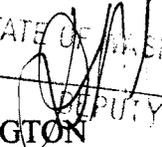


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DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 41289-6-II

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

DEE ANN STILES
Appellant

v.

GERALD KEARNEY
Respondent

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON KITSAP COUNTY

The Honorable Craddock J. Verser, Visiting Judge

BRIEF OF APPELLANT

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*Note: Rule CR 11 and Statute 4.84.185 is noted throughout the brief. The table of authorities notations are for those times that the specific language of the rule and statute are specified.

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it accepted and considered Mr. Kearney's Rebuttal, Declaration, and Exhibits submitted after the hearing.
2. The trial court erred when it granted CR 11 sanctions against Ms. Stiles and Ms. Young.
3. The trial court erred when it granted RCW 4.84.185 sanctions against Ms. Stiles.
4. The trial court erred when it awarded Mr. Kearney attorneys fees when he was acting as a pro se attorney-defendant.
5. The trial court erred when it awarded attorneys fees to Mr. Kearney for Ms. Rasmussen as Mr. Kearney's associate.
6. The trial court erred when it awarded attorneys fees to Mr. Kearney for Ms. Rasmussen prior to her Notice of Appearance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the acceptance and consideration of evidence received by the judge after the conclusion of the hearing to which the evidence pertained violate the Due Process rights of the opposing party?
(Assign. of Error 1)

2. Did the trial court abuse its discretion by granting sanctions based on the fact the claim failed in summary judgment? (Assign. of Error 2, 3)
3. Did the trial court abuse its discretion by granting sanctions for the filing of a Complaint prior to any meaningful opportunity for discovery? (Assign. of Error 2, 3)
4. As a matter of first impression for this court, can a pro-se attorney-defendant be awarded attorneys fees for his own time?(Assign. of Error 4)
5. As a matter of first impression for this court, can a pro-se attorney-defendant be awarded attorneys fees for the time for an associate of his firm? (Assign. of Error 5)
6. Did the trial court abuse its discretion when it awarded attorneys fees for time billed prior to the filing of a Notice of Appearance? (Assign. of Error 6)

C. STATEMENT OF THE CASE

Mr. Stiles and Mr. Kearney are members of a homeowner's association incorporated in the State of Washington as the Shore Woods Maintenance Commission, Inc. (CP 2). At the time of the filing of the Complaint, Ms. Stiles was a member of the Board of Directors of the

Corporation and appointed to the position of Secretary of that Board. (CP 85-86).

On October 4, 2009, the Board of Directors held a regularly scheduled Board meeting. Although it was a meeting of the Board, not the Membership, members of the corporation were welcome to attend. On this occasion, the meeting was disrupted by a vocal group wishing to discuss matters not on the agenda. Mr. Kearney was present at that meeting. (CP 3-7, 122)

As part of Ms. Stiles' duties as Secretary of the corporation, she regularly audio-recorded the meetings of the Board and then transcribed the minutes of the meetings from that recording. The transcribed minutes were then posted on the community website and summarized in the community newsletter (CP 122).

On October 31, 2009, one of the members of the corporation, Mr. Richard Lowry, posted an email to the Board of Directors complaining of in-fighting amongst the Board members. (CP 89, 111-112) That email, while directed to the Board, was sent out on the community listserve, comprising approximately 1/3 of the members of the corporation.(CP 87).

Mr. Wayne Stiles President of the Board at that time, sent an email in response to Mr. Lowry the same day which, among other things, pointed out that the email Mr. Lowry had sent was sent to the community

listserv. Mr. Stiles' email to Mr. Lowry suggested that the listserv be reserved for community news.

Later that day, Mr. Kearney posted a response to Mr. Lowry's email, and Mr. Kearney's response was the subject of the underlying Complaint. The portion of the email that at issue was, "*Finally, the last set of minutes by our secretary are written from the point of view of someone with an axe to grind. Again, this is divisive (us against them) and not helpful. DeeAnne [sic]: Do your job even-handedly or step down.*" (CP111)

Ms. Stiles felt herself injured by this email, in that it suggested that she had not done her duties as Secretary in an even-handed manner and that the minutes were not accurately reproduced. She requested a retraction of the email in a letter dated November 27, 2009 (CP 250). Mr. Kearney refused (CP 259).

On December 22, 2009, Ms. Stiles filed an Amended Complaint in the Kitsap County Superior Court requesting an order from the court that Mr. Kearney print a retraction of the statement (CP 1-6). Mr. Kearney was served a copy of the summons and complaint on January 21, 2010. He entered a Notice of Appearance on January 22, 2010.

