

72265-4

72265-4

No. 72265-4-1

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

---

Templar Label Group, Inc., Plaintiff,

v.

Sub Pop, Ltd., Respondent.

---

2011 DEC 17 PM 1:59  
S. WASHINGTON  
COURT OF APPEALS

AMENDED BRIEF OF APPELLANT, Anthony E. McNamer

---

Joan L. Volpert, WSB #17003  
McNamer & Co.  
321 S.W. Fourth Ave., Suite 305  
Portland, Oregon 97204  
Tel: (503) 727-2500  
Fax: (503) 727-2501  
Of Attorneys for Appellant  
Anthony E. McNamer

TABLE OF CONTENTS

I. INTRODUCTION. . . . . 1

II. ASSIGNMENT OF ERROR . . . . .1

    A. Assignment of Error. . . . .1

        The trial court abused its discretion in entering the order of July 14, 2014 granting CR 11 (A-1) sanctions against attorney Anthony E. McNamer and in entering the judgment of September 2, 2014 against Mr. McNamer in the sum of \$3179.91 plus interest.

    B. Issues Pertaining to Assignment of Error. . . . . 1

III. STATEMENT OF THE CASE . . . . . 2

IV. SUMMARY OF ARGUMENT. . . . . 6

V. ARGUMENT. . . . .7

    A. The Standard of Review is Abuse of Discretion. . . .7

    B. The Trial Court Abused Its Discretion in Awarding Sanctions. . . . .9

        1. Attorney McNamer Made a Reasonable Inquiry as to the Proper Sub Pop Party. . . . . 9

        2. Attorney McNamer Made a Reasonable Inquiry Regarding Standing. . . . .11

        3. The Trial Court Abused its Discretion by Adding Attorney McNamer to the Judgment, When the Original Motion and Order Did Not Name Him. . . . .14

VI. CONCLUSION . . . . .15

VII. APPENDIX. . . . .	A-1
Rule CR 11. . . . .	A-1
Judgment and Judgment Summary. . . . .	A-3

TABLE OF AUTHORITIES

Table of Cases

Washington cases

<i>Biggs v. Vail</i> , 124 Wn.2d 193, 876 P.2d 448 (1994). . . . .	8
<i>Brigade v. Econ. Dev. Bd. For Tacoma-Pierce Cnty.</i> , 61 Wash.App. 615, 811 P.2d 697, (1991). . . . .	8, 10
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wash.2d 210, 829 P.2d 1099 (1992). . . . .	7, 8, 10, 14
<i>Hicks v. Edwards</i> , 75 Wn. App. 156, 876 P.2d 953 (1994). . . . .	8
<i>MacDonald v. Korum Ford</i> , 80 Wn. App. 877, 912 P.2d 1052 (1996). . . . .	8
<i>Washington State Physicians Ins. Exch. &amp; Ass'n v. Fisons Corp.</i> , 122 Wash.2d 299, 858 P.2d 1054 (1993). . . . .	7

Other cases

<i>In re Keegan Mgmt. Co.</i> , 78 F. 3d 431 (9 <sup>th</sup> Cir. 1996). . . . .	8
<i>Meso Scale Diagnostics v. Roche Diagnostics GmbH</i> , 62 A.3d 62, 87 (Del. Ch. 2013). . . . .	12,13
<i>Zaldivar v. City of L.A.</i> , 780 F.2d 823 (9 <sup>th</sup> Cir. 1986). . . . .	13, 14

Regulations and Rules

Rule 11. . . . .	<i>passim</i>
------------------	---------------

## I. INTRODUCTION

This appeal addresses the issue of whether, under an objective, reasonableness standard, the trial court abused its discretion in awarding Rule 11 (A-1) sanctions against attorney Anthony E. McNamer under the facts presented.

## II. ASSIGNMENT OF ERROR

### A. Assignment of Error

The trial court abused its discretion in entering its order of July 14, 2104 granting CR 11 sanctions against attorney Anthony E. McNamer and in entering the judgment of September 2, 2014 against Mr. McNamer in the sum of \$3179.91 plus interest.

### B. Issues Pertaining to Assignment of Error

Did the trial court abuse its discretion in awarding sanctions against an attorney for filing this action against defendant, when there is uncontroverted evidence that: (1) the attorney made a reasonable inquiry about the defendant's identity by researching the official corporate record information found with the Washington Secretary of State; and (2) the attorney presented legally reasonable arguments about

standing, even though those arguments did not prevail on the merits?

