

42591-2

SUPREME COURT NO. 85716-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM SCHEIDLER,

Plaintiff/Petitioner.

v.

SCOTT ELLERBY,

Defendant/Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

On January 11, 2011, after more than 23 months of litigation, the Kitsap County Superior Court dismissed William Scheidler's claims against attorney Scott Ellerby because (1) they were factually and legally defective on their merits, and (2) Mr. Scheidler had violated discovery orders, and no lesser sanction than dismissal would suffice to deter his abuses of the legal system. The superior court later awarded Mr. Ellerby \$132,427.23 in attorney fees and costs pursuant to CR 11, CR 37, and RCW 4.84.185.

Mr. Scheidler appeals the dismissal and fee award. He also contends he should have been granted an accommodation in the conduct of his litigation under General Rule 33. Finally, he again urges this Court to reverse its prior rulings in this case and preclude discovery of his mental-health information even though he placed this information at issue by claiming damages from mental pain and suffering of up to \$735,000.

Mr. Ellerby requests his fees and costs for having to defend against this frivolous lawsuit and appeal.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Mr. Ellerby assigns no error to the decisions.

Issues Pertaining to Assignments of Error

Mr. Scheidler's "Assignments of Error" do not properly assign any

error to the superior court's decisions. Mr. Ellerby believes the issues on appeal are more properly stated as follows.

A. Whether the superior court correctly dismissed this action by Mr. Scheidler against his former attorney, where: (1) Mr. Scheidler based most of his claims on events that occurred in 1998; (2) he admits that he knew all elements of those claims in 1998, but did not file this action until 2008; (3) a three-year statute of limitations applies to those claims; (4) he presented no proof of any violation of the standard of care of an attorney; (5) Mr. Scheidler presented no proof of damages; (6) Mr. Scheidler openly violated the superior court's August 2009 and August 2010 discovery orders; (7) the superior court found that Mr. Scheidler's violations of those orders prejudiced Mr. Ellerby; and (8) the superior court found that no lesser sanction than dismissal would suffice to deter Mr. Scheidler's misconduct.

B. Whether the Court should assess attorney fees and costs against Mr. Scheidler under RAP 18.1, RAP 18.9, CR 11, and RCW 4.84.185 because this appeal is frivolous.

III. STATEMENT OF THE CASE

A. Mr. Scheidler's Statement of the Case violates RAP 10.3(a)(5), and the Court should disregard it

RAP 10.3(a)(5) requires that the Statement of the Case should be "[a] fair statement of the facts and proceedings relevant to the issues

presented for review, without argument. References to the record should be included for each statement.” Almost every paragraph of Mr. Scheidler’s Statement of the Case violates this standard, and as set forth in §V.A., *infra*, this Court should ignore it.

B. Mr. Ellerby briefly represented Mr. Scheidler in 1998 in an appeal for a disability exemption before the Washington Board of Tax Appeals.

Mr. Ellerby represented William and Mary Scheidler from May to November 1998 before the Washington Board of Tax Appeals to appeal the Kitsap County Board of Equalization’s denial of Mr. Scheidler’s application for a disability exemption on his real property taxes. CP 4 ¶2. The Board of Tax Appeals hearing was set for November 18, 1998. *Id.* On November 16, 1998, the attorney representing Kitsap County, Cassandra Noble, notified Mr. Ellerby that Kitsap County would argue at the November 18, 1998 hearing that a conflict of interest required the disqualification of Mr. Ellerby’s firm. CP 17 ¶1. Mr. Ellerby believed no conflict of interest existed that required his withdrawal, but he requested that Kitsap County “waive any arguable conflicts of interest to allow [his] continued representation of the Scheidlers.” CP 17-18. Mr. Scheidler received a copy of this letter. CP 18. Mr. Ellerby met with the Scheidlers the following day. CP 33 ¶3. Mr. Ellerby explained that they could request a continuance in light of the last-minute conflict-of-interest allegation, but Mr. Scheidler told Mr. Ellerby that he would not request a

delay. CP 34 ¶3. Mr. Scheidler did not request either that Mr. Ellerby or Mr. Ellerby's firm assist him in obtaining new counsel for the November 18 hearing. CP 36 ¶1. Kitsap County would not waive the conflict-of-interest allegation, and Mr. Ellerby withdrew from the representation on November 17, 1998. CP 19. Mr. Ellerby contended this withdrawal was at Mr. Scheidler's request. CP 2538 ¶4.

