

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY Kevin M. Sampson
DEPUTY

No. 39284-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JARNAIL MAAN,

Respondent,

v.

ANTHONY G. MALELLA,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

Defendant, Anthony G. Malella, assigns error to the trial court's ruling denying his requests for attorney fees and costs.

II. ISSUES PRESENTED FOR REVIEW

1. Both parties filed actions to enforce provisions of a lease and both voluntarily dismissed their claims, with the exception of one of Defendant's counterclaims. Defendant did not ultimately prevail on that claim. Did the trial court err in denying Defendant's requests for attorney fees when both parties voluntarily dismissed their actions?

2. Both parties filed claims for breach of contract. Plaintiff alleged, and submitted evidence showing, that Defendant failed to make repairs, comply with notice requirements, and interfered with Plaintiff's customer relations. Prior to any factual hearing both parties voluntarily dismissed their claims.

a. A trial court has discretion to impose sanctions under RCW 4.84.185 only when it is *patently*

clear that a claim has *absolutely* no chance of success. In light of the information before it, did the trial court abuse its discretion in concluding that there was no violation of RCW 4.84.185?

b. A trial court may order sanctions under CR 11 if a pleading entered with the court is not well grounded in fact or warranted by law. A claim is only frivolous when it cannot be supported by *any* rational argument on the law or facts. In light of the information before it, did the trial court abuse its discretion in concluding that there was no violation of CR 11?

3. The lease between the parties provides for an award of attorney fees to the “prevailing party” if an action is commenced to enforce a provision of the lease. Both parties stipulated to arbitration. The arbiter’s award was closer to Plaintiff’s position than Defendant’s. Did the trial court abuse its discretion in not concluding Defendant was the prevailing party and in denying his request for attorney fees and costs?

III. STATEMENT OF THE CASE

A. Factual Background

This action concerns disputes arising out of and related to commercial retail property located at 1800 NE 78th Street, Vancouver, Clark County, Washington. (CP 22)

Defendant is the owner of the subject property.

Plaintiff, Jarnail Maan, entered into a lease of the subject property with Defendant on August 1, 1996. (CP 50-64)

The term of the lease was to be for five years, beginning on August 1, 1996 and concluding on July 31, 2001. (CP 51)

Under the lease, Plaintiff had the option to extend the term of the lease for two additional five-year periods, if notice was provided prior to 180 days before the expiration of the previous lease term. (CP 51) The lease also provided for the recovery of reasonable attorney fees to the prevailing party if an action was commenced to enforce any of the provisions of the lease. (CP 58)

The rental amount for the first term of the lease was set at \$3,000 per month. (CP 51) The rental amount for the second term of the lease, if exercised, was set at \$3,500

per month. (CP 51) The rental amount for the third term of the lease, if exercised, was to be negotiated between the parties “to reflect the then current fair market rental” but was not to be less than the rental amount for the preceding term (\$3,500). (CP 51) In the event the parties could not agree on the rental price for the third term of the lease, the issue of rent was to be determined by binding arbitration as set forth in paragraph 33 of the lease. (CP 51)

Paragraph 33 of the lease provided that, if a consensus could not be reached between the parties as to the rental amount for the third term of the lease, the parties would each choose one arbiter, and those two arbiters would select a third arbiter to act as the sole arbiter to determine the question of basic rental for the third term of the lease. (CP 60)

Prior to the inception of the third term of the lease Defendant informed Plaintiff that Plaintiff was to not contact Defendant directly, but to direct all communications regarding the lease to Defendant’s counsel, David Jahn. (CP 231-232) Consistent with that request, on

January 30, 2006, Plaintiff sent correspondence to Defendant, through Jahn, indicating Plaintiff's intent to exercise the third five-year option under the lease. (CP 232, 253) Jahn received this correspondence on February 1, 2006. (CP 232, 253-254)

Prior to the inception of the third term of the lease, there was no agreement as to the rental amount. The initial communication between Defendant and Plaintiff that Defendant would request an amount above the amount from the second term of the lease was an August 1, 2006 letter from Defendant to Plaintiff's counsel noting that Defendant would "accept no less than \$4500.00 on a month to month basis." (CP 142, 177) This amount was not represented as for the third term of the lease, but was an interim amount proposed by Defendant on a month to month basis while the dispute was resolved as to whether adequate notice was provided to exercise the third term of the lease. (CP 177-178)

