

No. 73807-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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JESSE FULLER,  
Plaintiff-Appellant,

v.

FISHERMEN'S FINEST AND  
NORTH PACIFIC FISHING, INC.

Defendants-Respondents-Cross Appellants,

FILED  
Dec 30, 2015  
Court of Appeals  
Division I  
State of Washington

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**DEFENDANTS/RESPONDENTS/CROSS-APPELLANTS  
FISHERMEN'S FINEST AND NORTH PACIFIC FISHING, INC.'S  
REPLY BRIEF**

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William H. Walsh, WSBA No. 21911  
Karl Neumann, WSBA No. 48078  
COZEN O'CONNOR  
999 Third Avenue, Suite 1900  
Seattle, WA 98104  
Telephone: (206) 340-1000

*Attorneys for Defendants/  
Respondents/Cross-Appellants  
Fishermen's Finest and North Pacific  
Fishing, Inc.*

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## **I. REPLY ARGUMENT**

### **A. Appellant Fails to Address the Cross-Appeal.**

Appellant does not dispute the trial court's abuse of discretion in arbitrarily reducing the amount of fees awarded to Fishermen's Finest. Appellant fails to provide any counter-argument, citation to the record, or authority against the cross-appeal. Since Appellant's briefing is insufficient under RAP 10.3(a)(6), any opposition to Fishermen's Finest's entitlement of full reasonable fees and costs are waived.<sup>1</sup> Accordingly, this Court should remand and permit Fishermen's Finest to recover its originally-requested fees in the amount of \$70,318.43. *See* CP 228–231.

Appellant also fails to address, let alone oppose, Fishermen's Finest's entitlement to fees and costs for this frivolous appeal. Appellant's conduct at the trial level demonstrated a cavalier attitude toward the basic standards of practice that easily constituted sanctionable conduct.<sup>2</sup> *See, e.g., Lee v. Columbian, Inc.*, 64 Wn. App. 534, 540, 826 P.2d 217 (1991) (affirming CR 11 sanctions where “[t]he most cursory investigation would

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<sup>1</sup> Under RAP 10.3, Appellant was required to provide relevant “citations to legal authority and references to relevant parts of the record” for the Court's consideration. RAP 10.3(a)(6); *see also Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004) (“We need not consider arguments that are not developed in the briefs and for which a party has not cited authority.”).

<sup>2</sup> It is undisputed that Mr. Merriam (1) initiated a lawsuit for money that was paid to his client, CP 516–17; (2) had three weeks to consult with his client before filing the lawsuit, CP 1–3; (3) filed an Amended Complaint seeking the amounts already paid even though he received actual notice of the disputed payment, CP 7–9; and (4) refused to dismiss the lawsuit after being fully informed of the amounts paid. CP 516-17.

have disclosed” the claim was without merit). As Appellant’s failure to address the cross-appeal has left no disputed issue on review, Fishermen’s Finest is entitled to its fees and costs under RAP 18.1 and RAP 18.9.

**B. Appellant’s Arguments Avoid the Relevant Issues.**

Appellant’s arguments pertaining to maritime law, including crew shares, wage penalties, or contract interpretation are irrelevant. None of those arguments escape the fact that Appellant’s legal arguments were made in the context of unsupported factual allegations—allegations that were *knowingly* false when made in the Amended Complaint. It is important to emphasize that the merits of the substantive maritime claims were already briefed, heard, and decided in favor of Fishermen’s Finest in the underlying *binding* arbitration. *See* CP 52–53 (order enforcing arbitration); CP 454–471 (arbitration opinion). Those issues are not subject to appeal and do not address the findings related to counsel’s conduct that led to the imposition of sanctions; *i.e.*, knowingly pursuing a claim on false facts.

The record confirms that the trial court’s award of attorneys’ fees was not based on an interpretation of maritime law. *See* CP 303 (Findings of Fact). Rather, the award was predicated on the factually devoid filings and Mr. Merriam’s failure to conduct a pre-filing investigation:

Because the wages in dispute were fully paid to Mr. Fuller prior to the filing of the Original and Amended Complaints, both pleadings were not well-grounded in fact and filed without reasonable inquiry. Mr. Merriam should have been aware upon reasonable inquiry of his client that Mr. Fuller had been paid all outstanding wages prior to the filing of the Original and Amended Complaint.

CP 304 (Conclusions of Law). Appellant cannot circumvent the established record, which confirms the frivolous nature of the underlying litigation. Plaintiff Mr. Fuller conceded he was “fully compensated” prior to commencement of the lawsuit. CP 73–74. Mr. Fuller also admitted the lawsuit was filed solely so his counsel could obtain a benefit from the litigation, since Fishermen’s Finest had already provided full payment to Mr. Fuller. *See* 360–64.<sup>3</sup> The record fully and unequivocally supports the trial court’s findings that the pleadings were filed without factual foundation and without reasonable cause.