Mr. Scheidler appeared before the Board of Tax Appeals without counsel. CP 2383 ¶1. He testified that Kitsap County's assertion of a conflict of interest was a "charade" and that its attorney had "made up" the issue. CP 2539 ¶4. He did not request a delay in order to obtain new counsel, and unsuccessfully argued his appeal that day. CP 2398.

C. Mr. Scheidler waited nearly a decade before resuming his efforts to obtain an exemption from Kitsap County.

1. In July 2008, Mr. Scheidler resumed his effort to obtain an exemption from the County Assessor.

Nearly a decade later, on July 28, 2008, Mr. Scheidler e-mailed Kitsap County Assessor James Avery, and requested that Mr. Avery "go to bat" for him. CP 2421 ¶1. The e-mail asserted:

Scott Ellerby called that evening to tell me he was withdrawing from the case as Kitsap County refused to waive what was described by Scott as a dubious 'conflict' contention. ... While this occurred in 1999 [sic] and I have thought about it many times, it is only recently I can bring myself to deal with this event.

CP 2422 ¶2. He asserted that Mr. Ellerby had been "made to withdraw"

as “part of the county attorney’s strategy pervert [sic] justice” and asked that Avery “waive the statutory time limits” barring his claim. CP 2424.

Mr. Avery disagreed with Mr. Scheidler’s exemption argument and twice notified Mr. Scheidler that he believed the property-tax exemption could not apply to Mr. Scheidler. CP 2425-26. Mr. Scheidler told Mr. Avery on August 14, 2008 that he would apply for a partial property-tax exemption. CP 2425. Mr. Avery replied, “[y]ou certainly know where we stand on this point. If you wish to continue pressing the issue, your next step would be to submit an application.” *Id.*

2. Mr. Scheidler complained to the Washington Attorney General about the tax exemption.

Rather than submitting an application, Mr. Scheidler filed a complaint with the Washington Attorney General’s office on September 4, 2008 against the Department of Revenue and the county assessors’s offices. CP 1864 ¶1. Then, on September 15, 2008, not satisfied by the response he received to that complaint, Mr. Scheidler filed additional complaints with the Washington Attorney General’s Consumer Protection Division against the Washington State Attorney General, the Washington Department of Revenue, and Kitsap County alleging “fraud and attempted fraud by the department of revenue, under the advisory role of Cam Comfort of the AGO’s[sic] office.” CP 1872 ¶1. Mr. Scheidler next sought the intervention of elected officials, “watchdog agencies,” news

agencies, and the FBI regarding what he contended was the Washington Department of Revenue's "scheme" to defraud taxpayers. CP 1893 ¶1.

3. Mr. Scheidler sought an opinion from the Department of Revenue on the exemption.

On November 7, 2008, in preparation for his suit against the Kitsap County Assessor, Mr. Scheidler contacted Peggy Davis of the Department of Revenue and asked that she calculate various inclusions for "disposable income" related to the property tax exemption program for senior citizens and disabled persons. CP 1896 ¶1. She responded five days later with an interpretation of capital gains and losses. CP 1898-99. Based on her response, without ever applying for an exemption from Kitsap County as Mr. Avery had advised, on November 20, 2008 Mr. Scheidler sued the Kitsap County Assessor's office. CP 1904.

4. Mr. Scheidler's suit against Kitsap County was dismissed.

On December 29, 2008, Mr. Scheidler's complaint against the Kitsap County Assessor's office was dismissed. CP 1921. The superior court later awarded costs to Kitsap County pursuant to Chapter 4.84 RCW. CP 1923. In response, Mr. Scheidler e-mailed a number of state employees, his state representatives, Mr. Comfort, the FBI and the Seattle Post-Intelligencer with an accusation of criminal activity: "At this point it is clear you all belong in jail under **RCW 9A.90.010 ... Official misconduct**. CP 1927 (emphasis in original). Mr. Scheidler then posted a

“press release” in a public forum regarding a “scheme to defraud” by the Washington Department of Revenue and county assessors. CP 1929. He later posted a message to an online message board for the Port Orchard Independent newspaper regarding his “complaint against the Kitsap County Assessor for the fraud he perpetrates on Senior Disabled Citizens of Kitsap County pending before the Court of Appeals.” CP 1934 ¶3.