During the period in which the rental amount for the third term was being negotiated, Plaintiff continued to pay

Defendant \$3,500 per month. (CP 143) At no point in time did Plaintiff refuse to enter into binding arbitration to determine the rental amount for the third term of the lease. (CP 446, 472)

On June 13, 2008, Defendant filed a motion for summary judgment and requested that the Court appoint Retired Judge John Skimas as arbiter. (CP 211-212) Defendant also requested that the Court order Plaintiff to pay \$4,500 per month in back rent, retroactive to August 1, 2006. (*Id.*) Both requests were in violation of the language of the lease as each party was to appoint an arbiter separately, and those arbiters would then collectively appoint a third arbiter, who would determine the rental amount for the third lease term. (CP 60) Prior to June 13, 2008 Defendant had not proposed the use of any arbiter as required under the language of the lease. (CP 60, 472)

On July 11, 2008 Plaintiff and Defendant stipulated to the use of Judge Skimas as the sole arbiter to determine the amount of rent for the third term of the lease. (CP 343-344)

On February 5, 2009 an arbitration hearing was held before Judge Skimas. (CP 445) Following presentation of evidence, Defendant argued that the amount of rent for the third term of the lease should be set at no less than \$5,000 per month. (CP 446) Plaintiff requested that the amount of rent for the third term of the lease should remain at \$3,500 per month, or no greater than \$3,750. (CP 446, 473) Judge Skimas set the rental amount for the third term at \$4,000 per month. (CP 446)

B. Procedural Background

On January 8, 1998 Plaintiff filed suit against Defendant. (CP 185) In his amended complaint, Plaintiff requested declaratory relief to: 1) determine the relative rights of the parties with respect to storage tank upgrades; 2) reform the lease to include parking lot repairs; and 3) compel payment of costs and fees as permitted. (CP 312-313) On the clerk's motion of March 5, 2002, the matter was dismissed for want of prosecution. (CP 314-315)

On November 28, 2006 Plaintiff filed this lawsuit (CP 1-5) In the Complaint Plaintiff requested an award of

damages for: 1) Defendant's continued breach of the agreement between the parties to repair portions of the parking lot; 2) Defendant's breach of the lease in his failure to comply with notice requirements prior to inspection of the property; 3) Defendant's interference with Plaintiff's quiet enjoyment of the property; and 4) Defendant's interference with customer relations on the property, including impeding customer access. (CP 4-5)

On June 27, 2007, then counsel for Defendant, Susannah Southworth, contacted counsel for Plaintiff by telephone and asked if Plaintiff was interested in mediating the dispute. Ms. Southworth proposed using Retired Judge James Ladley as mediator. (CP 472)

On July 6, 2007, counsel for Defendant sent counsel for Plaintiff correspondence inquiring as to arbitration regarding the final five year term of the lease. (CP 459, 472)

On July 10, 2007, counsel for Plaintiff sent counsel for Defendant a letter rejecting mediation proposed by telephone on June 27, 2007. (CP 460, 472) This

correspondence made no reference to the arbitration proposal of the July 6, 2007 correspondence. (CP 460, 472)

Also on July 10, 2007, Plaintiff filed a “Notice to Set for Trial and Statement of Arbitrability” of the issues raised in Plaintiff’s Complaint. (CP 1-5, 34-36)

On August 17, 2007 Defendant filed his second amended answer. (CP 99-106) In that answer, Defendant, for the first time, alleged that Plaintiff had “failed to negotiate the basic rental to be paid during the third five year term and refuses to negotiate this issue by way of binding arbitration” resulting in an alleged breach of the lease agreement. (CP 103) This allegation was first raised *after* Plaintiff had filed his “Notice to Set for Trial and Statement of Arbitrability.”

On June 13, 2008, Defendant filed a motion for summary judgment. (CP 128-213) On June 30, 2008, Plaintiff filed a response to Defendant’s Motion for Summary Judgment. (CP 214-259) Also on June 30, 2008, Plaintiff filed a Voluntary Dismissal of Plaintiff’s Complaint without prejudice. (CP 263-265) On July 3,

2008, Defendant filed a Motion to Amend Plaintiff's Voluntary Order of Dismissal and for Award of Attorney Fees. (CP 266-268)

On July 11, 2008, Defendant filed an order for voluntary dismissal of his counterclaims with the exception of the claim set forth in Section 6.2 of Defendant's Compulsory Claims regarding arbitration of the rental amount. (CP 343-344) This dismissal included a voluntary dismissal of issues concerning whether the third term of the lease was properly exercised by Plaintiff. (*Id.*) Issues related to arbitration of the rental amount were stipulated to by the parties in Defendant's voluntary dismissal. (CP 343-344) No additional claims remained with the trial court.