Did the trial court abuse its discretion in naming the attorney personally in the judgment when the original motion and order upon which the judgment was based did not name him and the motion against him was made only after his client failed to pay?

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

On behalf of Plaintiff Templar Label Group, Ltd. ("Templar"), attorney Anthony McNamer ("attorney McNamer") filed a complaint against Sub Pop, Ltd. (CP 11-14). The complaint alleges that Templar (as the successor in interest to Bright Gray Productions, LLC d/b/a D'Cide through merger) had an exclusive artist recording agreement with musical recording artist Ishmael Butler ("Butler") (CP 4, 403, 405-410) and alleges that artist Butler breached that agreement by entering into a subsequent, exclusive artist recording agreement with defendant Sub Pop, Ltd. (CP 12 at ¶ 5). The complaint alleges that: (1) Sub Pop, Ltd. knowingly and intentionally interfered with Templar's business relations with

Butler; and (2) Sub Pop, Ltd. knowingly and intentionally interfered with Templar's contract with Butler (CP 12-13 at ¶¶ 7-12). Some "Sub Pop" entity released the records of artist Butler at issue in this case, so attorney McNamer knew that some "Sub Pop" entity was the appropriate defendant (CP 352). Prior to filing Templar's complaint, attorney McNamer searched the Washington Secretary of State corporate database to determine the appropriate "Sub Pop" entity against which to file suit (CP 332 at ¶2). In his 19 years of experience as an attorney, whenever unaware of the proper corporate party, attorney McNamer uses the official corporate information found with the relevant Secretary of State (CP 333 at ¶3). A copy of the search result is attached to attorney McNamer's declaration (CP 334-335). The search for any "Sub Pop" entity revealed three such entities, of which Sub Pop, Ltd. is the first registered entity (CP 334).

Sub Pop Records (the entity that Defendant asserts is the appropriate party) is not an entity registered to do business in Washington (CP 334-335).

Defense counsel's pre-suit correspondence to attorney McNamer did not say that Sub Pop, Ltd. was the wrong

“SubPop” entity; against which to file suit (CP 51, 68-71). In pre-suit correspondence, counsel for Sub Pop, Ltd. merely argued about the basis for assignment of Bright Gray Productions, LLC d/b/a D'Cide (*Id.*).

In its answer, Defendant alleged for the first time that Plaintiff had sued the wrong entity (CP 17). Specifically, Sub Pop, Ltd.'s answer denies that “it is a proper party at interest or any wrongdoing” (CP 18). According to attorney McNamer this denial is “something routinely denied by all Defendants in their answers” that did “not justify immediately taking a deposition on the issue” (CP 351).

Sub Pop, Ltd.'s answer also alleges that Sub Pop, Ltd. is the assignee of artist Butler's claims against Templar (CR 18) and presents counterclaims based on the agreement, including breach of contract, infringement and liability under the Copyright Act and restitutionary remedies and disgorgement (CR 18-21). Thus, Defendant claims that it is not a proper *defendant*, and then turns around and claims that it is a proper *counter-claimant* based on the exact same facts. However Sub Pop, Ltd. may be legally related to “Sub

Pop Records,” one thing is for sure: Sub Pop, Ltd. is intimately related to the dispute. Attorney McNamer also was not willing to dismiss Templar’s complaint against Sub Pop, Ltd. based on the unsupported statements of Sub Pop, Ltd.’s representatives (CP 24-36, 141-153). It is unclear whether “Sub Pop Records” even legally exists. What is absolutely clear, however, is that “Sub Pop Records” is not registered to do business in Washington (CP 332-335).

Templar filed a motion to dismiss Defendant’s counterclaims on the ground that exclusive jurisdiction of those claims rests in Virginia. The trial court denied that motion (CP 200-201).

Sub Pop, Ltd. filed a cross-motion for dismissal of Templar’s claims on the grounds that Sub Pop, Ltd. was not the proper party for Templar to sue and that Templar lacked standing to sue (CP 94-105). The trial court granted Sub Pop, Ltd.’s motion and entered an order dismissing Templar’s complaint (CP 200-201).

Sub Pop, Ltd. then filed a motion for reasonable fees and costs against Templar (CP 202-211), which the court

granted (CP 5). The court's order, the form of which defense counsel submitted, awarded fees and cost against Templar only---not against attorney McNamer (CP 5). After Templar failed to make payment, Sub Pop, Ltd. filed a motion for entry of judgment against both Templar and attorney McNamer --- literally just adding on McNamer after the motion and order. After briefing, the court entered an order (CP 381-396) and judgment<sup>1</sup> against both Templar and McNamer. Attorney McNamer filed notices of appeal from both the order (CP 381-396) and judgment.