D. Meanwhile, Mr. Scheidler embarked on a campaign against Mr. Ellerby based on the 1998 representation.

1. Mr. Scheidler demanded that Mr. Ellerby refund his attorney fee from 1998 even though he admitted his request was likely not justified.

While renewing his efforts to obtain an exemption from Kitsap County, Mr. Scheidler also contacted Mr. Ellerby for the first time in almost ten years. CP 2408 ¶3. On July 14, 2008, Mr. Scheidler e-mailed Mr. Ellerby to ask for a refund of the \$2,045.00 fee he had paid in 1998. CP 223. Mr. Scheidler acknowledged that his request for a refund of fees was likely not justified:

[Y]ou may remember me as you were to handle my dispute with the WA State Board of Tax Appeals, that was until the eve of the appeal date when Kitsap County raised a conflict of interest charge against you. That was some years ago. Unfortunately my health and financial situation has further deteriorated and am asking that the money I paid for your representation be refunded. **While it is likely this request may not be justified**, I am hoping the fact that you pulled out at the last minute makes it a reasonable request. ... Thank you for anything you may be able to do.

CP 223 (emphasis added).

Mr. Ellerby declined Mr. Scheidler's request for a refund. CP 224 ¶1. Mr. Ellerby reminded Mr. Scheidler that it was his recollection the Scheidlers had asked that he not contest the conflict. *Id.* Mr. Scheidler replied, "I am going to muster what little energy I have left to collect from you what I would be entitled to from the county had you actually represented me." CP 388 ¶6. In preparation for that effort, on about July 27, 2008, Mr. Scheidler asked for legal advice on an electronic forum concerning whether his disability would toll the statute of limitations, and was advised that it likely would not. CP 2771-72 ¶2.

On July 30, 2008, Lawrence Mills, president of Mills Meyers Swartling, Mr. Ellerby's law firm, received an e-mail message that Mr. Scheidler sent through a link on the firm's website. CP 557. Mr. Mills responded that he had investigated Mr. Scheidler's allegations of a breach of ethics and professional malpractice but found no factual basis for Mr. Scheidler's contentions. CP 558 ¶3. Mr. Mills also declined Mr. Scheidler's request for a refund of fees from 1998. CP 558 -59.

Mr. Scheidler's reply stated that Mr. Mills was justified in declining his request for a refund of fees:

I'm sure your explanation is sound and your [sic] are justified in declining my request for a refund. However your advice to put this issue behind me isn't realistic as it was my case that was recently cited by the assessor to overturn an exemption granted by the Board of Equalization for a Mr. McDonald. I don't know Mr. McDonald, but I wanted to call him to apologize and

explain the events that led to my losing at the Board of Tax Appeals. I couldn't locate him, but I feel responsible.

CP 558 (emphasis added). On August 9, 2008, Mr. Scheidler e-mailed Mr. Mills and Mr. Ellerby separately regarding their refusal to refund legal fees paid in 1998. Mr. Scheidler informed Mr. Ellerby:

[M]r. Ellerby you have dumped your responsibility on me then, now my case is used to deny others their just exemption, which cause[sic] me great distress, and you're a liar willing to slander me for once again your own benefit!

You have 5-days[sic] to make everything right!

CP 560 ¶2. In his e-mail to Mr. Mills, Mr. Scheidler stated:

This is an interesting trick in how messages addressed to Scott are diverted to you without my knowledge. While I haven't researched client-attorney confidentiality or fraud it now seems this issue is between you and me. You have to the close of business Monday to present a solution to my claim.

CP 561. Mr. Mills confirmed he would not refund the fees paid by Mr. Scheidler in 1998. CP 563 ¶3.

2. Mr. Scheidler filed a Bar Association grievance against Mr. Ellerby.

On October 29, 2008 Mr. Scheidler filed a grievance with the Washington State Bar Association ("WSBA"), asserting that Mr. Ellerby had conspired with the attorney representing Kitsap County to leave him without representation in the 1998 appeal of the county's property tax determination. CP 447 ¶5. Mr. Ellerby defended against Mr. Scheidler's bar grievance in a written statement that fully set forth the circumstances

surrounding his withdrawal from representation. CP451 ¶3.