On August 29, 2008 the Court held a hearing on Defendant's Motion for Costs and Fees. (RP 8)¹ The Court inquired of Defendant's counsel how one could be considered a prevailing party if his claims had been

¹ The transcripts for all hearings ordered by Defendant are contained in a single volume. Transcript references are to the pages in that volume.

dismissed. (*Id.*) The court requested that counsel provide the trial court with a basis for the conclusion that “running of the statute of limitations equals frivolous.” (RP 16) A subsequent hearing was set for September 26, 2008 to allow for briefing of the issue. (RP 18) Following the conclusion of the September 26 hearing, the trial court denied Defendant’s motion for fees and costs. (CP 466-467)

Plaintiff proposed the following at hearing in response to Defendant’s motion for attorney fees:

In this matter, Mr. Maan advanced multiple theories of relief under breach of contract. One was the – the representation as to the paving of the parking lot. . . . They—Plaintiff also asserted Defendant breached the contract by failing to provide Plaintiff with adequate notice prior to the Defendant’s inspections of the premises and that Defendant breached the contract by impeding customer access to the property and otherwise interfering with customer relations on said property.

There’s been no factual determination as to that. There’s no basis to conclude that they are patently without merit even if there’s an assertion that the statute of limitations had expired.

(RP 23-24) The Court agreed, concluding:

And I don't think that it's frivolous when you have an action that's based upon some legitimate concerns between two parties. If there was only the claim of the statute of limitations then I might see it your way, counsel. But because there are other claims being there – the access of the location and so on – these other things that are occurring in the action as filed by the attorneys, I can't say that this lawsuit was a frivolous lawsuit.

(RP 27)

On April 17, 2009, the trial court entered an order denying attorney fees and costs from the September 26, 2008 hearing. (CP 466-467)

On February 5, 2009, an arbitration hearing was held before Judge Skimas. (CP 445) Judge Skimas set the rental amount for the third term at \$4,000 per month—less than the \$5,000 requested by Defendant and more than the \$3,500 to \$3,750 requested by Plaintiff. (CP 446, 473) On April 10, 2009, Defendant submitted a motion for entry of judgment on the arbitration award and for an award of attorney fees and costs. (CP 427-440) Following oral argument on April 30, 2009, the trial court entered an amended order granting judgment in favor of Defendant on

the arbitration award, and denying Defendant's request for attorney fees and costs. (CP 505-507)

Defendant has now appealed the rulings of the trial court denying his requests for attorney fees and costs.

IV. SUMMARY OF ARGUMENT

Abuse of discretion is the standard for review of the trial court's denial of attorney fees and costs. Defendant has failed to show that the trial court erred, let alone that it abused its discretion, and the trial court's decisions must therefore be affirmed.

Defendant cannot be considered the prevailing party below because both Defendant and Plaintiff voluntarily dismissed their counterclaims and claims respectively. Furthermore the one claim that remained was stipulated to by both parties and, following an arbitration hearing, the award granted was much closer to Plaintiff's position than Defendant's.

Defendant has failed to show any abuse of discretion by the trial court in refusing to either find a violation of

either RCW 4.84.185 or CR 11 or in failing to award costs and fees recoverable under those authorities.

Defendant is also not entitled to recovery of costs and fees incurred in connection with the arbitration hearing because (1) Plaintiff did not refuse to submit the lease amount issue to arbitration as required by the lease, and (2) Plaintiff, not Defendant, was the prevailing party following arbitration. For these reasons Defendant's position should be rejected, and the trial court's decisions should be affirmed.

V. ARGUMENT

A. STANDARD OF REVIEW

A trial court's decision to impose or not impose sanctions is reviewed for an abuse of discretion.