#### **IV. SUMMARY OF ARGUMENT**

Attorney McNamer made a reasonable inquiry as to the proper Sub Pop party by consulting the official records of the Washington Secretary of State. He was not required to accept as true Defendant's allegations that Sub-Pop was not the proper entity (CP 17, 18) or the unsupported declarations of Defendant's representatives (CP 24-36, 141-153). The trial court abused its discretion in awarding Rule 11 sanctions against attorney McNamer for filing Templar's complaint against Sub Pop, Ltd.

<sup>1</sup> The judgment (A-3 – A-4).is attached to the amended notice of appeal that attorney McNamer filed with the trial court and served on this court.

Attorney McNamer also made a reasonable inquiry regarding the standing issue. His arguments were legally reasonable even though his arguments did not prevail. The trial court abused its discretion in awarding Rule 11 sanctions against Mr. McNamer for filing Templar's complaint against Sub Pop, Ltd.

The trial court was not entitled to add Mr. McNamer to the judgment after the fact. The Defendant sought, and court ordered, sanctions against Templar and Templar alone. After Templar failed to pay, the court could not rewrite history and add attorney McNamer to the judgment. The trial court abused its discretion in awarding Rule 11 sanctions against Mr. McNamer.

## V. ARGUMENT

### A. The Standard of Review Is Abuse of Discretion.

The standard of appellate review of CR 11 sanctions is the abuse of discretion standard. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338-39, 858 P.2d 1054 (1993). "The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system." *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d

210, 219, 829 P.2d 1099, 1104 (1992). It is the duty of a lawyer to evaluate cases before filing them. See *Brigade v. Econ. Dev. Bd. For Tacoma-Pierce Cnty.*, 61 Wash.App. 615, 624-25, 811 P.2d 697, 702 (1991).

Rule 11 is not intended to chill an attorney's enthusiasm or creativity in pursuing legal or factual theories. *Bryant*, 119 Wn.2d at 219. Sanctions are reserved for egregious conduct. *Biggs v. Vail*, 124 Wn.2d 193, 198 n.2, 876 P.2d 448 (1994).

A filing is baseless if it is not well grounded in fact, existing law, or a good faith argument for the extension of existing law. CR 11: *Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994). Even a baseless filing is not subject to CR 11 sanctions, unless the trial court also finds that the attorney failed to conduct a reasonable inquiry into the factual and legal bases for the filing. *In re Keegan Mgmt. Co.*, 78 F.3d 431, 434-5 (9<sup>th</sup> Cir. 1996); *Bryant*, 119 Wn.2d at 220; *MacDonald v. Korum Ford*, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996). The court should evaluate an attorney's conduct under an objective reasonableness standard and asks whether a reasonable attorney in similar circumstances would believe that his or her actions were factually and legally

justified. *Bryant*, 119 Wn.2d at 220.

Here the trial court abused its discretion in finding that neither facts nor law supported Mr. McNamer's position and that a reasonable inquiry would have revealed this to him (CP 393 at ¶ 2.13).

B. The Trial Court Abused Its Discretion in Awarding Sanctions.

1. Attorney McNamer Made a Reasonable Inquiry as to the Proper Sub Pop Party.

The evidence is uncontroverted that, prior to filing Templar's complaint, attorney McNamer searched the Washington Secretary of State corporate database to determine the appropriate "Sub Pop" entity against which to file suit (CP 332 at ¶2). In his 19 years of experience as an attorney, whenever unaware of the proper corporate party, attorney McNamer uses the official corporate information found with the relevant Secretary of State (*Id.*, ¶3). The search for any "Sub Pop" entity revealed three such entities, of which Sub Pop, Ltd. is the first registered entity (*Id.*, ¶2; CP 334-335)). Sub Pop Records (the entity that defense counsel asserts is the appropriate party) is not an entity registered to do business in Washington (*Id.*).