On February 11, 2010, Mr. Kearney filed an Answer and Affirmative Defense through counsel Douglas E. Somers, who also filed a Notice of Appearance on that date (CP 7-16).

On February 23, 2010 Ms. Stiles filed a Subpoena for records from the Shore Woods Board. The information requested included several hundred emails as well as letters and other documentary evidence (CP 11-14). On March 5, 2010 Mr. Kearney served Ms. Stiles with interrogatories. On March 15, 2010 the documents requested from Shore Woods were sent to Ms. Stiles' attorney in electronic format. The interrogatories by Mr. Kearney requested much of the information contained in the Shore Woods records and were answered on April 2, 2010.

On May 11, 2010 Mr. Kearney filed a Motion for Summary Judgment. (CP 15-32). Because Mr. Kearney is an attorney practicing in Kitsap County, the court assigned the case to a visiting judge, the Honorable Craddock Verser, from Jefferson County.

On June 14, 2010 Mr. Kearney filed a Notice of Association of Counsel for Ms. Natalie Rasmussen.

On June 25, 2010 the court heard the Motion for Summary Judgment, Judge Verser presiding. The court found in favor of Mr. Kearney and ordered Ms. Stiles to pay statutory attorney's fees (CP 187). A Satisfaction of Judgment was filed on July 16, 2010 (CP 206).

On the same date of the filing of the Satisfaction of Judgment Mr. Kearney filed a Motion for CR 11 Sanctions in Kitsap County Superior Court (CP 188). The hearing was originally noted by Mr. Kearney for August 20, 2010. After being notified of the unavailability of counsel, Mr. Kearney re-noted the matter for September 3, 2010, to be heard in Jefferson County. On August 25, 2010 Mr. Kearney filed a Declaration by Steven Olsen that was apparently an Addendum to his Motion without leave of court (CP 207-209).

On August 30, 2010, Ms. Stiles and Ms. Young filed a Response to Defendant's Motion for Sanctions with a Memorandum in Support and a copy of the verbatim report of proceedings (Support CP 210-247), together with supporting Declarations of Ms. Stiles (CP 248-251, Ms. Young (CP 257-259), Wayne Aldrich CP 252-254), and Sally Gruger (CP 255-256). Attempts to serve Mr. Somers resulted in verbal notice that he was not counsel in this action and had not joined Mr. Kearney in the Motion.

Mr. Aldrich and Ms. Gruger are two members of the Shore Woods homeowners association unrelated to the action. They were witnesses to the Board meeting and email string in question and testified to their own knowledge.

On September 2, 2010, Mr. Kearney filed a rebuttal with supporting declaration and exhibits (CP 263-268). He delivered a copy of the rebuttal brief with declaration to Ms. Young, one of the attorneys for Ms. Stiles sometime between 11:30 a.m. and 1:30 p.m.. Ms. Kent, the other counsel, did not receive a copy until after 4:00 p.m. that date.

Neither Ms. Young's nor Ms. Kent's copies of the rebuttal contained the exhibits referenced in the rebuttal and Mr. Kearney's declaration attached to the rebuttal.

During the hearing, Ms. Kent objected to the use of the rebuttal and declarations based on the fact that Ms. Stiles was unable to respond to material she had never received (RP 12). After some discussion, the trial court properly excluded the response and exhibits (RP15).

Later that date, but after the hearing, Mr. Kearney re-submitted the declaration for the rebuttal with attendant exhibits and provided them to the trial court (CP 281-287).

On September 16, 2010 the trial court entered the Decision and Order re: Sanctions, Findings of Fact and Conclusions of Law, and Judgment that are the subject of this appeal (CP 288-301).

D. ARGUMENT

a) ASSIGNMENT OF ERROR 1 - DUE PROCESS

Due Process requires, at the minimum, notice and a meaningful opportunity to be heard . *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050, *cert. denied*, 513 U.S. 1056, 115 S.Ct. 663, 130 L.Ed.2d 598 (1994). In this case, the court violated Ms. Stiles' due process rights when it accepted and considered the reply brief of Mr. Kearney and its supporting declaration and exhibits *after* the hearing on the Motion for Sanctions.

During the hearing, Ms. Stiles and Ms. Young objected to the use of the rebuttal, declaration, and attendant exhibits (RP12). The court properly excluded the rebuttal, declaration, and exhibits from consideration at that time (RP15); however, Mr. Kearney re-submitted the declaration and exhibits the day after the hearing (CP 281-287).