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338-339, 858 P.2d 1054 (1993); *Cooper v. Viking Ventures*, 53 Wn. App. 739, 742, 770 P.2d 659 (1989). The standard of review is not de novo, as explained in *Fisons*:

The abuse of discretion standard again recognizes that deference is owed to the

judicial actor who is “better positioned than another to decide the issue in question.” . . . Further, the sanction rules are “designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to reduce the reluctance of courts to impose sanctions” If a review de novo was the proper standard of review, it could thwart these purposes; it could also have a chilling effect on the trial court’s willingness to impose . . . sanctions.

122 Wn.2d at 339 (citations omitted).

There must be a clear showing of abuse by the trial court to overturn the trial court’s ruling. *Timson v. Pierce County Fire Dist. No. 15*, 136 Wn. App. 376, 386, 149 P.3d 427 (2006). If an action can be supported by *any* rational argument, then a trial court properly exercises its discretion in not finding an action to be frivolous under the statute. *Id.* The action must be frivolous in its entirety; if any of the asserted claims are not frivolous, the action is not frivolous. *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). An award of sanctions is available only when the action as a whole can be deemed frivolous. *Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wn. App. 500, 510, 31 P.3d 698 (2001), “Under RCW 4.84.185, a court cannot

pick and choose among those aspects of an action that are frivolous and those that are not. . . . The action must be viewed in its entirety and only if it is frivolous as a whole will an award of fees be appropriate. . . . An action is frivolous if it "cannot be supported by any rational argument on the law or facts." *Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931 (2004) (citations omitted).

B. DEFENDANT IS NOT ENTITLED TO FEES AS THE PREVAILING PARTY HAVING VOLUNTARILY DISMISSED HIS COUNTER CLAIMS

Defendant contends that he was the "prevailing" party below and is therefore entitled to an award of attorney fees under the lease as a matter of law. Defendant relies on CR 41 and the case of *Walji v. Candyco*, 57 Wn. App. 284, 787 P.2d 946 (1990), for this proposition. However, the same authority upon which Defendant relies precludes the Court from determining that Defendant was the prevailing party.

On June 30, 2008, the trial court entered a voluntary dismissal of Plaintiff's Complaint without prejudice. (CP 263-265) On July 11, 2008, the trial court entered a

voluntary dismissal of Defendant's counterclaims (with the exception of the claim set forth in Section 6.2 of Defendant's Compulsory Claims regarding arbitration of the rental amount). (CP 343-344)

The basis for Defendant's contention that he was the prevailing party is the voluntary dismissal entered by Plaintiff. However, utilizing the same logic, Plaintiff was the prevailing party as a consequence of the voluntary dismissal entered by Defendant. As a consequence, neither party can be considered the prevailing party on the basis of the voluntary dismissal of claims and counterclaims.

This issue was explained in *Smith v. Okanogan County*, 100 Wn. App. 7, 24, 994 P.2d 857 (2000):
"Generally, the prevailing party is the party who receives a judgment in his or her favor. . . . If both parties prevail on major issues, there may be no prevailing party. . . . When there is no prevailing party, neither party is entitled to attorney fees." (citations omitted). The *Smith* court concluded that both parties had prevailed on major issues and therefore neither party was entitled to fees as the

prevailing party. *Id.* As both Plaintiff and Defendant were the recipients of voluntary dismissals of claims by the other, each party could be considered successful on major issues and therefore neither Defendant nor Plaintiff should be considered a prevailing party.

Furthermore, Defendant has failed to submit any evidence that there was either error as a matter of law by the trial court, or an abuse of discretion by the trial court, in its decision to not conclude Defendant was the prevailing party as a consequence of the voluntary dismissal.

Defendant may contend that because one claim remained following his voluntary dismissal that he should still be considered the “prevailing” party. This is without merit as well. The remaining claim concerned the arbitration clause. Both parties stipulated that this controlled. Therefore there was no dispute. Additionally, once the arbitration clause was triggered, the award ultimately reached by the arbiter was much closer to Plaintiff’s position than Defendant’s. As a consequence there was a valid basis to conclude that Defendant was not

the prevailing party. This is also discussed in greater detail below.

C. **THERE HAS BEEN NO SHOWING OF AN ABUSE OF DISCRETION BY THE TRIAL COURT IN DENYING COSTS UNDER RCW 4.84.185.**

RCW 4.84.185 provides a basis for the award of fees, in relevant part, 'as follows:'

In any civil action, the court having jurisdiction *may*, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the non-prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim or defense.