In December 2008, conflicts review officer Zachary Mosner of the Washington Attorney General's office analyzed Mr. Scheidler's allegations and dismissed the grievance. CP 1650. Mr. Scheidler sent Mr. Mosner multiple e-mails and voicemails protesting the decision and indicated that he intended to contact Mr. Mosner's supervisor regarding his "performance." CP 2438 ¶1. Counsel for the WSBA contacted Mr. Scheidler directly regarding his accusations against Mosner. *Id.*

Mr. Scheidler then requested (1) that the WSBA reconsider dismissing the grievance and (2) sanctions against Mr. Mosner for dismissing the grievance. CP 2440, 2446 ¶¶1-2. He also alleged a potential conflict of interest between Mr. Mosner and another employee of the state Attorney General's office. CP 2440. After a thorough review, the WSBA review committee unanimously dismissed the grievance. CP 2449.

3. After his bar grievance was dismissed, Mr. Scheidler brought this action.

On March 18, 2009, Mr. Scheidler sued Mr. Ellerby in Kitsap County Superior Court, alleging that Mr. Ellerby's November 17, 1998 withdrawal from his legal representation had caused Mr. Scheidler to suffer physical and mental injury. CP 10 ¶6, 12 ¶¶8-9. Mr. Scheidler's suit alleged nine causes of action, including civil conspiracy, fraud,

intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, breach of duty, breach of promise, defamation, and false light invasion of privacy. CP 9, 11-12. Mr. Scheidler alleged mental anguish and numerous other references to his medical condition. CP 12-13. At this point, Mr. Ellerby had been tangled for seven months in an unexpected disagreement with Mr. Scheidler over a matter concluded ten years prior. *Cf.* CP 3, 215. Mr. Ellerby's answer included a counterclaim for attorney fees and costs under the frivolous suit statute, RCW 4.84.185, and CR 11. CP 62.

E. Mr. Scheidler significantly expanded the scope of the Kitsap County superior court action.

1. Mr. Scheidler's refusal to cooperate in discovery lengthened the proceedings.

To defend himself, Mr. Ellerby propounded his first interrogatories exploring Mr. Scheidler's claims and damages on April 27, 2009. CP 253, 260, 266, 269. In response to discovery, Mr. Scheidler alleged pain and suffering and loss of enjoyment of life related damages in the amount of \$386,657.76. CP 198, CP 260 ¶1. (Mr. Scheidler claimed total damages of \$735,065.36, but if the claimed damages he described as "punitive" are deducted, claimed damages of \$386,657.76 remain.) Mr. Scheidler also identified several healthcare providers with relevant information. CP 260 ¶1, 266 ¶6. Mr. Scheidler resisted Mr. Ellerby's efforts to discover the facts underlying his claims from these providers. CP 2025 ¶1.

Mr. Scheidler sought to compel Mr. Ellerby's response to an interrogatory on August 13, 2009. CP 136. The same day, he moved for a protective order to prevent discovery of his healthcare records. CP 140. On August 21, 2009, Superior Court Judge Russell Hartman court found that neither motion was well taken and sanctioned Mr. Scheidler under CRs 11 and 37 in the amount of \$3,642. CP 336. Judge Hartman advised Mr. Scheidler that as a pro se litigant, he would be held to the same standard as an attorney, and that his discovery motions were not remotely meritorious. CP 2073, 2075.

Discovery continued at a slow pace as a result of Mr. Scheidler's objections; and, on August 6, 2010, the superior court was forced to intervene yet again, this time ordering Mr. Scheidler to appear for his deposition, to allow Mr. Ellerby access to discovery from Mr. Scheidler's healthcare providers, and not to interfere in the deposition of Mary Scheidler. CP 978-79. Mr. Scheidler refused to appear for his deposition, refused to answer interrogatories, obstructed the deposition of his wife, and interposed objections to the deposition of Curtis Holder, M.D., that the superior court had already overruled. CP 2578 (Mr. Scheidler), 2604 (third interrogatories), 2628, 2647-49 (M. Scheidler), 2588 (Dr. Holder). By this time, Mr. Ellerby had been engaged in the disagreement for more than two years. *Cf.* CP 2628, 215.

2. Mr. Scheidler's sought interlocutory appellate review that expanded the scope of the litigation.

Mr. Scheidler sought reconsideration of the superior court's August 21, 2009 order allowing discovery of his healthcare information. CP 338. That motion was denied. CP 345. Mr. Scheidler then moved for discretionary review from Division Two of the Court of Appeals. CP 351. When that motion was denied, Mr. Scheidler sought this review by this Court. The commissioner of this Court denied review; Mr. Scheidler refused to accept that ruling; and this Court sanctioned him on February 2, 2011. CP 2800. As this issue has been exhaustively briefed, Mr. Ellerby adopts by reference as though fully set forth herein the statement of facts set forth in Mr. Ellerby's Answer to Motion for Discretionary Review of October 18, 2010, which was attached as Appendix 1 to his Answer to Statement of Grounds for Review on April 21, 2011.

