

**NO. 41289-6-II**

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DEE ANN STILES,

Appellant,

v.

GERALD KEARNEY,

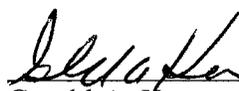
Respondent.

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**BRIEF OF RESPONDENT**

January 10, 2011

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**I.      STATEMENT OF THE CASE**

This is an appeal from an award of attorney fees by the trial court to the Respondent in this action, Gerald A. Kearney, against the Appellant's, Dee Ann Stiles', attorney, Arleta E. Young, for violation of Civil Rule ("CR") 11, and against the Appellant for filing and maintaining a frivolous lawsuit in violation of RCW 4.84.185.

Ms. Stiles sued Mr. Kearney for an alleged defamation. At the outset of this litigation, Mr. Kearney placed Ms. Stiles on notice that he would seek attorney fees for defending against a frivolous lawsuit and for CR 11 sanctions in his Answer to Complaint and Affirmative Defenses filed with the trial court on February 11, 2010 (CP 10).

Mr. Kearney generally agrees with the Appellant's statement of the case with the following exception. The Brief of Appellant misstates the ruling of the trial court regarding the exclusion of rebuttal documents submitted by Mr. Kearney to the trial court (Appellant's Br. 7; RP 12-15). Ms. Young, Ms. Stiles' attorney, objected to the consideration of two exhibits attached to the Declaration of Gerald A. Kearney, Attorney at Law and not the declaration itself (RP 12-15; CP 269-75). The exhibits included a letter written by Ms. Stiles to the homeowner's association and an e-mail written by Ms. Stiles to another board member of the homeowner's association (CP 272-75). Mr. Kearney concedes that the

service copies of this Declaration to Ms. Stiles' attorneys did not have these documents attached. Ms. Rasmussen, Mr. Kearney's attorney, conceded at oral argument that these two letters were not necessary for the court's consideration and the court ruled accordingly (RP 15). Ms. Stiles, through her attorney, M. Patrice Kent, conceded at oral argument that Ms. Young, another of Ms. Stiles' attorneys, was otherwise properly served with the rebuttal documents (RP 12; CP 320).

Mr. Kearney did file a duplicate declaration with the correct exhibits on Monday, September 6, 2010 (CP 281-89). There is no evidence that this later filed declaration was seen or considered by the Court.

## **II. STANDARD OF REVIEW**

The decision to award attorney fees as a sanction for a frivolous action is left to the discretion of the trial court, and the court's decision should not be disturbed absent a showing of abuse of discretion. *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 132, 783 P.2d 82, review denied, 113 Wn.2d 1001, 777 P.2d 1050 (1989). CR 11 grants the court "discretionary authority to impose sanctions upon a motion by a party or on the superior court's own initiative." *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 842, 100 P.3d 791 (2004). When reviewing a trial court's decision to impose CR 11 sanctions, the appellate court "must keep in

mind that the purpose behind is to deter baseless filings and to curb abuses of the judicial system." *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (internal quotation omitted).

### III. ARGUMENT

**A. The Appellant failed to designate by number the trial court's findings of fact which she wishes to be considered on appeal as required by RAP 10.3(g).**

The Appellant did not comply with RAP 10.3(g) because she failed to designate the trial court's findings of fact to which she assigns error.

RAP 10.3(g) provides in pertinent part:

Special Provision for Assignments of Error.... A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

Under RAP 10.3(g), the appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. *State v. Elkins*, 152 Wn.App. 871, 879, 220 P.3d 211 (2009). Because the Appellant failed to assign error to the findings of fact by the trial court they should be considered as verities on appeal.<sup>1</sup> *Id.*

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<sup>1</sup> The Findings of Fact entered by the trial court are:

1. Plaintiff complaint alleged that Mr. Kearney had defamed her.

**B. The Appellant failed to set out a verbatim report of the trial court's findings of fact which she wishes to be considered on appeal as required by RAP 10.4(g).**

In addition to her failure to comply with RAP 10.3(g), the Appellant failed to comply with RAP 10.4(c).

RAP 10.4(c) provides:

**(c) Text of Statute, Rule, Jury Instruction, or the Like.** If a party presents an issue which requires study of a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.

Ms. Stiles failed to include a verbatim report of any of the findings of fact or conclusions of law in her brief or its appendix as required by RAP 10.4 (c).

Ms. Stiles is obligated to demonstrate why specific findings of the trial court are not supported by the evidence and to cite to the record in support of that argument. *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). A court can waive some technical violations of the rules where the briefing makes the nature of the challenge perfectly clear.

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2. Plaintiff failed to present any credible or cognizable evidence that defendant's statement was provably false, an essential element of a defamation claim.
  3. Plaintiff failed to present any credible evidence that defendant's statement was not protected by the "common interest" privilege, an absolute defense to a claim of defamation.
  4. Plaintiff failed to present any credible evidence that defendant's statement caused her any damages, an essential element of a defamation claim.
  5. Defendant's writings were non-actionable statements of his opinion. (CP 298).

Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 710, 592 P.2d 631 (1979).

However, the Washington State Supreme Court has stated:

Strict adherence to the aforementioned rule is not merely a technical nicety. Rather, the rule recognizes that in most cases, like the instant, there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

Lint, 135 Wn.2d at 532. In the absence of a clear challenge, the Court treats findings of fact as verities on appeal. Id. at 533.

In addition to failing to comply with RAP 10.4(c), Ms. Stiles has failed to include any argument in her brief regarding Findings of Fact Nos. 3 & 4 as entered by the trial court (CP 298). These findings of fact declared that Ms. Stiles failed to present any credible evidence that Mr. Kearney's statement was not protected by the "common interest" privilege and that Ms. Stiles failed to present any credible evidence that Mr. Kearney's statement caused her any damages (CP 298). Further, Ms. Stiles has failed to cite any evidence in the record contrary to these

Findings of Fact as required by RAP 10.3(a)(5) and (6).<sup>2</sup> Findings of Fact 3 and 4 should therefore be accepted as verities on appeal.