(Emphasis added)

1. The Court of Appeals reviews the denial of fees under RCW 4.84.185 for abuse of discretion.

Whether a trial court awarded or failed to award sanctions is reviewed by the Court of Appeals for an abuse of discretion. *Koch*, 108 Wn. App. at 510; *Snohomish County v. Citybank*, 100 Wn. App. 35, 43, 995 P.2d 119 (2000); *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998); *Tiger Oil Corp. v. Dep't of*

Licensing, 88 Wn. App. 925, 937-939, 946 P.2d 1235 (1997).

2. There was no violation of RCW 4.84.185.

The trial court concluded that there was no violation of RCW 4.84.185. This is reviewed under the abuse of discretion standard. Defendant has failed to produce any evidence to show an abuse of discretion on the part of the trial court.

In order to conclude that a party violated RCW 4.84.185, the trial court must necessarily find that Plaintiff's position was "frivolous and advanced without reasonable cause" In this case, there was no factual hearing on the merits of the respective claims and counterclaims by the parties. However, in connection with Defendant's Motion for Summary Judgment, Plaintiff submitted the declarations of Jarnail Maan (CP 231-236) and Ravi Paul Singh (CP 260-262). These declarations were evidence presented to the court of violations of the lease by Defendant sufficient to defeat any contention of a violation of either RCW 4.84.185 or CR 11 by Plaintiff.

3. Even if the trial court found a violation of RCW 4.84.185, it is discretionary whether the court awards sanctions.

RCW 4.84.185 provides that even if there is a violation of the statute, it is discretionary with the trial court to determine whether costs should be awarded. Because the decision to award frivolous litigation attorney fees is within the discretion of the trial court, it will not be disturbed absent a clear showing of abuse. *Reid v. Dalton*, 124 Wn. App. 113, 125, 100 P.3d 349, (2004); *Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931 (2004); *Eugster v. City of Spokane*, 110 Wn. App. 212, 231, 39 P.3d. 380 (2002).

The burden is on the moving party to justify the request for sanctions. *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994); *Eugster v. City of Spokane*, 110 Wn. App. 212, 232, 39 P.3d 380 (2002); *Brin v. Stutzman*, 89 Wn. App. 809, 827, 951 P.2d 291 (1998). Defendant has failed to meet that burden.

D. THERE HAS BEEN NO SHOWING OF AN ABUSE OF DISCRETION BY THE TRIAL COURT IN DENYING COSTS UNDER CR 11.

CR 11 provides in relevant part that every pleading, motion, and legal memorandum submitted by a party shall be signed and that:

The signature of a party . . . constitutes a certificate by the party . . . that the party . . . has read the pleading, motion, or legal memorandum, and that to the best of the party's . . . knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

The rule further provides that a court *may* order sanctions against a party who signs a document in violation of the rule.

1. The Court of Appeals reviews the denial of fees under CR 11 for abuse of discretion.

The Court of Appeals reviews for abuse of discretion an award of sanctions imposed under rule governing pleading, motion, and legal memorandum. *McNeil v. Powers*, 123 Wn. App, 577, 590-591, 97 P.3d 760 (2004).

The decision to grant sanctions for the bringing of motions interposed for an improper purpose is left to the sound discretion of the trial court and will not be overturned absent abuse of that discretion. *Eugster*, 110 Wn. App, at 231.

2. The trial court properly found no violation of CR 11.

Defendant contends that the trial court abused its discretion by basing its decision on manifestly unreasonable or untenable grounds, (Appellant's Brief at 19) but submits no evidence to support this proposition. The trial court found that the Complaint was not frivolous, concluding:

And I don't think that it's frivolous when you have an action that's based upon some legitimate concerns between two parties. If there was only the claim of the statute of limitations then I might see it your way, counsel. But because there are other claims being there – the access of the location and so on – these other things that are occurring in the action as filed by the attorneys, I can't say that this lawsuit was a frivolous lawsuit.

(RP 27)

In denying Defendant's motion for CR 11 costs and fees the trial court necessarily found that Plaintiff's Complaint was: 1) well grounded in fact and warranted by law; and 2) not interposed for an improper purpose such as harassment or unnecessary delay. CR 11.

The abuse of discretion standard recognizes that deference is owed to the trial judge who is better positioned than an appellate court to decide the issue. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Deference should be given to the trial court's personal contact with the case. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004).