3. Mr. Scheidler obstructed this action in superior court with *ex parte* applications for stays.

On June 15, 2009, Mr. Scheidler requested both a hearing for an order of default and accommodation under GR 33 based on his "panic disorder/phobic neuroses." CP 2171, 24. Although Mr. Scheidler delivered his motion for default to Mr. Ellerby's counsel, he withheld his application for an accommodation. CP 2171.

On June 22, 2009, the superior court notified the parties by letter of its decision regarding Mr. Scheidler's request. CP 50 ¶3. The superior

court set the hearing in a courtroom where no other matters were scheduled. *Id.* By agreement of the parties, his motion for default was not heard, mooting Mr. Scheidler's first request for accommodation. CP 63.

On August 10, 2009, the superior court pre-assigned Mr. Scheidler's litigation to Judge Hartman. CP 2172 ¶2. The parties received calls from Judge Hartman's clerk on August 13, 2009, advising them that Mr. Scheidler's pending motion for a protective order would need to be set before Judge Hartman. CP 2172 ¶ 5, CP 2177 ¶ 1. Without notifying Mr. Ellerby's counsel, Mr. Scheidler appeared *ex parte* before Judge Hartman and requested that the superior court expand his time to present his motion for protective order. CP 2177 ¶1. At that hearing, Judge Hartman instructed Mr. Scheidler to provide notice to Mr. Ellerby's counsel before bringing *ex parte* motions, denied the *ex parte* motion, and administratively continued Mr. Scheidler's motion for a protective order to August 21, 2009. CP 2178 ¶2, 2178-79; *see also* §III.E.1.

On March 22, 2010, Mr. Scheidler e-mailed the Kitsap County Superior Court with a request that all proceedings be stayed and/or continued for a period of up to 90 days. CP 2200 ¶1. Mr. Ellerby's counsel was not copied on this e-mail. CP 2201 ¶1. Mr. Scheidler repeated his request, again without notifying Mr. Ellerby's counsel, on April 1, 2010. *Id.* at ¶2. Mr. Scheidler's renewed request for accommodation was spurred by Mr. Ellerby's continuing efforts to compel

discovery. CP2259-60 ¶5.

Judge Hartman set an April 9, 2010 hearing to consider Mr. Scheidler's third request for accommodation. CP 645. In connection with that hearing, Judge Hartman directed Mr. Scheidler to provide medical information regarding the impairment necessitating accommodation. CP 644 ¶¶3-4. Mr. Scheidler responded with a statement from a healthcare provider that a stay of three months would help him "stabilize." CP 681. Mr. Scheidler did not provide Mr. Ellerby's counsel with the healthcare provider's statement. CP 2260 ¶¶8-9.

Mr. Ellerby's counsel objected to the stay and openly disclosed that once Mr. Ellerby completed basic discovery he planned to seek summary dismissal of Mr. Scheidler's complaint. CP 2173 ¶12. At this point, Mr. Ellerby had been defending against Mr. Scheidler's claims for more than two years. *Cf.* CP 447, CP 644. After weighing the prejudice to Mr. Ellerby and Mr. Scheidler's request for a stay, Judge Hartman granted a 90-day stay of proceedings. CP 761 ¶1.

Contrary to his claims of incapacity, Mr. Scheidler used the stay to pursue his case against the Kitsap County Assessor, to prepare a joint 28-page opposition to Mr. Ellerby's motion to compel his deposition and to disqualify Mr. Ellerby's counsel, which he filed only three days after the stay was lifted. *See* CP 763, 2722, 2724, 2730.