In its Memorandum, the trial court listed the rebuttal as part of the evidence relied upon in making its decision (CP 288). Ms. Stiles and Ms. Young were denied their due process right to notice prior to the hearing and a meaningful right to be heard when the trial court accepted the post-hearing filing for consideration.

The trial court states, in general, that it relied upon the pleadings in this case but does not specify in its Memorandum or Judgment what information, in particular, led the court to its decisions. Because we do not know how much influence the rebuttal, declaration, and exhibits had

or in what portion of his decision he relied upon that evidence, the fact that it was considered cannot be determined to be harmless error.

b) ASSIGNMENT OF ERROR 2 & 3 – ABUSE OF DISCRETION

An appeal of a finding of violation and sanctions under Civil Rule 11 (CR 11) or RCW 4.84.185 is reviewed for an abuse of discretion. In United States v. Hinkson, 585 F.3d 1247 (9th Cir. 2009)(en banc), the Court outlined a two part test for determining whether there was an abuse of discretion. First, whether the court identified the correct legal standard; and second, whether the findings of fact, and its application of those findings to the legal standard were illogical, implausible, or without support. *Id.*, at 1251.

In this case, we submit the trial court failed to identify the proper legal standard and, even under the proper standard, applied it to the facts illogically and without support. The Memorandum Decision entered by the trial court (CP 288-296) is not supported by the record and the Findings of Fact and Conclusions of Law entered by the trial court (CP 297-299) is not supported by its Memorandum.

1) Civil Rule 11 Sanctions Not Warranted

The purpose of CR 11 is to deter baseless filings and frivolous pleadings. See Bryant v. Joseph Tree, 119 Wn.2d 210, 220, 829 P.2d 1099

(1992)¹. CR 11 requires the attorney to sign court filings to certify that, after reasonable inquiry, the filing is well-grounded in fact, supported by existing law, and that the filing is not interposed for an improper purpose. .
CR 11.²

The courts in Washington have cautioned that CR 11 sanctions should be used sparingly. “CR 11 sanctions have a potentially chilling effect, and so the 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, 755, 82 P.3d 797 (2004) (emphasis added).³ See also *Salvidar v. Momah*, 145 Wn.App. 365, 403, 186 P.3d 1117 (Wash.App. Div. 2 2008) (“The intent of CR 11 is not to chill an attorney’s enthusiasm or creativity in pursuing [f]actual or legal theories because , if excessive use of sanctions chilled vigorous advocacy, wrongs would be uncompensated.”)⁴

¹ Citing *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 552, 111 S.Ct. 922, 934, 112 L.Ed.2d 1140 (1991).

² CR11 states (in pertinent part), “the signature of...an attorney constitutes a certificate by ... the attorney 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) 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....”

³ Citing *In re Cooke*, 93 Wash.App. 526, 529, 969 P.2d 127 (1999).

⁴ Citing *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 219, 829 P.2d 1099 (1992).

The Court in Blair v. GIM Corporation, Inc., 88 Wn.App. 475, 945 P.2d 1149 (Wash.App. Div. 3 1997) summarized the rule on determining if CR 11 sanctions are appropriate: “A 'pleading, motion or legal memorandum' may be subject to CR 11 sanctions if it is **both** (1) 'baseless' and (2) signed without reasonable inquiry.”⁵ See Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir.1990); Lockhart v. Greive, 66 Wash.App. 735, 743-44, 834 P.2d 64 (1992). A filing is “'baseless' ” if (a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.⁶ Blair v. GIM Corporation, Inc., 88 Wn.App. at 482-483 (some internal cites omitted.) (emphasis added). In the present instance, the facts are not in dispute (RP 6).

The court is not required to agree with the attorney’s interpretation of legal application, only to determine whether that attorney met the objective standard for advancing the cause. See Wood v. Battle Ground School Dist., 107 Wn.App. 550, 575, 27 P.3d 1208 (Wash.App. Div. 2 2001) (“And Wood’s failure to convince the trial court does not entitle Sharp to CR 11 sanctions” (citing Doe v. Spokane & Inland Empire Blood Bank, 55 Wn.App. 106, 111, 780 P.2d 853 (Wash.App. Div. 1 1989))).

⁵ Citing Hicks v. Edwards, 75 Wash.Ap. 156, 163, 876 P.2d 953 (1994), (quoting Bryant v. Joseph Tree, 119 Wash.2d 210, 217, 829 P.2d 1099).

⁶ Citing Hicks, 75 Wash.App. at 163, 876 P.2d 953 (quoting Bryant, 119 Wash2d at 219-20, 829 P.2d 1099).

During the hearing, the trial court's questioning evidenced that reasonable minds can disagree as to the application of defamation law in Washington (RP 5).