A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts. *Smith v. Okanogan County*, 100 Wn. App. 7, 14, 994 P.2d 857 (2000). A trial court should impose sanctions *only* when it is *patently* clear that a claim has *absolutely no chance* of success. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004); *In re Cooke*, 93 Wn. App. 526, 529, 969

P.2d 127 (1999); *MacDonald v. Korum Ford*, 80 Wn .App. 877, 884, 912 P.2d 1052 (1996). CR 11 gives the trial court broad discretion in who should be sanctioned. *In re Cooke*, 93 Wn. App. at 529, To overturn the trial court, there must be evidence that all of the claims put forth by Plaintiff had absolutely no chance of success. There is no such evidence.

In the Complaint Plaintiff requested an award of damages for: 1) Defendant's continued breach of the agreement between the parties to repair portions of the parking lot; 2) Defendant's breach of the lease in his failure to comply with notice requirements prior to inspection of the property; 3) Defendant's interference with Plaintiff's Quiet Enjoyment of the property; and 4) Defendant's interference with customer relations on the property, including impeding customer access. (CP 1-20)

Defendant contends that "it is quite apparent that Plaintiff's complaint was not well grounded in fact and the filing was not warranted by existing law or a good faith argument . . ." (Appellant's Brief, p. 21) However,

Defendant fails to offer any credible evidence in support of this assertion. Furthermore, there was no factual hearing to determine whether Plaintiff's claims were well grounded. Even Defendant's motion for summary judgment did not address all of the claims made in Plaintiff's Complaint.

Defendant contends that, because plaintiff filed a complaint in January 1998 that addressed similar contentions as the suit filed in November 2006, CR 11 sanctions are warranted. However, it is clear that the suit filed in November 2006 encompassed additional disputes between the parties not raised in the original complaint, including: 1) Defendant's breach of the lease in his failure to comply with notice requirements prior to inspection of the property; 2) Defendant's interference with Plaintiff's Quiet Enjoyment of the property; and 3) Defendant's interference with customer relations on the property, including impeding customer access. (CP 1-20) None of these were addressed by Defendant as being without merit. There was no factual determination on these issues. There was clearly a valid basis for the denial of CR 11 sanctions

by the trial court, and Defendant has failed to show anything approximating an abuse of discretion.

3. Even if the trial court found a violation of CR 11, it is discretionary whether the court awards sanctions.

CR 11 provides that a court *may* order sanctions against a party who signs a document in violation of the rule. CR 11 sanctions are not appropriate because an action's factual basis ultimately proves deficient or a party's view of the law proves incorrect. *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 141-142, 64 P.3d 691 (2003); *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 110-111, 780 P.2d 853 (1989).

The lack of merit to a claim, if based on a reasonable position, is not subject to CR 11 sanctions. A reasonable position was advanced by Plaintiff.

E. DEFENDANT WAS NOT THE PREVAILING PARTY ENTITLED TO FEES, FOLLOWING ARBITRATION

Defendant further contends that the trial court abused its discretion in denying Defendant's request for attorney fees and costs as the prevailing party after arbitration. The

lease provided for the recovery of reasonable attorney fees to the prevailing party if an action was commenced to enforce any of the provisions of the lease. (CP 58)

Defendant's argument is faulty for two reasons: 1) Plaintiff never refused to enter into arbitration, so there has been no violation of the lease sufficient to trigger the recovery of attorney fees; and 2) Defendant was not the prevailing party at arbitration as the arbitration award was closer to the position put forth by Plaintiff, rather than Defendant.

1. Plaintiff did not refuse to submit to arbitration.

In support of the contention that Plaintiff refused to enter into arbitration, Defendant referenced an exchange that took place between Defendant's former counsel, and Plaintiff's counsel in the summer of 2007. The support for this argument was a July 6, 2007, letter from counsel for Defendant to counsel for Plaintiff inquiring as to arbitration regarding the final five year term of the lease. (CP 472) Defendant contends that a July 10, 2007, letter from counsel for Plaintiff to counsel for Defendant

rejecting *mediation* is support of Plaintiff's refusal to arbitrate. Defendant's counsel and this Court are clearly aware of the distinction between arbitration and mediation. These two pieces of correspondence address two separate discussions. The representations of Defendant are inaccurate. As noted above, the correspondence sent by Plaintiff on July 10, 2007 rejecting mediation, was in fact responding to a telephone conference between Plaintiff's counsel and then Defendant's counsel, Susannah Southworth that took place on June 27, 2007 in which Ms. Southworth proposed the use of Retired Judge James Ladley as a mediator to resolve the litigation. The July 10, 2007 correspondence made no reference to the arbitration proposal of the July 6, 2007 correspondence and no rejection of arbitration occurred. (CP 472) No action was taken as counsel for Defendant proposed no arbiter consistent with the requirements of the lease until over one year later.

