE CR 11 NOTICE, THE FAILURE OF NOTICE ACTS AS A BAR TO ANY AWARD OF SANCTIONS.

Buck served Green with the required CR 11 notice on August 2, 2007 and Green filed the Second Amended Complaint on September 17, 2007. We do not dispute the sufficiency of the CR 11 notice between those dates. We do, however, believe there was a complete failure of notice after September 17, 2007 and, in particular, after October 5, 2007.

We would ask the Court to consider the facts that faced Robert Green on October 6, 2007, the day after Buck withdrew as counsel on the case.

- Green had amended the complaint in response to the CR 11 notice.

- Buck had not informed Green that the pleading was still insufficient.
- Buck had not filed the CR 11 motion.
- Buck had not answered the Second Amended Complaint.
- Counsel of record Davies Pearson had not served Green with CR 11 notice. (Of course, Davies Pearson *never* served Green with CR 11 notice.)

And yet, somehow, against this factual background Green was supposed to know that his every action from that day forward was a continuing violation of CR 11. In other words, Green was required to be clairvoyant.

Of course, in addition to the facts he knew, there were facts that Green did not know as of October 6, 2007. 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. He didn't know any of this, though the lower court charged him with this knowledge.

More importantly, Green did not know Buck's CR 11 motion was about to descend like a submarine into the murky waters of litigation, where it would wait in invisible silence until it could resurface at the moment of greatest possible damage. Submarines, of course, inflict

damage by waiting for the enemy to pass before surfacing and striking from behind. In our view that is exactly what happened here: Green was bushwhacked, ambushed, and shot in the back. That Buck would engage in such underhanded litigation tactics is beyond the pale. That the lower court would give these tactics such rich reward is even worse.

There does not appear to be a recorded decision addressing the requirement that a lawyer file a CR 11 motion prior to withdrawing as counsel. However, any other rule would both defy common sense and defeat the purpose of CR 11 notice. Accordingly, we ask this Court to articulate in its holding the rule that failure to file the CR 11 motion before withdrawing as counsel negates the CR11 notice and extinguishes the motion.

With respect to the rule that substituting counsel must independently give CR 11 notice, the rule is certainly implicit in the holding of *MacDonald v. Korum Ford*, 80 Wn.App. 877, 912 P.2d 1052 (1996). We simply ask this Court to make the rule explicit.

In *MacDonald*, as here, the lower court awarded the complaining party its full attorneys' fees as CR 11 sanctions. On appeal, the case was remanded for a substantial reduction in damages based primarily on the complaining party's failure to mitigate. One fact indicating a failure to

mitigate was the fact that substituting counsel gave no notice of its intent to seek CR 11 sanctions:

Second, it appears that attorney two (the substituting attorney) could have avoided or mitigated the fees reasonably generated in responding to specific sanctionable filings. For example, Korum Ford's first attorney notified Cain that he intended to seek CR 11 sanctions if Cain proceeded with a pending motion to amend the complaint and join an additional party. In response, Cain withdrew the motions. ***Had attorney two similarly notified Cain that she considered his continued pursuit of the case sanctionable, she might have deterred some of the litigation abuse.*** *MacDonald*, 80 Wn.App. at 893 (emphasis added).

It is clear from *MacDonald* that substituting counsel should give independent notice of CR 11 intent. However, the purposes of CR 11 are better served by a less ambiguous directive, so we therefore ask the Court to articulate the common sense rule that substituting counsel *must* give CR 11 notice as a prerequisite to seeking CR 11 sanctions.

Where Buck's notice failed when he withdrew, and where Davies Pearson never gave effective notice, the notice failure of Allied Law Group is even more pronounced. Allied was not retained until a year after Buck's CR 11 notice and never gave independent CR 11 notice to Green. By what earthly rationale is Allied Law Group's notice sufficient to

support the “back door” award of \$22,477.32? And by what legal authority can Buck claim sanctions on Allied Law Group’s behalf?

The failure of notice in this case was extreme and, as with the 391 day delay in filing the motion for sanctions, should act as a complete and total bar to sanctions.

E. GREEN SHOULD BE AWARDED HIS ATTORNEYS’ FEES ON APPEAL.

“CR 11 does not, by its terms, prohibit appellate courts from imposing sanctions against a party who brings a meritless CR 11 motion even where the trial court grants that motion below.” *Bryant v. Joseph Tree*, 57 Wn.App. 107, 121, 791 P.2d 537 (1990). Admittedly, it would be the very rare case where this Court would impose sanctions on the party that prevailed below, *i.e.*, a case where the trial court sanctioned the wrong lawyers. This is that rare one-in-a-million case. The claims of defense counsel are not well grounded in law. In the clear light of day, this Court should recognize that the following claims are sanctionable:

- The claim that a lawyer can pocket a CR 11 motion for 391 days while allowing the parties to engage in extensive unnecessary litigation.
- The claim that a lawyer may withdraw as counsel of record and still bring a CR 11 claim based on a previous notice.

- The claim that a law firm that has not given CR 11 notice can thereafter make a claim for sanctions.
- The claim that a law firm may claim CR 11 sanctions on behalf of another firm, where the other firm has not given CR 11 notice.
- The claim that complaining counsel has no duty to mitigate (a claim that is a necessary inference from counsels' conduct).

These really are indefensible tactics and baseless arguments.

Green has been put through the wringer both personally and professionally by this misconduct and it would be fitting for this Court to provide some relief in the way of an award of attorneys' fees on appeal.

CONCLUSION

In the simplest terms, this appeal does no more than ask the Court to be true to its previous jurisprudence, which is literally the smallest favor any appellant can ask. There was a failure of notice in this case, the delay in filing was inexcusable, and the consequent failure to mitigate was also inexcusable. We therefore respectfully request that this Court reverse the lower court and vacate the award of sanctions in its entirety.

Dated this the 12th day of August, 2009.

A handwritten signature in black ink, appearing to read 'Lee H. Rousso', written over a horizontal line.

Lee H. Rousso, WSBA #33340
The Law Office of Lee H. Rousso
1000 Second Avenue, 30th Floor
Seattle, Washington 98104
(206)623-3818
(206)386-7343(f)
lee@leerousso.com

DECLARATION OF SERVICE

I, Lee H. Rousso, declare that on August 12, 2009, I caused the Appellants' Opening Brief in Case No. 63211 to be served as follows:

BY HAND DELIVERY

Court of Appeals, Division One
One University Square
Seattle, Washington 98101

**BY DEPOSITING IN THE UNITED STATES MAIL, FIRST CLASS POSTAGE
PREPAID**

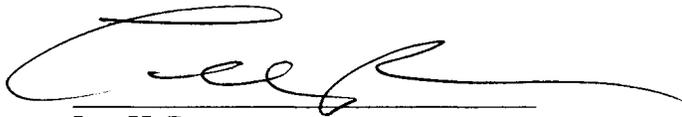
Mr. Peter Buck
The Buck Law Group
2030 1st Avenue, Suite 201
Seattle, Washington 98121

Ms. Rebecca Larson
Davies Pearson PC
920 Fawcett Avenue
Tacoma, Washington 98401

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 AUG 12 PM 1:13

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated August 12, 2009



Lee H. Rousso

RECEIVED
COURT OF APPEALS
DIVISION ONE

AUG 12 2009