Washington Court Rules require that a claim for relief shall contain "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." CR 8. RCW 4.36.120 requires that an initial pleading in a libel action only must "state generally, that the same was published or spoken concerning thee plaintiff, and if such allegation be controverted, *the plaintiff shall be bound to establish on trial that it was so published or spoken.*" RCW 4.36.120 (emphasis added). In other words, it is for the trier of fact to determine the outcome.

Under Washington law, the fact that a claim fails is in no way dispositive of whether or not sanctions are warranted. "The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable". Bryant, at 220.

i. The Complaint was not Baseless

The trial court erroneously finds that the Complaint was not grounded in fact or law based on its conclusion that a statement of opinion

is absolutely incapable of defamatory meaning.(CP 291). Washington law, however, does not support this conclusion.

The trial court at summary judgment found the phrase “an axe to grind” was a statement of opinion and therefore not capable of defamatory meaning (CP 244). The court did not address the second phrase in the offending email, “DeeAnne: Do your job evenhandedly or step down” or Ms. Stiles’ argument that the two phrases, used in conjunction, implied underlying facts (CP 5, 70,).

The Memorandum adopts the trial court’s finding without elaboration and again without addressing either the second portion of the statement at issue or Ms. Stiles’ legal theory. The Memorandum states, “the e-mail paragraph at issue was a statement of opinion not a provable statement of fact,” and “[t]here is simply no possibility that Ms. Stiles could ever prove that the statement that the minutes were “...written from the point of view of someone with an axe to grind” is anything other than the author’s opinion” (CP 291). Neither the second portion of the offending statement nor the underlying argument was addressed.

Under Washington law, the fact that a statement is in form an opinion is not entirely dispositive of whether or not it may be defamatory. In *Schmalenberg v. Tacoma News, Inc.*, 87 Wn.App.579, 943 P.2d 350 (Wash.App.Div. 2 1997), the court held that a statement is provably false

where it “falsely expresses or implies provable facts, *regardless of whether the statement is, in form, a statement of fact or a statement of opinion.*” Schmalenberg v. Tacoma News Inc., 87 Wn.App. at 590-591 (emphasis added).

Similarly, the Court in Dunlap v. Wayne, 105 Wn.2d 529, 716 P.2d 842 (Wash. 1986) stated, “A defamatory communication may consist of a statement *in the form of an opinion,*” adding the proviso “a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.” *Id.* at 538 (emphasis added). Ms. Stiles’ asserted in her argument on summary judgment the *two* phrases at issue, used in conjunction and in the surrounding circumstances (Mr. Kearney’s presence at the meeting and prior Board experience), implied undisclosed underlying facts.

Further, the courts have held that statements can be provably false where they present an implication concerning the subject matter of the statement. “A statement may be provably false in at least the following ways: because it falsely represents the state of mind of the person making it, because it is falsely attributed to a person who did not make it, or *because it falsely describes the act, condition or event that comprises its subject matter.*” Schmalenberg, 87 Wn.App at 591 (*emphasis added*).

Ms. Stiles argued that the *implications* created by the statements in this case *can be disproved*. This is a reasonable argument, as the minutes were audio recorded and transcribed from those recordings. If the transcription was written from a biased viewpoint, the minutes would not accurately reflect the events and statements made during the meeting or would reflect only a portion or the biased position of the writer.

The underlying facts of the case - that the email was written, was published to third parties, and it concerned Ms. Stiles in her professional office, were undisputed by Mr. Kearney.

Further, the remainder of the trial court's Memorandum is not supported by the record. The Memorandum states, without explanation, "[n]or did Ms. Stiles have a reasonable argument regarding the other three requirements for a defamation action, lack of privilege, fault and damages." The record clearly shows the arguments Ms. Stiles raised on these issues were reasonable, and arguably persuasive.

There were no findings by the trial court on the matter of fault, either in the summary judgment or CR 11 hearings. There was no argument during the CR 11 hearing concerning the matter of fault. A finding that there was no reasonable argument on this issue is unsupported by the facts and the record in this case.

The trial court at summary judgment explicitly refused to make findings on the matter of privilege, stating “I don’t think I can even decide it” (CP 245). The fact that the lower court could not make a decision on the matter of privilege at the summary judgment level indicates that there were reasonably persuasive arguments made by both Ms. Stiles and Mr. Kearney. The fact that additional argument would be needed indicates that Ms. Stiles’ argument was reasonable.