**C. *There is no indication that the trial court “accepted or considered” the late filed declaration.***

Ms. Stiles, in her Assignment of Error No. 1, complains that the trial court erred when it “accepted and considered” a late filed declaration by Respondent, Gerald A. Kearney (CP 281-87). There is no evidence that the trial court either accepted or considered this document in rendering its decision. The record reflects that just the opposite happened.

In the Memorandum Opinion and Order Re: Sanctions, the trial court lists the documents that were considered in reaching its decision (CP 288). The trial court lists the following of Respondent’s documents: (1) Defendant’s Motion for CR 11 and RCW 4.84.185 Sanctions (CP 188-97); (2) The Declaration of Steven Olsen<sup>3</sup> (CP 207-09); the Declaration of John

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<sup>2</sup> RAP 10.3(a)(5) and (6) state:

- (a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated...
  - (5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.
  - (6) Argument. The argument in support of the issues presented for review, together with citations to the legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

<sup>3</sup> Appellant makes reference in the Brief of Appellant that Respondent filed the Declaration of Steven Olsen “without leave of the Court” (Brief of Appellant, Page 6).

Wiegenstein (CP 198-201); Declaration of Gerald A. Kearney, Attorney at Law, Re Attorney Fees (CP 202-06); Declaration of Gerald A. Kearney dated September 22, 2010 [sic]<sup>4</sup>(CP 269-75); and Defendant's Rebuttal to Plaintiff's Response to Defendant's Motion for CR 11 and RCW 4.84.185 Sanctions (CP 263-68). The trial court makes no mention of the Declaration filed by Gerald A. Kearney on September 3, 2010 (CP 281-287). Thus, an inspection of the record demonstrates that the trial court did not consider the Declaration of Gerald A. Kearney which was filed on September 3, 2010 in reaching its conclusion to impose sanctions under CR 11 and RCW 4.84.185.

Furthermore, Ms. Stiles conceded in oral argument that her attorney, Arleta Young, was properly served with copies of the rebuttal/response documents on the day before the hearing (RP 12).

In addition, Mr. Kearney and his counsel timely filed and served a copy of his Declaration as a reply to Ms. Stiles' Response in Opposition to Motion for Summary Judgment. The Jefferson County Local Rules for the Superior Court provide:

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This declaration was timely filed and served for the purposes of the motion hearing on September 3, 2010. CP 319. Respondent maintains that no leave of the Court was necessary. Further, Appellant made no objection to the consideration of this document at the hearing.

<sup>4</sup> Respondent believes that the Court was referring to the declaration dated September 2, 2010. CP 269-275.

**(b) Response documents.** Any party opposing a motion or any part thereof shall file all original responsive documents and serve copies upon all parties not later than 12:00 noon two court days prior to the scheduled date for arguments on the motion.

**(c) Reply to Response Documents.** All reply documents to the response documents as provided for in (b) of this rule shall be filed and served no later than noon one court day prior to the date set for argument on the motion. No additional documents shall be filed or served or considered by the court after that date and time.

Jefferson County Superior LCR 5.5 (b) & (c). Because Mr. Kearney filed and served his reply documents on September 2, 2010, one day prior to the September 3<sup>rd</sup> hearing, the response documents were timely filed and served (CP 320).

**D. If the trial court did consider documents it deemed inadmissible at the hearing, it was harmless error and not prejudicial.**

Even if the trial court did consider the documents, it was harmless error. ER 103 provides in pertinent part, “(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.” ER 103 does not allow reversal for a harmless error. Harmless error is error which is trivial, formal, or academic. Adcox v. Children's Orthopedic Hosp. and Medical Center, 123 Wn.2d 15, 864 P.2d 921 (1993). As described below, the trial court in this case had substantial and overwhelming evidence outside of the excluded letter and e-mail to impose CR 11 and RCW 4.84.185 sanctions. Because the trial court did not base its decision

to impose sanctions solely on the excluded letter and email, and because there was other substantial evidence on which the trial court based its decision, any error was trivial. Thus, even if the trial court did improperly consider the letter and email attached to Mr. Kearney's Declaration, the error was harmless and is not grounds for reversal.

**E. The imposition of CR 11 sanctions was within the sound discretion of the trial court.**

Under CR 11, an attorney's signature on a legal pleading, motion, or memorandum is a certification by the attorney that the attorney has read the document and:

to the best of the...attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) [the document] is well grounded in fact; (2) [the document] 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; and (3) [the document] is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation

CR 11.

If a pleading, motion, or memorandum is signed in violation of CR 11, the court is authorized to assess sanctions against the attorney who signed the document, the represented party, or both. *Id.* CR 11 sanctions "may include an order to pay to the other party...the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee." *Id.*

CR 11 thus authorizes courts to impose sanctions against an attorney and/or a represented party for filings which either “lack [a] factual or legal basis (baseless filings)” or are “made for improper purposes.” *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883, 912 P.2d 1052 (1996). However, before imposing CR 11 sanctions for a baseless filing, the trial court must also find that the signing attorney “failed to conduct a reasonable inquiry into the factual and legal basis of the claims.” *Id.* at 884.

A trial court’s decision to impose sanctions under CR 11 is reviewed for abuse of discretion and, therefore, the trial court’s decision to issue CR 11 sanctions may not be overturned unless the trial court’s decision was “manifestly unreasonable or based on untenable grounds.” *Id.*

In this case, the trial court acted within its discretion in imposing CR 11 sanctions against Ms. Young because the defamation complaint filed against Mr. Kearney was baseless, and because Ms. Young failed to conduct a reasonable inquiry into the factual and legal basis of the claims contained in the defamation complaint.