On November 12, 2010, Mr. Ellerby moved for summary

judgment. CP 1120 ¶1. Mr. Scheidler thereafter contacted the superior court and sought a stay, but later withdrew that request. CP 2669. On December 3, 2010 Mr. Ellerby filed a motion to dismiss the action as a discovery sanction. CP 1120 ¶2. Both motions were noted to be heard on December 10, 2010. *Id.*

However, on December 6, 2010, Mr. Scheidler again requested a 30-day continuance. The superior court informed Mr. Scheidler that it would consider his request for a continuance at the December 10 hearing before proceeding to the merits of Mr. Ellerby's motions. CP 1121 ¶2. Even though Mr. Scheidler did not appear at the December 10, 2010 hearing, and even though Judge Hartman noted that Mr. Scheidler had been able to vigorously advocate his position on several prior occasions, he granted Mr. Scheidler's request. CP 1121 ¶3. Mr. Ellerby's motions were continued to January 28, 2011. CP 1122 ¶2. Mr. Scheidler was ordered to provide supporting medical information in connection with any future accommodation request. CP 1122 ¶1.

Mr. Scheidler sought stays on two further occasions after his claims were dismissed. CP 1282, 1782. On February 2, 2011, Mr. Scheidler submitted healthcare information in support of his GR 33 accommodation request, but of the 267 pages of documents delivered to Judge Hartman, none was more recent than February 17, 2002. CP 1281 ¶2. Contrary to the superior court's order of December 16, 2010, he

supplied no independent supporting information. CP 1281 ¶2. Mr. Scheidler's fifth request for accommodation was denied on February 8, 2011. CP 1282 ¶3.

After February 8, 2011, Mr. Scheidler continued to campaign for an accommodation request by e-mail without notifying Mr. Ellerby's counsel. CP 1781 ¶1. Mr. Scheidler's additional support for his stay request consisted of a portion of the deposition of Curtis Holder, M.D., who stated he had not treated Mr. Scheidler since July 3, 2007. CP 1782 ¶1. On February 23, 2011, after considering the additional material, Judge Hartman responded to these e-mails and denied Mr. Scheidler's sixth request for accommodation. CP 1782 ¶1. Mr. Ellerby had been defending against Mr. Scheidler's claims for more than two years and in litigation for 23 months. *Cf.* CP 3, 447, 644. All told, Mr. Scheidler obtained stays of the litigation totaling nearly five months.

F. Mr. Ellerby moved for dismissal due to lack of merit and for Mr. Scheidler's discovery abuse.

On January 28, 2011, the superior court heard Mr. Ellerby's motions for summary judgment and to dismiss as a discovery sanction. CP 1268. Mr. Scheidler presented his 224 pages of opposition to both motions and a "Statement of Protest/Duress," but again refused to appear for the hearing. CP 1008, 1124, 1266-67. After considering both parties' pleadings, the superior court granted both of Mr. Ellerby's motions.

CP 1271. The superior court determined that Mr. Scheidler's ongoing violations of its orders and the Civil Rules prejudiced Mr. Ellerby's ability to defend against his claims and warranted dismissal. CP 1271. After an extensive review of the record, the superior court found that Mr. Scheidler's violations of the court's previous discovery orders demonstrated that he would not be deterred from continuing this conduct by lesser sanctions. CP 1270 ¶8. The superior court dismissed Mr. Scheidler's complaint with prejudice and ordered that Mr. Ellerby be awarded his reasonable attorney fees and litigation expenses. CP 1271. Mr. Scheidler moved for reconsideration of the order, but his motion was denied. CP 1284.

G. The superior court awarded attorney fees after duly considering Mr. Scheidler's opposition.

On February 25, 2011, the superior court granted Mr. Ellerby's motion for an award of his reasonable attorney fees in the amount of \$132,427.23. CP 1784-87. Mr. Scheidler opposed the motion, submitting more than 222 pages of opposing briefing and exhibits but again refused to appear at the hearing. CP 1558. The superior court found that statutes of limitation barred seven of Mr. Scheidler's claims and that the remaining claims that allegedly arose in 2008 were not supported by any reasonable investigation into the law and facts in violation of CR 11 and RCW 4.84.185. CP 1786 ¶¶1-3. Finally, based on Mr. Scheidler's discovery

abuses, including his violations of the superior court's discovery orders in 2009 and 2010, the superior court awarded fees and costs for discovery violations pursuant to CRs 26 and 37. CP 1786 ¶¶4-6, 1787 ¶7.

IV. SUMMARY OF ARGUMENT

The superior court properly dismissed Mr. Scheidler's claims against Mr. Ellerby as a matter of law. Most of Mr. Scheidler's claims were barred by the statute of limitations. He knew the facts giving rise to his claims for nearly ten years but made no effort to pursue the claims. There were no facts supporting essential elements of Mr. Scheidler's claims not barred by the statute of limitations. As a matter of Washington law, neither a defamation claim nor a claim for publication in a false light can survive when the allegedly defamatory comments were not published to the public. No facts showed that any allegedly defamatory comments were ever made publicly. Finally, Mr. Scheidler had no facts showing he had been damaged.