At summary judgment, the trial court ruled against Ms. Stiles on the matter of damages, but stated, “Ms. Woods (sic) makes a pretty darn...it’s a good argument, a great argument...” (CP 245). It is difficult to comprehend how an argument can be both “great” and manifestly unreasonable.

Although not dispositive, the fact the trial court designates Ms. Young in its Memorandum as “Ms. Wood” (CP 290 at L46, CP 293 at L8, 26) is indicative in itself of an improper reliance upon the result of the summary judgment motion. Ms. Young’s name is clearly indicated in all of the pleadings in this case. The only time that Ms. Young was called “Ms. Wood” was during the trial court’s oral ruling on the summary judgment motion (CP 242, 245).

ii) Reasonable Inquiry

A reasonable pre-filing inquiry has been found to include: amount of time available to investigate, reliance on the client for factual support; whether the case was brought from another attorney, complexity of legal and factual issues; and the need for discovery. *Bryant*, 119 Wn.2d at 219.⁷

The Memorandum provided by the court does not apply an objective test to whether Ms. Young made a “reasonable inquiry.” It appears instead to rely primarily on the outcome of the underlying case, noting without elaboration that the outcome of the Summary Judgment was based nearly exclusively on the finding that one portion of the alleged defamatory statement was “a statement of opinion not a provable statement of fact” (CP 291). Without applying any of the factors as set forth above, the trial court stated, “[a] reasonable attorney in like circumstance, no matter how hurt the client was by the statement, would have realized that the statement is not actionable” (CP 291).

Ms. Young relied not only on her client’s statement but also on the documents available at the time, the recording of the minutes that were the center of the dispute, statements of other persons (CP 252-256)⁸, and considerable case research. (CP 257-258). During the hearing, the trial court noted, “I’m not sure what factual inquiry she would conduct that she didn’t” (VR 6).

⁷ Citing *Miller v. Badgley*, 51 Wn.App. 285, 753 P.2d 530 (Wash.App. Div. 1 1988).

⁸ Declaration of Wayne Aldrich, CP 252-254; Declaration of Sally Gruger, CP 255-256.

Second, defamation is a complex and difficult area of law as was noted both by this court in its Summary Judgment (CP 244)⁹ and in one of the Declarations offered by supporters of the Defendant.(CP 198)¹⁰ Finally, the time for Ms. Young to conduct discovery was limited by Defendant’s own motion. “A court should thus be reluctant to impose sanctions for factual errors or deficiencies in a complaint before there has been an opportunity for discovery” *Bryant*, 119 Wn.2d at 222.¹¹

2) Error of law in granting sanctions under RCW 4.84.185

Just as in determining the appropriateness of sanctions under CR 11, the fact that Ms. Stiles did not prevail is not dispositive for determination of whether or not sanctions were warranted under RCW 4.84.185. See *Hous. Auth. Of the City of Everett v. Kirby*, 154 Wn.App. 842, 859, 226 P.3d 222 (2010), *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 220, 829 P.2d 1099 (1992).

In *In re Yagman*, 796 F.2d 1165 (9th Cir.), amended, 803 F.2d 1085 (1986), the U.S. Supreme Court upheld the trial court’s decision that the statements, as here, were nonactionable opinion, but reversed sanctions. The Court held, “Although we have upheld the district court’s finding that the statements were indeed protected opinion, *we do not consider the*

⁹ Response to Defendant’s Motion for Sanctions, Exhiboit A Verbatim Record, p. 23.

¹⁰ Declaration of John Wiegenstein, p 1 (“... a defamation Plaintiff has some significant hurdles to overcome...”)

¹¹ Citing *Rachel v. Banana Republic, Inc.* 831 F.2d 1503, 1508 (9th Cir. 1987).

distinction between fact and opinion to be so clear that merely filing a complaint in these circumstances permits a finding of subjective bad faith.” Yagman, 796 F.2d at 1187 (emphasis added).

Under RCW 4.84.185, sanctions may be appropriate where a claim is “frivolous and advanced without reasonable cause.” RCW 4.84.185.¹² “A lawsuit is frivolous “when, considering all of the pleadings in their entirety, the lawsuit cannot be supported *by any rational argument on the law.*” Tiger Oil v. Department of Lic., 88 Wn.App. 925, 938, 946 P.2d 1235 (1997) (emphasis added). As discussed supra, Ms. Stiles presented several rational arguments in support of her position. The fact that the trial court did not agree with those arguments is not dispositive.