**1. The defamation action which Ms. Young filed against Mr. Kearney was baseless because the action was neither well grounded in fact nor warranted by existing law.**

The defamation action filed against Mr. Kearney lacked any factual or legal basis and was therefore, baseless.

An action is baseless when it is not well grounded by fact or existing law, or a good faith argument for altering existing law. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004). Although an action's failure to succeed on its merits is not dispositive of whether to impose CR 11 sanctions, an action which had absolutely no chance of succeeding on its merits is the proper subject of CR 11 sanctions. *Id.* at 755.

In this case, the trial court acted within its discretion in determining that the complaint filed against Mr. Kearney was neither factually nor legally justified, and was thus baseless and had absolutely no chance of succeeding at trial (CP 291).

When a claim has several required elements, lack of any evidence to support even one of the required elements render's the entire claim baseless. *See MacDonald*, 80 Wn. App. 877.

For example, in *MacDonald*, the Washington State Court of Appeals, Division II, upheld the trial court's imposition of CR 11

sanctions against an attorney for his pursuit of a sexual discrimination claim and wrongful discharge claim when the trial court found that only one element of each of the claims lacked factual and legal support.<sup>5</sup> *Id.* Because every element was necessary to the action, lack of factual and legal support for even one element rendered the entire action baseless. *Id.*

A defamation claim has four required elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 529, 730 P.2d 1299 (1987). Because a defamation claim, like the sexual discrimination and wrongful discharge claims at issue in *MacDonald*, has several required elements, lack of factual and legal support for even one of the four required defamation elements renders the entire defamation action baseless. Thus, even if, as the Appellant argues, the trial court only analyzed the falsity element of the defamation claim, the trial court still acted within its discretion because the trial court found that at least one required element in the defamation claim lacked factual and legal support (Appellant's Br. 15).

However, in this case the trial court found not only that the first element of the defamation claim lacked factual and legal support, but that every element lacked factual and legal support (CP 291). Because the

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<sup>5</sup> A sexual discrimination requires proof of the challenged conduct, damages and four additional elements. A wrongful discharge claim has four required elements. *MacDonald*, 80 Wn. App. At 885, 889.

trial court's finding that the required defamation elements of falsity, unprivileged communication, and damages had no factual and legal support was reasonable and based on sound logic, the trial court did not abuse its discretion in finding that the defamation action Ms. Young pursued against Mr. Kearney was baseless.

**a) There was no factual or legal support that Mr. Kearney's statements were provably false statements of fact.**

It was within the trial court's discretion to conclude that the statements at issue in this case were not provably false statements of fact.

For a statement to be defamatory, the statement must be a provably false statement of fact. *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 590, 943 P.2d 350 (1997). A statement of opinion which expresses only thoughts or ideas cannot be a provably false statement of fact because, "under the First Amendment there is no such thing as a false idea." *Dunlap v. Wayne*, 105 Wn.2d 529, 537, 716 P.2d 842 (1986).

The Washington State Supreme Court explained the difference between a pure statement of opinion and a statement which implies underlying, undisclosed, provably false facts as follows:

A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and

therefore implies that there are undisclosed facts on which the opinion is based, is treated differently.

Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves

*Id.* at 540 (quoting the Restatement (Second) Torts § 566, Comment c at 173.).

A case which helps illuminate the difference between actionable statements of fact and non-actionable statement of opinion is *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002). In *Robel*, the Washington Supreme Court found that the words at issue were all non-actionable statements of opinion. 148 Wn.2d at 57. *Robel* involved a situation where the plaintiff's supermarket coworkers called her vulgar names, called her an "idiot" and accused her of being a "snitch," "squealer," and "liar" in front of other employees, and told customers that she "lied about her back." *Id.* at 41.

The *Robel* court agreed with the appellate court's reasoning that "mere vulgarisms" and the word "idiot" are statements of opinion "not intended to be taken literally as statements of fact" and as such, incapable of carrying a defamatory meaning. *Id.* at 5.

The court also agreed that the words "snitch," "squealer," and "liar" were statements of opinion, and were non-actionable because they

did not imply any undisclosed defamatory facts. *Id.* at 58. As the court explained, because the plaintiff’s coworkers all knew the facts underlying these epithets, there were no implied, undisclosed facts. *Id.* The court also reasoned that the statement made to customers that the plaintiff “lied about her back” did not imply any undisclosed facts but instead, “the remark overtly explains why the . . . co-workers regarded [the Plaintiff] as a liar.” *Id.*

Like the words at issue in *Robel*, Mr. Kearney’s statements were purely statements of his opinion, and did not imply any undisclosed defamatory facts.

To begin with, the Appellant incorrectly maintains that the trial court only addressed the phrase “axe to grind” (Appellant’s Br. 13). In its memorandum opinion, the trial court specifically notes that the statement at issue is the entire last paragraph of Mr. Kearney’s email, including the statement “Dee Anne: do your job even-handedly or step down” (CP 289). And in its analysis of whether or not to grant CR 11 sanctions, the trial court states that, “[t]here is no reasonable attorney, after a review of the law of defamation in the State of Washington, who could believe that the *paragraph* in the e-mail at issue is a factual statement capable of being proved or disproved” (CP 291) (emphasis added). Thus, the trial court’s

decision was based on an analysis of the entire paragraph that Ms. Stiles alleged to be defamation.

The trial court's finding that Mr. Kearney's statements were merely statements of his opinion was reasonable and should be upheld by this court. Like the vulgarisms and word "idiot" at issue in *Robel*, the phrase "axe to grind," in this case is merely a statement of Mr. Kearney's opinion, not meant to be taken literally. As the trial court explained, "[t]hat statement is not capable of being proven to be true or false" (CP 291).