Attorney McNamer did not name a random entity unrelated to the case. A "Sub Pop" entity released the records and a "Sub Pop" entity is the proper defendant in this action. A "Sub Pop" entity entered into exclusive artist recording agreement with artist Butler after Templar already had entered into an exclusive recording artist agreement with that same artist. Attorney McNamer's search of the official, Washington state corporate records for "Sub Pop" entities in Washington (CP 332 at ¶2) was a reasonable inquiry. This was not a baseless filing or an abuse of the judicial system. *See, Bryant, supra.* Mr. McNamer evaluated the proper defendant before filing the case. *See, Brigade, supra.*

The trial court effectively held that attorney McNamer should have ignored the results of his reasonable inquiry and instead took Defendant's word on the matter once Defendant filed its answer alleging that it was not the proper party. On the contrary, it would have been malpractice for Mr. McNamer to simply take the opposing party's "word" in light of the official state records that flatly contradicted Defendant's unsupported "claim".

Furthermore, the fact that Defendant Sub Pop, Ltd. raised counterclaims based on the agreement, including

breach of contract, infringement and liability under the Copyright Act and restitutionary remedies/disgorgement (CP 18-21 at ¶ 3.0-3.17) goes to show that Sub Pop, Ltd. was not a random entity, unrelated to the case.

And even if attorney McNamer did not make a sufficient factual investigation before filing the complaint, to be frivolous, the complaint must also be from an objective perspective, legally or factually baseless. *In re Keegan Mgmt. Co.*, 78 F. 3d at 434-5. It is not “baseless” to rely on the official corporate records to determine the proper identity of a party (instead of unsupported allegations). That Mr. McNamer may have been able to make other inquiries is not the standard. He had a legitimate “basis” for naming Sub Pop, Ltd. as the defendant in this matter. The trial court erred in awarding sanctions against Mr. McNamer for filing Templar’s complaint against Sub Pop, Ltd.

Without even acknowledging the uncontroverted facts regarding attorney McNamer’s pre-filing investigation, or the reasons underlying them, the trial court found that the “pre-filing investigation...was inadequate” (CP 57, ¶1.8). The trial court findings imply that attorney McNamer then unnecessarily burdened Defendant with motion practice

before conducting discovery. Plaintiff filed a motion to dismiss Defendant's counterclaims on legal grounds---that the Virginia courts had exclusive jurisdiction---so discovery was not required.

2. Attorney McNamer Made a Reasonable Inquiry Regarding Standing.

The standing issue is a legal issue, not a factual issue. The fact that the Court agreed with Defendant's arguments does not mean that attorney McNamer failed to make a reasonable inquiry in regard to them or that attorney McNamer engaged in sanctionable conduct by making these arguments.

Templar's complaint was based on the fact that Templar was the successor to Bright Gray Productions d/b/a D'Cide ("Bright Gray"). Defendant argued that the contract between Bright Gray and Butler could not be assigned to Templar as a matter of law because, as a recording contract, it was a contract for personal services. On behalf of Templar, attorney McNamer presented two, alternate arguments.

First, when Templar purchased all of Bright Gray's stock (and Bright Gray merged into Templar) there was no assignment because "[S]tock purchase transactions ... do not result in assignment by operation of law." *Meso Scale*

*Diagnostics v. Roche Diagnostics GmbH*, 62 A.3d 62, 87 (Del. Ch. 2013).

Second, Templar was not seeking to enforce a personal services contract against Butler at all. Instead, Templar was suing Defendant for its interference with business relations and interference with contract (CP 11-14). Therefore, Defendant's argument regarding assignability was moot.

While the trial court decided in favor of Defendant on this legal issue, attorney McNamer had clear support for his arguments. The fact that Mr. McNamer lost on the merits on the standing issue does not establish that Mr. McNamer's conduct was sanctionable conduct. In assessing whether the filing of a particular paper was frivolous under Rule 11, the court should not consider the failure on the merits, but rather whether the position taken was "warranted by existing law" (CR 11)—that it was not "legally unreasonable." *See Zaldivar v. City of L.A.*, 780 F.2d 823, 832 (9<sup>th</sup> Cir. 1986).

This was not a baseless filing or an abuse of the judicial system. *See, Bryant, supra*. Mr. McNamer had legal authority for Templar's position. *See Meso Scale, supra*. Indeed, the Court failed to explain why Delaware law did not govern and

why the *Meso Scale* Court's holding did not control. The trial court abused its discretion in awarding sanctions against Mr. McNamer on the standing issue.

The trial court's findings emphasize the fact that Defendant presented its argument on lack of standing to attorney McNamer both before and after the complaint was filed (CP 369-370 at 1.3-1.5). However, attorney McNamer's legal argument was warranted under existing law---regardless of when defense counsel presented a contrary legal argument.