Furthermore, the superior court properly exercised its discretion to curb violations of its discovery orders and deter meritless suits by dismissing Mr. Scheidler's claims. The superior court found that its discovery orders of August 21, 2009 and August 6, 2010 had been violated and no lesser sanction than dismissal would deter Mr. Scheidler's discovery abuse. The superior court found the costs of litigation had been increased by the discovery abuse and that Mr. Scheidler's claims were not

based on a reasonable inquiry into the facts or the law. It properly exercised its discretion to award Mr. Ellerby his costs of defense. And accordingly, this court should affirm the superior court's dismissal of Mr. Scheidler's claims against Mr. Ellerby.

V. ARGUMENT

A. **Mr. Scheidler's brief repeatedly violates the RAPs, and those many and serious violations preclude review.**

Mr. Scheidler's brief contains countless violations of the standards set out in the Rules of Appellate Procedure for appellate briefing. The RAPs set strict requirements for content, style, and form for all appellate briefs. *See* RAP Title 10. Pro se litigants are held to the same standard as attorneys and must comply with all procedural rules on appeal. *West v. Washington Ass'n of County Officials*, ___ Wn. App. ___, 252 P.3d 406, 415 n.13, (2011). Failure to do so may preclude review. *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999). Factual statements included in an appellant's brief must be supported by citation to the record. *See* RAP 10.3(a)(4). Appellate courts are not required to search the record to locate those portions relevant to a litigant's arguments. *Mills v. Park*, 67 Wn.2d 717, 721, 409 P.2d 646 (1966). Arguments should be made "with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(5). Arguments that are not supported by any reference to the record or by any citation of

authority need not be considered. *Sherry v. Financial Indem. Co.*, 160 Wn. 2d 611, 615 n. 1, 160 P.3d 31 (2007).

Mr. Scheidler's brief repeatedly and flagrantly violates these rules. Mr. Scheidler cites neither the record nor Washington authority in any meaningful way. App. Brief at 17 ¶4. His brief identifies an indeterminate number of alleged errors, cites no relevant legal authority supporting any assignment, and attempts to incorporate the entire record by reference. App. Brief at 26 ¶3.

Mr. Scheidler's citation to authority bears no relation to any argument presented. For example, Mr. Scheidler cites a decision regarding judicial discipline, *In re Turco*, 137 Wn.2d 227, 228, 970 P.2d 731 (1999), throughout his assignments of error, but that decision has no connection to the constitutional violations Mr. Scheidler seems to allege concerning either the application of CR 37 or the privilege he belabors regarding his mental healthcare providers. *See e.g.*, App. Brief at 17 ¶1.

Mr. Scheidler's assertions of constitutional violations do not cure his unsupported arguments. Parties cannot bolster weak arguments merely by asserting constitutional issues; they must present considered arguments on the merits. *State v. Johnson*, 119 Wn. 2d 167, 171, 829 P.2d 1082, 1084 (1992). Here, Mr. Scheidler willfully violated court orders with which he disagreed and now asserts that his disagreement alone is enough to raise an issue of constitutional magnitude. App. Brief at 47 ¶2.

Finally, Mr. Scheidler's brief is littered with unfounded and scandalous allegations against Mr. Ellerby, Mr. Ellerby's defense counsel, and Judge Hartman. Personal comments regarding a party, opposing counsel, or the trial judge are improper, reflect the lack of merit in the arguments being advanced by the party making them, and insult the court asked to consider them. *Plummer v. Weil*, 15 Wn. 427, 431, 46 P. 648, 649-650 (1896). Mr. Scheidler attacks Mr. Ellerby personally, attributes breaches of the rules of professional conduct to his defense counsel, and accuses Judge Hartman of prejudice. App. Br. at 41, 55. He fails to support any of these inflammatory and impertinent allegations, and this Court should ignore them.

This Court may impose sanctions against a party who submits an improper brief. RAP 10.7; *Chevron U.S.A., Inc. v. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. 2d 131, 139, 124 P.3d 640, 643 (2005). This Court should award Mr. Ellerby his costs arising from these improprieties, which have significantly increased the cost of responding to Mr. Scheidler's arguments and his request for direct review.