Furthermore, the phrase "axe to grind" even when used in conjunction with the statement, "DeeAnne: Do your job evenhandedly or step down" implies no undisclosed, defamatory facts. Just as the statement in *Robel* that the plaintiff "lied about her back" overtly explained why the plaintiff's co-workers thought she was a liar, so does the statement "do your job evenhandedly or step down" overtly explain why Mr. Kearney thought Ms. Stiles wrote the minutes with an axe to grind: because she was not doing her job evenhandedly.

There was thus, no factual or legal support for the claim that Mr. Kearney's statements were provably false statements of fact. The trial court acted within its discretion in determining that the statements at issue

were merely statements of Mr. Kearney's opinion, incapable of carrying a defamatory meaning (CP 291).

**b) There was no factual or legal support that Mr. Kearney's statements were unprivileged.**

The second required defamation element is that the communication at issue was unprivileged. A defamation plaintiff must prove that a privilege does not exist to shield the defendant from liability. *Computers Inc. v. Cowels Pub. Co.*, 114 Wn. App. 371, 382, 57 P.3d 1178 (2002). One privilege which may exist to protect a defamation defendant is the common interest privilege. *Moe v. Wise*, 97 Wn. App. 950, 957 989 P.2d 1148 (1999). The common interest privilege operates to protect otherwise defamatory statements when the declarant and recipient have a common interest in the subject matter of the statement. *Id.* at 958.

In this case, Mr. Kearney's statements were protected by the common interest privilege. Mr. Kearney published the statement at issue in an email, which was published to the Shore Woods homeowner's association listserv (CP 33-8). This listserv consisted almost entirely of members of the Shore Woods community, and thus, members of the Shore Woods homeowner's association (CP 88). Thus, Mr. Kearney's statements were published to members of the Shore Woods homeowner's association. Mr. Kearney's statements pertained to the homeowner's

association meeting minutes. Both Mr. Kearney and the homeowner's association members have a common interest in the homeowner's association meeting minutes. The common interest privilege therefore, protects Mr. Kearney from liability in this case for defamation.

Ms. Stiles herself even admitted in her Response to Interrogatories that a common interest existed in this case (CP 48-9). When asked, "Do you contend that the persons on the Shore Woods listserv do not have a common interest in the accuracy of the minutes produced by our Secretary?" Ms. Stiles answered, "No" (CP 48-9). Ms. Stiles' own admission thus proves that there was no factual or legal argument to support the claim that Mr. Kearney's statement was not privileged. The trial court's finding that there was no factual or legal basis to support this defamation element was therefore, within the sound discretion of the trial court.

**c) There was no factual or legal support for the claim that Ms. Stiles suffered any damages or satisfied the requirements of a libel per se claim.**

A defamation plaintiff must prove that she suffered actual damages. *Wood v. Battle Ground School Dist.*, 107 Wn. App 550, 573.27 P.3d 1208 (2001). Absent actual damages, a plaintiff's only avenue for recovery is the libel per se doctrine, which requires a showing that the defendant's statements exposed the plaintiff to contempt, ridicule, loss of

public confidence or social intercourse, public humiliation, emotional distress, or caused damage to her office. Caruso v. Local Union No. 690, 100 Wn.2d, 343, 353, 670 P.2d 240 (1983).

There was no factual or legal support in this case that Ms. Stiles sustained any actual damages, or that Mr. Kearney's statements constituted libel per se. Ms. Stiles admitted that she suffered no actual damages as a result of Mr. Kearney's statements (CP 41-3). And, the only evidence which Ms. Stiles ever produced to demonstrate that she was exposed to contempt, ridicule, loss of public confidence, social intercourse, public humiliation, emotional distress, or damage to her office were her impressions that persons in the community "avoid" or "do not acknowledge" her (CP 52). Ms. Stiles' bare allegations, without any other supporting evidence, are not sufficient to prove that this element had any factual and legal support. See Baldwin v. Sisters of Providence, 121 Wn.2d 127, 769 P.2d (1989) (noting that bare allegations do not create a material issue of fact for purposes of summary judgment); See also MacDonald, 80 Wn. App. 890 ("An attorney's blind reliance on a client..." is "seldom" reasonable (internal quotation omitted)). Thus, there was no factual or legal support for the damages element of the defamation claim.

The complete lack of factual and legal support for three of the required elements of a defamation claim demonstrates that the trial court acted reasonably in determining that “Ms. Stiles claim had absolutely no chance of success” (CP 291). It was therefore, within the trial court’s discretion to conclude that the defamation action Ms. Young pursued against Mr. Kearney was baseless.

**2. Ms. Young failed to make a reasonable inquiry before initiating this lawsuit.**

In addition to filing a baseless defamation claim against Mr. Kearney that had absolutely no chance of success in court, Ms. Young did not make a reasonable inquiry into the facts and the law before initiating this lawsuit.

The reasonableness of an attorney’s inquiry is judged using an objective standard, asking “whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 821 P.2d 1099 (1992). The trial court in this case thus had to determine whether it was reasonable under the circumstances for Ms. Young to believe that she was factually and legally justified in pursuing the defamation action against Mr. Kearney.

When determining the reasonableness of an attorney's factual and legal inquiry, the court should consider such factors as:

the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.

*Id.* at 220-21. A reasonable pre-filing investigation must almost always include more than an attorney's "blind reliance" on the client's statements.

MacDonald, 80 Wn. App. at 880.

In this case, the trial court specifically found that it was unreasonable for Ms. Young to believe that Mr. Kearney's statements were "capable of being proven to be true or false" (CP 291). The trial court goes on to explain that "Ms. Young should have realized that fact before filing the complaint. A reasonable attorney in a like circumstance, no matter how hurt the client was by the statement, would have realized that the statement is not actionable" (CP 291). The trial court's reasoning is well supported by the law.