The purpose of RCW 4.84.185 is “to discourage frivolous lawsuits and to compensate the targets of frivolous lawsuits for their fees and costs incurred in defending meritless cases.” Kearney v. Kearney, 95 Wash.App. 405, 416, 974 P.2d 872 (1999). “If an action can be supported by *any rational argument*, then the trial court properly exercised its discretion in not finding an action to be frivolous...” Timson v. Pierce County Fire

¹² “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 nonprevailing party to pay the prevailing party reasonable expenses, including reasonable fees of attorneys...” RCW4.84.185 (emphasis added).

Dist. 15, 136 Wn.App. 376, 149 P.3d 427 (Wash.App. Div. 2 2006).

(internal cites omitted) (emphasis added).

Where RCW 4.84.185 sanctions have been awarded without a specific showing of improper purpose, the claim has been so lacking in any reasonable argument that bad faith or improper purpose could be presumed. In direct contradiction the court found “the complaint was not interposed for any improper purpose...” (CP 291).

In Reid v. Dalton, 124 Wn.App. 113, 100 P3d 349 (Wash.App. Div. 3 2004), the court held that sanctions were appropriate where the claimant knew that he had no claim in fact or law but pursued it anyway. Id. 123. Similarly, in MacDonald v. Korum Ford, 80 Wn.App. 877, 912 P.2d 1052 (Wash.App. Div. 2 1996), sanctions were imposed where the attorney learned from his own client’s testimony that there was no case but continued to pursue it. See also Harrington v. Pailthorp, 67 Wn.App. 901, 841 P.2d 1258 (Wash.App. Div. 1, 1992).¹³

In Skimming v. Boxer, 119 Wn.App. 748, 82 P.3d 707 (Wash.App. Div. 3 2004), the court found that RCW.84.185 sanctions were not warranted in a defamation case even though the statement at issue was found to be opinion in summary judgment. In that case, Mr. Skimming

¹³ Ex-husband sued ex-wife’s attorney for malpractice for representing the wife in an action for modification of the parenting plan in the dissolution decree despite having his own counsel, no privity with Pailthorp, or any other standing, factual, or legal theory to support the suit.

had faced criminal charges and was acquitted at trial. After the trial, his employer was quoted as saying, “We’re disappointed with the verdict.” At least in Mr. Skimmer’s estimation, this suggested that she had knowledge that the acquittal was erroneous. “Mr. Skimming believed he was wronged and his lawyers asserted an assortment of legal theories in an attempt to recompense that wrong.” *Id.* at 757.

Here, Ms. Stiles did not face criminal prosecution prior to the statements made by Mr. Kearney, but the implication of the phrases used by Mr. Kearney was felt to be damaging to her professional reputation. The phrases, used in conjunction (“...the last set of minutes by our secretary are written from the point of view of someone with an axe to grind...DeeAnne: do your job evenhandedly or step down”) were believed by Ms. Stiles and others (CP 252-256) to imply that Mr. Kearney had knowledge that the minutes were prepared inaccurately, and that the inaccuracies were purposeful. Ms. Stiles, like Mr. Skimmer, believed she was wronged and her attorney asserted legal theories in an attempt to recompense that wrong.

c) AWARD OF FEES— ASSIGNMENT OF ERROR 4,5,6

1) Fees are Not Reasonable

Even if sanctions under RCW 4.84.185 and CR 11 were warranted, the award of attorney fees in this case was not reasonable. Both rules

allow for recovery of reasonable costs *incurred*, including attorney fees, for the defense of the underlying sanctionable action. Mr. Kearney was awarded statutory attorneys fees in the Summary Judgment where he was represented by outside counsel.(CP 187). The court found that to be “appropriate.” (CP 246). Mr. Kearney then filed his motion for sanctions requesting fifty times the awarded amount.

In *MacDonald v. Korum Ford*, 80 Wn.App. 877, 912 P.2d 1052 (Wash.App. Div. 2 1996), the court went into what is considered reasonable when determining CR 11 sanction awards of attorney’s fees. That court found that “In considering whether a fee is “reasonable,” the trial court must also consider whether those fees and expenses could have been avoided or were self-imposed. “A party resisting a motion that violates CR 11 has a duty to mitigate and may not recover excessive expenditures.”” *MacDonald*, 80 Wn.App. at 891.¹⁴

An experienced attorney such as Mr. Kearney, when faced with a baseless complaint would be expected to file a CR 12(b)(6) motion to dismiss. Instead, Mr. Kearney associated two attorneys, engaged in discovery, and did extensive research. In *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (Wash. 1992), the court held that because the defendant had not used the court rule applicable to the offending

¹⁴ Quoting *Miller v. Badgley*, 51 Wash.App. 285, 303, 753 P.2d 530, review denied, 111 Wash.2d 1007 (1988).

document CR 11 sanctions did not apply. The Court stated, “CR 11 sanctions are not appropriate where other court rules more properly apply.” Bryant, 119 Wn.2d at 223.¹⁵ In that case, the Plaintiff had failed to make a more definite statement as ordered by the trial court and the more appropriate rule for dismissing the case was CR 12 (e). Similarly, if Mr. Kearney’s allegations in the present Motion are assumed to be true, the more appropriate rule in this case would have been CR 12(b)(6).