Furthermore, Defendant contends that Plaintiff's filing of his "Notice to Set for Trial and Statement of

Arbitrability” on July 10, 2007 in which the matter was noted for a jury trial was evidence of his refusal to arbitrate the cost for the third term of the lease. This is also without merit. On that pleading Plaintiff represented to the Court that the case was not subject to arbitration. Not only is this accurate because it only referenced the claims raised by Plaintiff, but it is accurate because Defendant had yet to raise any counterclaims for breach of the lease.

On July 25, 2007 Defendant filed a motion to amend his amended Answer. (CP 37-85) On August 17, 2007 following a hearing, Defendant filed his second amended answer. (CP 99-124) In that second amended answer Defendant alleged, for the first time, that Plaintiff had “failed to negotiate the basic rental to be paid during the third five year term and refuses to negotiate this issue by way of binding arbitration” resulting in an alleged breach of the lease agreement. (CP 103) This allegation was first raised *after* Plaintiff had filed his “Notice to Set for Trial and Statement of Arbitrability.”

Not only did the trial court conclude that the notice to set for trial and statement of arbitrability was a separate action from Defendant's contention of arbitration of the rental amount for the third term (RP 64), but the dispute with respect to the rental amount for the third term was not raised as a counterclaim until over one month after the notice to set for trial was filed with the court.

Following oral argument on April 30, 2009 the trial court denied Defendant's request for attorney fees and costs incurred in connection with the arbitration. (CP 505-507) One of the bases for the denial was that there was nothing in the record to indicate a refusal to arbitrate by Plaintiff. (RP 64) There was a valid basis for the court's conclusion.

Defendant also contends that the trial court had to enter an order to compel arbitration. This is inaccurate as there was a stipulation among the parties to enter into arbitration. (CP 343-344) Plaintiff never refused to enter into arbitration. (*Id.*)

2. The Court concluded that Defendant was not the prevailing party at arbitration.

On February 5, 2009 an arbitration hearing was held before Judge Skimas. (CP 445) Following presentation of evidence, Defendant's argued that the amount of rent for the third term of the lease should be set at no less than \$5,000 per month. (CP 446) Plaintiff requested that the amount of rent for the third term of the lease should remain at \$3,500 per month, or no greater than \$3,750. (CP 446, 473) Judge Skimas set the rental amount for the third term at \$4,000 per month. (CP 446)

Prior to arbitration Defendant represented that he would accept "no less than \$4500.00" in rent. (CP 142, 177-178) In his memorandum in support of summary judgment Defendant requested that the trial court order rent to be set at \$4,500 per month. (CP 211) In his second amended answer Defendant requested that the trial court order rent to be set at \$4,500 per month. (CP 105)

It is clear that there was a valid basis for the trial court to conclude that Defendant was not the prevailing party following arbitration. The final rental amount

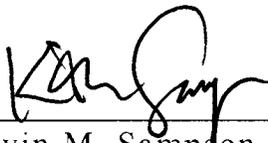
concluded by the arbiter was much closer to the number set forth by Plaintiff than Defendant. Furthermore, Defendant has failed to show any abuse of discretion by the trial court in reaching this conclusion.

VI. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the trial court's decisions denying Defendants' motions for attorney fees and costs be **AFFIRMED.**

DATED: August 20, 2009

BULLIVANT HOUSER BAILEY PC

By 
Kevin M. Sampson, WSBA #24162

Attorney for Jarnail Maan

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2009, a true and correct copy of the foregoing document was served on the following:

Ronald W. Greenen Greenen & Greenen, PLLC 1104 Main St., Ste. 400 Vancouver, WA 98660	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery
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Dated: August 20, 2009 at Vancouver, Washington.



Kevin Sampson

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DIVISION II
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