To begin with, a quick glance at defamation case law would have revealed that because of the First Amendment implications, a plaintiff must overcome a high bar to prove defamation. See Mark v. Seattle Times, 96 Wn.2d 473, 485, 635 P.2d 1081 (1981). Thus a reasonable

attorney would have concluded that for a defamation action to succeed, her client must have ample compelling facts to support her case.

And although it is true that defamation is a complex area of law, it is also true that defamation is a well developed area of the law.<sup>6</sup> Thus, any reasonable attorney would have easily realized that Mr. Kearney's statements did not rise to the level of defamation.

In addition to the large amount of legal authority on defamation law in Washington State, there was ample time for Ms. Young to conduct enough discovery and legal research for her to realize that Mr. Kearney's statements were not defamatory. Ms. Young's claim that her opportunity for discovery was cut short because of Mr. Kearney's summary judgment motion is misleading and irrelevant (Appellant's Br. 18). Ms. Young's claim is misleading because the proper focus in this case for CR 11 sanctions is the attorney's *pre-filing* inquiry. *MacDonald*, 80 Wn. App. at 884. Thus, for purposes of CR 11 sanctions, the court determines whether Ms. Young conducted a reasonable pre-filing investigation. The timing of Mr. Kearney's Summary Judgment Motion is irrelevant because it occurred after Ms. Young filed the complaint in this case.

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<sup>6</sup> A search on Casemaker © for Washington State case law with the word "defamation" turns up 313 results.

And even if the time for investigation is measured from the filing of the Complaint on May 11, 2010 to the filing of Mr. Kearney's Summary Judgment Motion December 21, 2009, this still leaves Ms. Young with five months to conduct discovery and legal research. This amount of time would be sufficient for any reasonable attorney to realize that she had no case. Further, she did not request an extension of time for additional discovery under CR 56(f).

Additionally, despite having had ample time to engage in discovery, Ms. Young relied solely on her client's statements for factual support of the claim that Mr. Kearney's statements were libelous per se. The only evidence which was ever submitted to support Ms. Stile's claim that Mr. Kearney's statement's exposed her to contempt, ridicule, loss of public confidence or social intercourse, public humiliation, emotional distress, or damage to her office, were Ms. Stiles' own impressions that persons in the community "avoid" or "do not acknowledge" her (CP 52). Ms. Young's blind reliance on her client's statements, despite having had adequate time for investigation and research, does not amount to a reasonable pre-filing inquiry.

Lastly, an examination of Ms. Young's Amended Complaint demonstrates that she had no comprehension of privilege in the defamation setting. At paragraph 30 of her Amended Complaint Ms.

Stiles states: “Mr. Kearney has no privilege as he is not an attorney for Shore Woods or the Board and was not giving legal advice; nor does he have any credentials as a reporter or other person who may have a qualified privilege” (CP 5). Ms. Young apparently confused the attorney-client privilege and some vague reporter’s privilege with the privileges available to a defendant in a defamation suit. This lack of understanding of a fundamental element of the claim she was pursuing demonstrates that Ms. Young did perform an adequate initial inquiry into the law as required by CR 11.

Ms. Young’s argument that she conducted a reasonable inquiry because she relied not only on Ms. Stiles’ statements, but also on various documents, the recorded minutes at issue, witness statements, and case research is irrelevant (Appellant’s Br. 17). Regardless of the amount of research Ms. Young actually conducted, it was unreasonable for her to persist in her belief that she was factually and legally justified in pursuing a defamation claim against Mr. Kearney. No reasonable attorney would have filed a defamation action against Mr. Kearney. Any reasonable attorney, having conducted the pre-filing inquiry which Ms. Young claims to have conducted, would have realized that Mr. Kearney’s statements did not amount to defamation or, even if the statements were defamatory, were protected by the common interest privilege.

Because the defamation action which Ms. Young pursued against Mr. Kearney had no factual or legal support and had absolutely no chance of succeeding at trial, and because Ms. Young failed to conduct a reasonable pre-filing investigation, the trial court acted within its discretion in imposing CR 11 sanctions for Ms. Young's filing of the Amended Complaint in this case.

**F. The trial court correctly granted sanctions under RCW 4.84.185**

The trial court's decision to impose RCW 4.84.185 sanctions against Ms. Stiles was proper and should be upheld. RCW 4.84.185 authorizes a court to impose sanctions against a party that files a frivolous lawsuit that was advanced without reasonable cause. *Skimming*, 119 Wn. App. at 756.<sup>7</sup> A frivolous lawsuit is a lawsuit that, when considered in its

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<sup>7</sup> In its entirety, RCW 4.84.185 states:

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 the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

entirety “cannot be supported by any rational argument on the law or facts.” *Haus. Auth. City of Everett v. Kirby*, 154 Wn. App. 842, 859, 226 P.3d 222 (2010). As with CR 11 sanctions, the fact that an action does not prevail on its merits is not dispositive of whether to issue RCW 4.84.185 sanctions. *Id.* at 859. However, RCW 4.84.185 sanctions are proper “if, when considering the action in its entirety, it cannot be supported by any rational argument on the law or facts.” *Id.* (quoting *Skimming* at 756.)

A trial court’s decision to impose RCW 4.84.185 sanctions is reviewed for abuse of discretion and therefore, cannot be overturned unless manifestly unreasonable or based on untenable grounds. *Skimming* 119 Wn. App. at 754. Because the defamation action which Ms. Stiles brought against Mr. Kearney cannot be supported by any rational argument on the law or facts and was advanced without reasonable cause, the trial court’s imposition of RCW 4.84.185 sanctions against Ms. Stiles should be affirmed.