“CR 11 is not a mechanism for providing attorney’s fees to a prevailing party where such fees would otherwise be unavailable.” Bryant, 119 Wn.2d at 220.¹⁶ See also MacDonald v. Korum Ford, 80 Wn.App. 877, 891, 912 P.2d 1052 (Wash.App. Div. 2 1996),¹⁷ Wood v. Battle Ground School Dist., 107 Wn.App. 550, 27 P.3d 1208 (Wash.App. Div. 2 2001).

Assuming, *arguendo*, Mr. Kearney’s claim of a facially-baseless complaint is correct, the submitted attorney’s fees were not reasonable. As noted above, he would have an affirmative duty to notify Ms. Young of that fact and thereby mitigate any damage to which he was subjected. “Both practitioners and judges who perceive a *possible* violation of CR 11 must bring it to the offending party’s attention as soon as possible.

¹⁵ Citing Clipse v. State, 61 Wash.App. 94, 808 P.2d 777 (1991).

¹⁶ Citing John Doe v. Spokane Inland Empire Blood Bank, 55 Wash.App. 106, 111, 780 P.2d 853 (1989).

¹⁷ “CR 11 is not meant to act as a fee shifting mechanism.”

Without such notice, CR 11 sanctions are unwarranted.” Biggs, 124 Wn.2d at 198. (emphasis added)¹⁸

2) Award of Fees to *Pro Se* Attorney-Defendant

Whether a *pro se* litigant may receive an award of attorney’s fees by virtue of being himself an attorney is a matter of first impression for this court. Although the Washington State Supreme Court has not directly addressed this issue, there is some indication that an attorney representing himself may not receive an award of attorney’s fees for his own time. In *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 228 (1994) the Court reduced an attorney fee award to limit the recovery of the attorney who was working on his own behalf. “It is clear that attorney Vail was acting as both attorney and defendant in this matter, and his claim for fees must be discounted.” *Biggs*, 124 Wn.2d at 201.

The U.S. Supreme Court considered the issue of attorney’s fees for plaintiff’s who were also attorneys in cases involving 42 U.S.C§1988 cases in *Kay v. Ehrler*, 499 U.S. 432, 111 S.Ct. 1435 (1991) and held that *pro se* litigants, whether or not they were attorneys, were not entitled to attorney’s fees. In its Decision, the Court pointed out, “The adage that ‘a lawyer who represents himself has a fool for a client’ is the product of

¹⁸ Citing *Bryant*, 119 Wash.2d at 224, 829 P.2d 1099 (Wash. 1992).

years of experience by seasoned litigators.” *Kay v. Ehrler*, 499 U.S. at 437-438. The court went on to state, “A rule that authorizes awards of counsel fees to *pro se* litigants – even if limited to those who are members of the bar – would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.” *Id.*, at 438.

The Ninth Circuit Court of Appeals extended the rule to include *pro se* defendants in *Elwood v. Drescher*, 456 F.3d 943 (9th Cir. 2006), stating, “While we recognize that the policy considerations affecting a *pro se* attorney-defendant differ from those relevant to a *pro se* attorney-plaintiff, we find *Kay* to be controlling here ...the decision sweeps broadly, appearing to apply to *pro se* litigants generally...” *Id.*, at 947.

RCW 4.84.185 states in relevant part that the prevailing party in a frivolous suit may be awarded “...reasonable expenses, including fees of attorneys, *incurred* in opposing such action...” RCW 4.84.185 (emphasis added). Similarly, CR 11 states in relevant part that the court may impose a sanction “which may include an order to pay to the other party or parties the amount of the reasonable expenses *incurred* ...” CR 11 (emphasis added). The plain language of both the statute and the court rule requires

that the litigant incur costs that may be reimbursed at the discretion of the court. “When attorney fees are granted under CR 11, the trial court ‘must limit those fees to the amounts reasonably *expended* in responding to the sanctionable filings’.” MacDonald v. Korum Ford, 80 Wn.App. 877, 891,912 P.2d 1052 (Wash.App. Div. 2 1996).¹⁹

The Court in *Elwood* noted that other courts had not limited the ruling in *Kay* to §1988 cases. “Courts have also viewed *Kay* as precluding the award of fees to *pro se* attorney-defendants in other fee shifting statutes.” Elwood, 456 F.3d at 947 (citing Bond v. Blum, 317 F.3d 385, 398-400 (4th Cir. 2003) (applying *Kay* to 17 U.S.C. § 505); and DiPaolo v. Moran, 277 F.Supp.2d 528, 536 (E.D.Pa. 2003) (applying *Kay* to Rule 11 and 28 U.S.C. § 1927 to deny attorney’s fees for *pro se* attorney-defendant)).