The fact that Defendant and the court ultimately interpreted that law differently does not make attorney McNamer's legal analysis worthy of sanction.

3. The Trial Court Abused its Discretion by Adding Attorney McNamer to the Judgment, When the Original Motion and Order Did Not Name Him.

Defendant could have brought a motion for sanctions against attorney McNamer when it sought fees and costs against Templar, but it did not. Alternatively, the trial court could have ordered sanctions against Mr. McNamer when it ordered fees and costs against Templar, but it did not. The trial court order ordered fees and costs against Templar and

Templar alone. Instead, Defendant waited until Templar to pay, and then sought sanctions against its attorney.

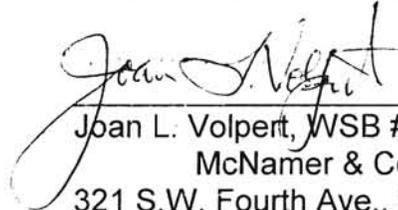
Defendant cited no case, and none exists, that gives the court the power to rewrite history and to add an additional unnamed party to a judgment, after motion and after an order is entered thereon.

#### VI. CONCLUSION

The judgment entered against attorney Anthony E. McNamer should be reversed and vacated.

Dated this 16<sup>th</sup> day of December, 2014.

Respectfully submitted,

  
Joan L. Volpert, WSB #17003  
McNamer & Co.  
321 S.W. Fourth Ave., Suite 305  
Portland, Oregon 97204  
Tel: (503) 727-2500  
Fax: (503) 727-2501  
Of Attorneys for Appellant  
Anthony E. McNamer

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

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is well grounded in fact;

(2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a

pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is well grounded in fact;

(2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

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

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON  
IN AND FOR KING COUNTY

TEMPLAR LABEL GROUP, INC.,  
A New York Corporation,

Plaintiff,

v.

SUB POP, LTD., a Washington  
Corporation,

Defendant.

No. 132375338-SEA

JUDGMENT AND  
JUDGMENT  
SUMMARY

1. Judgment Summary

- |                                     |  |
|-------------------------------------|--|
| 1. Judgment Creditor                | Sub Pop, Ltd.  |
| 2. Attorney for Judgment            | Randolph I. Gordon<br>Law Offices of Randolph I.<br>Gordon<br>1218 Third Avenue,<br>Ste. 1000<br>Seattle, WA 98121 |
| 3. Judgment Debtors                 | Anthony McNamer<br>and Templar Label Group,<br>Inc.  |
| 4. Attorney for Judgment<br>Debtors | Anthony McNamer, Esq.<br>1400 SW Fifth Avenue,<br>Suite 300<br>Portland, Oregon 97201                              |
| 5. Principal and Total<br>Judgment  | \$3,179.91*<br>*Per March 10, 2014<br>Court Order  |

6. Interest: Interest shall accrue on this Judgment at the rate of 12% per annum from the date of entry of this Judgment until paid in full.

II. Judgment

It is hereby Ordered:

1. Judgment shall be, and hereby is, entered against Anthony McNamer and Templar Label Group, Inc. in the amount of Three thousand one hundred seventy-nine dollars and ninety-one cents (\$3,179.91) pursuant hereto and this Court's Order of March 10, 2014.

2. Interest shall accrue on this Judgment at the rate of Twelve Percent (12%) per annum from the date of entry hereof until paid in full.

Signed 9/2/14

/s/ Patrick Oishi  
The Honorable Patrick Oishi  
Judge King County Superior Court

Presented by:  
Law Offices of Randolph I. Gordon PLLC  
By: /s/ Randolph Gordon  
Randolph I. Gordon, WSBA #8435  
Attorneys for Defendant Sub Pop, Ltd.

CERTIFICATE OF SERVICE

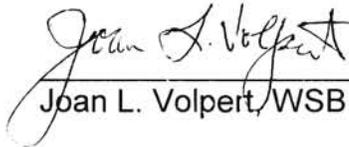
I certify that on this date I have mailed two copies of AMENDED BRIEF OF APPELLANT ANTHONY E. MCNAMER by first-class mail, postage pre-paid to the following attorney at the address below:

Randolph Gordon  
1218 Third Street, Suite 1000  
Seattle, Washington 98121

I also certify that, pursuant to a stipulation, I have e-mailed a copy of said brief to Attorney Gordon Randolph at [randy@randygordonlaw.com](mailto:randy@randygordonlaw.com).

I further certify under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of December, 2014.

  
Joan L. Volpert, WSB #17003