Ms. Stiles erroneously argues that a court must find that a complaint was filed for an “improper purpose” before RCW 4.84.185 sanctions are authorized (Appellant’s Br. 20). RCW 4.84.185 authorizes

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sanctions when an action is “frivolous and advanced without reasonable cause.” RCW 4.84.185. A finding that an action was “advanced without reasonable cause” does not require a finding that the action was advanced for an improper purpose. See *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 969 P.2d 64 (1998).<sup>8</sup>

For instance, in *Quick-Ruben* the Washington State Supreme Court affirmed the trial court’s imposition of RCW 4.84.185 sanctions, absent any finding by the trial court that the action was filed for an improper purpose. 136 Wn.2d at 904. The trial court in *Quick-Ruben* specifically found that:

[t]he evidence before the court at the time of the motion establishes that [the plaintiff’s] position on standing was untenable. When he filed an action in which he either knew or should have known that he lacked standing, his action was frivolous and was advanced without reasonable cause. An award of attorney fees is appropriate under RCW 4.84.185

*Id.*

Thus, the action in *Quick-Ruben* was advanced without reasonable cause because the action was filed without a proper legal basis, and because the plaintiff either knew or should have known that the action had no legal basis. Determining whether or not the action was filed for an

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<sup>8</sup> See also *Kearney v. Kearney*; 95 Wn. App. at 416-17 (imposition of RCW 4.84.185 sanctions based on a finding that the plaintiff/appellant filed a legal action which was based on an untenable legal theory, and that a reasonable inquiry into the law should have led the plaintiff to conclude that his legal theory was untenable).

Mr. Gerald Kearney, Respondent in this action, is no relation to the parties in *Kearney*.

improper purpose was not part of the trial court's decision to impose RCW 4.84.185 sanctions. The fact that the Washington State Supreme Court affirmed the trial court's decision demonstrates that a finding of improper purpose is not necessary for the imposition of RCW 4.84.185 sanctions. *Id.* at 904.

Similar to the trial court's finding in *Quick-Ruben*, the trial court in this case found that Ms. Stiles filed an action against Mr. Kearney that was filed without a proper legal basis (CP 292). As the trial court explained, "[t]here is no possible interpretation of the facts or rational argument which could convert the facts here into an actionable defamation case given the law in Washington requiring the statement at issue to be capable of being proven to be false" (CP 292). And, also like the trial court in *Quick-Ruben*, the trial court in this case found that a reasonable pre-filing investigation should have revealed to the Appellant that the defamation complaint lacked any legal basis (CP 291).

Therefore, just as the Washington State Supreme Court affirmed the trial court's imposition of RCW 4.84.185 sanctions in *Quick-Ruben* when the trial court found that the action was filed without proper legal basis and when the plaintiff should have known the action had no legal basis, so should this court affirm the trial court's imposition of RCW 4.84.185 sanctions when the trial court found that Ms. Stiles' action was

based on an untenable and irrational legal theory, and when a reasonable investigation into the law and facts should have revealed the action's legal inadequacy.

In contrast, when courts have found an action to be non-frivolous, the action contained issues which were at least debatable. *See Skimming*, 119 Wn. App. 748. In *Skimming*, the appellant falsely accused the respondent of committing a felony. *Id.* at 752. The respondent was acquitted of the charge, and subsequently brought claims of defamation, infliction of emotional distress, and violations of certain civil rights against the appellant. *Id.* at 753. All of the respondent's claims were dismissed by the court. *Id.* The appellant then brought a claim for RCW 4.84.185 sanctions against the respondent. *Id.* A panel of the Washington Division III Court of Appeals upheld the trial court's refusal to impose RCW 4.84.185 sanctions against the respondent. The appellate court reasoned that because the respondent was charged with a felony, had been forced on administrative leave at work as a result of the charge, and because the appellant made negative statements about the respondent to the media, his claims against the appellant were, although weak, at least debatable. *Id.* at 757. The respondent's claims were therefore not frivolous as required for RCW 4.84.185 sanctions.

Unlike the claims made against the appellant in *Skimming*, the defamation claim which Ms. Stiles brought against Mr. Kearney was not just weak but irrational and devoid of any legal merit whatsoever. At summary judgment, the trial court had to go no further than the first defamation element to find that Ms. Stiles' claim should be dismissed (CP 243-45). And when explaining the basis for imposition of RCW 4.84.185 sanctions, the trial court found that there "is no possible interpretation of the facts or rational argument which could convert the facts...into an actionable defamation case" (CP 292). Thus, in contrast to the claims in *Skimming* which were at least debatable, Ms. Stiles' defamation claim was wholly irrational.

Because it was reasonable for the trial court to find that no rational argument on the law or facts could support Ms. Stiles' defamation action against Mr. Kearney, the trial court acted within its discretion in finding the defamation action was frivolous and advanced without adequate cause. The trial court's decision to impose RCW 4.84.185 sanctions against Ms. Stiles should therefore be affirmed by this court.

**G. The amount of attorney fees awarded was eminently reasonable.**

**1. An award of statutory attorney fees under RCW 4.84.010 does not preclude an award of attorney fees under CR 11 or RCW 4.84.185.**

Ms. Stiles seems to make the argument that because Mr. Kearney was awarded statutory attorney fees under RCW 4.84.010, he is precluded from an award of attorney fees under CR 11 and RCW 4.84.185 (Appellant’s Br. 21-22). Ms. Stiles argues that because the trial court, in its oral ruling, found the award of statutory attorney fees “appropriate,” the award of actual attorney fees under CR 11 and RCW 4.84.185 is somehow “inappropriate”.<sup>9</sup> This proposition has no support under Washington State Law.

**2. A CR12(b)(6) motion was not the appropriate motion to dismiss the Appellant’s complaint.**

Ms. Stiles also complains that this dismissal of her complaint would have been more efficiently reached by a CR 12(b)(6) motion (Appellant’s Br. 22). Under CR 12(b)(6), the factual contentions of Ms. Stiles’ complaint must be accepted as true for purposes of review. *Barnum v. State*, 72 Wash.2d 928, 435 P.2d 678 (1967).