Washington courts have repeatedly noted that RCW 4.84.185 and CR 11 are decidedly not fee-shifting statutes. It would follow that if *pro se* attorney-defendants may not recover in a somewhat favorable environment, they should not properly recover in a non fee-shifting setting.

3) Attorney Fees For Associate/Lack of Notice

¹⁹ Internal cites omitted, quoting Biggs v. Vail, 124 Wash.2d 193, 201, 876 P.2d 448 (1994).

Again, whether or not a junior associate of an attorney-defendant may be awarded attorney fees where a portion of the fee would be attributable to the attorney-defendant is a matter of first impression for the court.

Based on the case law and argument presented *supra*, any fees charged for Ms. Rasmussen's time must necessarily be discounted by Mr. Kearney's portion of the fee. To award Ms. Rasmussen her full fee would be to award Mr. Kearney a portion of that fee as if he were representing himself.

Ms. Rasmussen's time must also be discounted based on a lack of notice. In *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 228 (1994), the Court noted that "[p]rompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses."²⁰ Washington courts have imposed an affirmative duty to notify the opposing party if a pleading is sanctionable under CR-11. "A party resisting a motion that violates CR 11 has a duty to mitigate and may not recover excessive expenditures."²¹ Accordingly, the moving party must notify the offending party as soon as it becomes aware of sanctionable activities, thereby providing the offending party with an opportunity to mitigate the sanction by withdrawing or amending the offending paper." *MacDonald*, 80 Wn.App.at 891 (internal cites omitted). Here Defendant's

²⁰ *Biggs v. Vail*, 124 Wn 2d. 193,198, 876 P.2d. 228 (1994)

²¹ *Citing Miller*, 51 Wash. App. At 303.

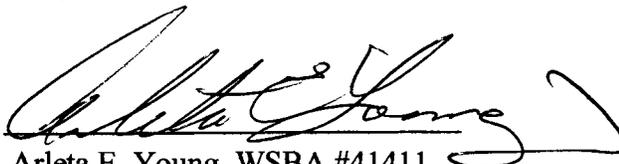
Motion, filed after this court's finding on merits at Summary Judgment, was the first Notice presented.

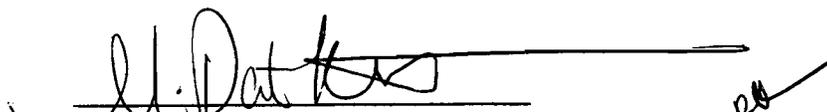
Even if Notice had been given previously, however, that Notice would only have applied to fees and costs of which the opposing party would be aware. Ms. Rasmussen did not file a Notice of Appearance in this matter until June 14, 2010. Fees and costs attributable to Ms. Rasmussen would therefore be presumed to begin as of that date. Ms. Rasmussen's bill includes over 6 hours of time expended before any notice was given.

E. CONCLUSION

For the foregoing reasons, Ms. Stiles and Ms. Young request this court to reverse the trial court's decision, find in favor of Ms. Stiles and Ms. Young, and award costs and statutory attorney's fees for the underlying action as well as the appeal.

Respectfully submitted this 13th day of December, 2010.


Arleta E. Young, WSBA #41411


M. Patrice Kent, WSBA # ~~41411~~ 42460 JPA

**Court of Appeals for the State of Washington
Division Two**

In re:

Dee Ann Stiles

Plaintiff,

and

Gerald Kearney

Defendant.

No. 41289-6-II

Declaration of Service

Declaration

My name is Connie J Greene, I am over the age of eighteen years and not a party to this action.

I served the following documents to the Law Office of Gerald A. Kearney at 11227 State Highway 104 NE in Kingston, Washington on December 13, 2010 at 10:33 pm(am)

1. Appellant's Brief
2. Verbatim Report of Proceedings

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

Signed at (city) Kingston, (state) WA on (date) 12-13-10.

Connie J Greene
Signature

Connie J Greene
Print or Type Name

Fees:

Service \$20.00

Mileage _____

Total \$20.00