Interestingly, for the first time in this litigation, Appellant contends on Reply that the pleadings were not baseless because Appellant allegedly never sought compensation for the disputed contract completion bonus or airfare.<sup>4</sup> *Appellant Reply* 4. This is contradicted by the record. Indeed,

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<sup>3</sup> *Cf. MacDonald v. Korum Ford*, 80 Wn. App. 877, 888, 912 P.2d 1052 (1996) (affirming CR 11 sanctions where plaintiff’s deposition confirmed a lack of factual basis).

<sup>4</sup> This argument was never made to the trial court or even in Mr. Fuller’s opening appellate brief. The argument should be dismissed. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (noting that arguments raised “for the first time in a reply brief [are] too late to warrant consideration.”).

Mr. Fuller confirmed in deposition testimony that he was seeking the contract completion bonus and airfare amounts from the outset. *See, e.g.*, CP 360–61 (noting that the reason for retaining Mr. Merriam was the contract completion bonus dispute). Pleadings confirm the same.<sup>5</sup> Given the deference that must be given to the trial court’s determination that Appellant’s pleadings constituted baseless filings (which is warranted since those findings are uncontradicted), they should be affirmed. *See Stiles v. Kearney*, 168 Wn. App. 250, 263, 277 P.3d 9 (2012) (“But under an abuse of discretion standard, we can only reverse a trial court’s [CR 11 and RCW 4.84.185] sanction decisions if the decisions are manifestly unreasonable or based on untenable grounds.”).

Notably, Appellant does not provide citation to precedent under CR 11 or RCW 4.84.185 in the appellate briefing to demonstrate how the trial court abused its discretion in awarding fees to Fishermen’s Finest. Instead, Appellant merely re-hashes arguments already decided in the underlying *binding* arbitration. Since Appellant fails to provide the requisite support for the alleged assignments of error, the trial court’s

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<sup>5</sup> *See, e.g.*, CP 37 (noting that Mr. Fuller was seeking compensation of “the monies paid by defendants” – *i.e.*, the contract completion bonus and airfare; CP 311, 316 (making arguments based on the alleged non-payment of the contract completion bonus and airfare). Indeed, Appellant has alleged that Mr. Fuller was “cheated” out of the contract completion bonus and airfare in the appellate briefing, which is contrary to the record. *Appellant’s Opening Br.* 11 (claiming entitlement to completion bonus); *Appellant’s Reply* 5.

award of fees should be affirmed. *See Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004) (dismissing numerous claims on appeal for failure to support with sufficient argument or relevant legal authority); *see also* RAP 10.3(a)(6).

## II. CONCLUSION

Mr. Merriam carelessly filed the Original Complaint then filed the Amended Complaint knowing his client's grievance was fully resolved. The record establishes a clear abuse of the judicial system, which CR 11 and RCW 4.84.185 are designed to curb. When repeatedly confronted with the error, Mr. Merriam became further entrenched and refused to dismiss the case. As such, counsel has ignored several opportunities to avoid the consequences that have now befallen him. Worse, he (likely intentionally) drove up the defense costs of Fishermen's Finest by taking meritless positions during motions practice at the trial level and, now, by filing this frivolous appeal. The trial court's award of fees should be affirmed with remand for the trial court to enter the originally-requested amount of \$70,318.43 in favor of Fishermen's Finest. The entire amount is a product of the unreasonable actions by Mr. Merriam, and Fishermen's Finest deserves to have it paid in its entirety. Such sanctions would be an appropriate general and specific deterrence for similar conduct.

Additionally, Fishermen's Finest respectfully requests an award of its reasonable fees and costs in defending this frivolous appeal.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of December, 2015.

COZEN O'CONNOR

By: s/ William H. Walsh  
William H. Walsh, WSBA No. 21911  
E-mail: [wwalsh@cozen.com](mailto:wwalsh@cozen.com)  
Karl Neumann, WSBA No. 48078  
E-mail: [kneumann@cozen.com](mailto:kneumann@cozen.com)

Attorneys for  
Defendants/Respondents/Cross-Appellants

**DECLARATION OF SERVICE**

The undersigned states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 30th day of December, 2015, I caused to be electronically filed the foregoing *Defendants/Respondents/Cross-Appellants Fishermen's Finest and North Pacific Fishing, Inc. Reply Brief* with the Court of Appeals, Division I. I also served a copy of said document on the following party as indicated below:

<p><b><i>Counsel for Plaintiff-Appellant:</i></b></p> <p>John W. Merriam, WSBA No. 12749 4005 20<sup>th</sup> Avenue West, Suite 110 Seattle, WA 98199-1290 Telephone: 206.729.5252 Facsimile: 206.729.1012 Email: <a href="mailto:john@merriam-maritimelaw.com">john@merriam-maritimelaw.com</a></p>	<p><i>Via Email and Legal Messenger</i></p>
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 30<sup>th</sup> day of December, 2015.

s/ Dava Bowzer  
Dava Bowzer, Legal Assistant