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<sup>9</sup> This argument as stated, is the logical fallacy known as “affirming a disjunct” or “false alternative disjunct”, i.e.: A or B. A therefore not B.

CR 12(b) provides, in pertinent part:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56.

Since Mr. Kearney's summary judgment motion relied in part on facts and evidence gained in discovery (like the fact that plaintiff suffered no economic damages (CP 29-31; CP 40-43)), a CR 12 motion was not the correct procedure. A motion for summary judgment under CR 56 was the appropriate procedure.

**3. Under established Washington State law, a pro se attorney may be awarded attorney fees for defending against a complaint filed in violation of CR 11.**

Washington State Courts have held that a pro se attorney may receive attorney fees for defending against a complaint filed in violation of CR 11. *Leen v. Demopolis*, 62 Wn. App. 473, 815 P.2d 269 (1991), review denied, 118 Wn.2d 1022, 827 P.2d 1393 (1992). This is not an issue of first impression in Washington State as Ms. Stiles argues. The leading Washington State case on this issue held that a pro se attorney may be awarded attorney fees for his or her time expended in defending against a lawsuit filed in violation of CR 11. *Id.* at 487. In so finding, the court stated:

The better reasoning supports an award of attorney fees to lawyers who represent themselves. As reasoned in the Winer case, lawyers

who represent themselves must take time from their practices to prepare and appear as would any other lawyer. Furthermore, overall costs may be saved because lawyers who represent themselves are more likely to be familiar with the facts of their cases.

*Id.* at 487 (citing *Winer v. Jonal Corp.*, 169 Mont. 247, 545 P.2d 1094 (1976)).

Other jurisdictions are in agreement with the Washington State rule. For instance, the Alaska Supreme Court, in *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173 (Alaska 1993), reasoned that a pro se attorney litigant could be awarded attorney fees when there was a proper basis for the fees and the fees awarded were for the time performing traditional attorney work and not as a client. The Court stated:

[T]he rule permitting the recovery of attorney fees by pro se attorney litigants is well founded. An attorney has expended considerable time and effort in obtaining the skills necessary to practice law. Whether those skills are directed to the representation of others or oneself, the attorney skills and time have a clear marketable value. None of the policy reasons given by the court in *Bernhardt* to deny lay pro se litigants attorney fees are applicable to attorneys who represent themselves.

*Id.* at 1181 (internal quotations ommitted).

Oregon is likewise aligned. The Oregon Supreme Court very recently held that a pro se attorney was entitled to attorney fees for the reasonable value of the legal services that he performed on his own

behalf.” *Colby v. Gunson*, 349 Or 1, 238 P.3d 374 (2010). The Oregon

Court stated:

Plaintiff is an attorney, in the ordinary sense of the word. He graduated from law school, is a member of the Oregon State Bar, and is authorized to practice law in this state. Throughout the proceedings below, he was subject to the Oregon Rules of Professional Conduct, along with other statutory provisions that govern the conduct of attorneys. *See* ORS 9.527 (Supreme Court may discipline members of the bar for misconduct, including violation of the Rules of Professional Conduct); *see also In re Glass*, 308 Or 297, 301-02, 779 P2d 612 (1989) (attorney acting on his own behalf violated disciplinary rule prohibiting frivolous claims). Because plaintiff is an attorney and because he performed legal services in seeking disclosure of public records, he is entitled to collect attorney fees for those services. It is irrelevant that he performed those legal services on his own behalf.

*Id.* at 8.

The instant case never proceeded past summary judgment. The work performed by Mr. Kearney was traditional legal work, i.e. research, answering the complaint, drafting the motion for summary judgment, responding to Ms. Stiles’ counter-motion for summary judgment, etcetera (CP 295-96). Ms. Stiles did not propound any discovery directed towards Mr. Kearney (CP 258). Mr. Kearney did not appear at a deposition, answer interrogatories or respond to any discovery requests.

The only time Mr. Kearney may have expended defending against the defamation action in a non-attorney role as a witness, was the preparation of a declaration in support of his motion for summary

judgment (CP 33-60). All of the rest of the work listed was traditional attorney work necessary for the defense of the allegations in Ms. Stiles' complaint (CP 271).

The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). As discussed by the Washington Supreme Court:

This court has infrequently discussed under what conditions it should disregard the doctrine of stare decisis and overturn an established rule of law. An eloquent opinion on the matter was given by Justice Hale in State ex rel. State Fin. Comm. v. Martin, 62 Wash.2d 645, 665-66, 384 P.2d 833 (1963):

Through stare decisis, the law has become a disciplined art—perhaps even a science—deriving balance, form and symmetry from this force which holds the components together. It makes for stability and permanence, and these, in turn, imply that a rule once declared is and shall be the law. Stare decisis likewise holds the courts of the land together, making them a system of justice, giving them unity and purpose, so that the decisions of the courts of last resort are held to be binding on all others.

Without stare decisis, the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations and assertions—a kind of amorphous creed yielding to and wielded by them who administer it. Take away stare decisis, and what is left may have force, but it will not be law.

State v. Ray, 130 Wash.2d 673, 677, 926 P.2d 904 (1996).

The Appellant has made no such argument in her brief—in-chief.

Rather, the Appellant attempts to mislead this court as to the current state

of the law in Washington.<sup>10</sup> Since the Appellant failed to make any argument or showing in her appellate brief that this established law is incorrect or, she should not be allowed to make this argument in her reply brief. Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. It is for this reason that, in the analogous area of appellate review, the rule is well settled that the court will not consider issues raised for the first time in a reply brief. *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); RAP 10.3(c).

#### IV. ATTORNEY FEES

##### A. *Respondent is entitled to the attorney fees and costs to defend against a frivolous appeal pursuant to RAP 18.1, RAP 18.9, CR 11 & RCW 4.84.185.*

Under RAP 18.1(a), a party on appeal is entitled to attorney fees if a statute authorizes the award. RAP 18.9 authorizes this court to award compensatory damages when a party files a frivolous appeal. *Kearney v. Kearney*, 95 Wn.App. 405, 417, 974 P.2d 872, review denied, 138 Wn.2d 1022 (1999). An appeal is frivolous if there are "no debatable issues upon

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<sup>10</sup> The two cases cited by Appellant in her brief, *Kay v. Ehrler*, 499 U.S. 432, 111 S.Ct. 1435 (1991) and *Elwood V. Drescher*, 456 F.3<sup>rd</sup> 943 (2006), rely on a judicial discernment of Congressional intent in enacting the attorney fees provision of 42 U.S.C. §1988. These cases have no relevance here.

which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of success." *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (quoting *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)). The underlying authority for such an award of attorney fees is contained in RCW 4.84.185 and CR 11.

In the instant case, Ms. Stiles has failed to comply with RAP 10.3 (g) and 10.4(c). Further, Ms. Stiles has not presented this court with any credible evidence that would tend to refute the findings of fact, conclusions of law, and the memorandum opinion entered by the trial court (CP 288-296).

In addition, the Appellant seems unaware of the state of the law in Washington State about the right of pro se attorney litigants to collect attorney fees when authorized by statute, contract, or court rule. Thus, this appeal contains no debatable issues upon which reasonable minds might differ, and is so totally devoid of merit that there is no reasonable possibility of success.

**B. The Appellant is not the prevailing party and not entitled to the statutory attorney fees and costs of this appeal.**

RCW 4.84.010 provides for the award of statutory attorney fees and costs to the prevailing party. No matter what the outcome of this

appeal, the granting of Mr. Kearney's motion for summary judgment and the dismissal of Ms. Stiles complaint still leaves him as the prevailing party in this litigation. RCW 4.84.015. An award of the costs and statutory attorney fees to Ms. Stiles for this appeal, even if she prevails in this appeal, is improper.

## V. CONCLUSION

The trial court's decision to impose CR 11 and RCW 4.84.185 sanctions against the Appellant was reasonable and based on sound logic.

Even if the trial court improperly considered Mr. Kearney's Declaration and the attachments thereto, which were filed on September 3, 2010, this error was harmless and is not grounds for reversal.

Furthermore, the Appellant failed to designate under RAP 10.3 (g) and RAP 10.4 (c) the findings of facts entered by the trial court which she wished to be considered on appeal. These findings of fact should be considered verities on appeal.

Additionally, the defamation action which Ms. Young filed against Mr. Kearney was baseless because the action was neither well grounded in fact nor warranted by existing law. There was no factual or legal basis that Mr. Kearney's statement was provably false, that Ms. Stiles suffered any damages, or that Mr. Kearney was not protected by the common interest

privilege. The imposition of CR 11 sanctions was within the sound discretion of the trial court.

And because the defamation action which Ms. Stiles brought against Mr. Kearney cannot be supported by any rational argument on the law or facts and was advanced without reasonable cause, the trial court's imposition of RCW 4.84.185 sanctions against Ms. Stiles was proper.

The only basis upon which the Appellant contests the reasonability of attorney fees for the CR 11 and RCW 4.84.185 sanctions were that they awarded to Mr. Kearney and his associate, Ms. Rasmussen. Because Washington State allows pro se attorneys to receive attorney fees for time spent defending against a complaint filed in violation of CR 11, the trial court properly included Mr. Kearney's fees in its calculation of sanctions against Ms. Young.

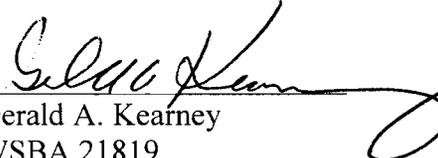
Finally, Mr. Kearney requests the attorney fees under RAP 18.1, RAP 18.9, CR 11 and RCW 4.84.185 for defending against this appeal. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of success. In the instant case, the Appellant did not comply with RAP 10.3 & RAP 10.4; presented no cognizable facts or argument of why this initial lawsuit was not frivolous, and provided no public policy reasons for changing established law in

Washington that an attorney may collect attorney fees for defending against a frivolous lawsuit under CR 11 and RCW 4.84.185.

Accordingly, Mr. Kearney respectfully requests the Court to:

1. Affirm the CR11 sanctions awarded by the trial court;
2. Affirm the trial award of attorney fees under RCW 4.84.185; and
3. Award Mr. Kearney the attorney fees for defending against a frivolous appeal under RAP 18.1, RAP 18.9, CR 11 and RCW 4.84.185.

*Respectfully submitted this 10<sup>th</sup> day of January, 2011.*

  
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**41289-6-II**

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

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DEE ANN STILES,

Appellant,

v.

GERALD KEARNEY,

Respondent.

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**DECLARATION OF SERVICE**

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COURT OF APPEALS  
DIVISION II

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BY \_\_\_\_\_  
DEP. CLERK



**DECLARATION OF SERVICE**

I hereby certify, under penalty of perjury of the laws of the State of Washington, that on this date I delivered true and correct copies of the following document:

1. Brief of Respondent

To the following attorneys of record:

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Attorney at Law  
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on January 11, 2011 by United States Mail

I declare under oath and penalty of perjury that the foregoing statements are true and accurate.

SIGNED at Kingston, Washington on this 11<sup>th</sup> day of January, 2011.



Susan Miedema  
Secretary to  
THE LAW OFFICES OF  
GERALD A. KEARNEY, PLLC