B. The standard of review on summary judgment is *de novo*, and the remaining decisions of the superior court should be reviewed for an abuse of discretion.

This Court's review of an order granting summary judgment is *de novo*, and the order may be affirmed on any basis supported by the record. *Electrical Workers v. Trig Electric*, 142 Wn.2d 431, 434-435, 13 P.3d 622

(2000). The standards for summary judgment are well established.

Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). The moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The facts are viewed in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). To avoid summary dismissal, the nonmoving party must make a showing that establishes each element on which that party will bear the burden of proof at trial. *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001). If the nonmoving party fails to make such a showing, no genuine issue of material fact prevents summary judgment, since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The nonmoving party may not rely on speculation, argumentative assertions that unresolved facts remain, or having its affidavits considered at face value. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 848, 92 P.3d 243 (2004). If the nonmoving party fails to demonstrate

that material facts are in dispute, then summary judgment is proper. *Vallandigham*, 154 Wn.2d at 26, 109 P.3d 805. As discussed below, the dismissal of Mr. Scheidler's claims on summary judgment was entirely proper as a matter of law.

C. The superior court properly dismissed claims arising from events in 1998.

Washington courts favor statutes of limitation, which assist courts in their pursuit of truth by barring stale claims. *See generally Tyson v. Tyson*, 107 Wn.2d 72, 75-76, 727 P.2d 226 (1986). Plaintiffs are responsible to make further inquiry as to particular rights of action that could be filed. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 770, 733 P.2d 530 (1987) (quoting with approval trial court decision). A party must exercise reasonable diligence in pursuing a claim; otherwise, the statute of limitations will bar the claim. *Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 502, 760 P.2d 348 (1988). For the statute to begin running, the plaintiff need not possess knowledge that a legal cause of action exists. *Id.* Otherwise, there would be no limitation of actions until a claimant saw his attorney. *See Buxton v. Perry*, 32 Wn. App. 211, 212, 646 P.2d 779 (1982).

A three-year limitation applied to most of Mr. Scheidler's claims. *See* RCW 4.16.080(2) (civil conspiracy, negligence, emotional distress claims); RCW 4.16.080(4) (fraud). Mr. Scheidler filed his complaint

based on events in 1998 on March 18, 2009. CP 3. Any applicable statute of limitations ran on these claims long before that date.

1. Mr. Scheidler had sufficient information in 1998 regarding the elements of his claims.

A personal-injury action accrues at the time the act or omission occurs. *In re Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992). Under the “discovery rule,” once a plaintiff has some information about the elements of his claim, the statute of limitations begins to run regardless of whether the plaintiff is aware of a legal cause of action at that time. *Wood v. Gibbons*, 38 Wn. App. 343, 685 P.2d 619, *rev. denied*, 103 Wn.2d 1009 (1984). Similarly, a fraud claim accrues when the plaintiff discovers, or should have discovered, the facts constituting the fraud and sustains some actual damage as a result of the fraud. *See First Md. Leasecorp v. Rothstein*, 72 Wn. App. 278, 864 P.2d 17 (1993).

When discussing Mr. Ellerby’s withdrawal from his representation before the Board of Tax Appeals, Mr. Scheidler admitted on July 28, 2008 that “[w]hile this occurred in 1999 and I have thought about it many times, it is only recently I can bring myself to deal with this event.” CP 2422. This admission clearly indicates that Mr. Scheidler first learned “some information” supporting the elements of his claims more than three years before suing. Those events arose not later than Mr. Ellerby’s withdrawal from representation of Mr. Scheidler in November 1998.

Mr. Scheidler had until 2001 to commence a lawsuit. However, he delayed his suit against Mr. Ellerby until March 18, 2009, more than 10 years after the events in question. Any applicable statute of limitation had run by that time. Mr. Scheidler's claims were time-barred. He raises no argument in his brief that contradicts these facts. The superior court did not err when it dismissed Mr. Scheidler's stale claims.

2. Mr. Scheidler offered no proof of his claims.

Even had the statute of limitations not barred these claims, they still would have failed. Mr. Scheidler's complaint pleaded claims of "breach of duty; breach of promise; conspiracy, [and] fraud." CP 3-14. He alleged that Mr. Ellerby knew that his medical condition prevented him from self-representation and that Mr. Ellerby withdrew his representation under false pretenses to help conceal another fraudulent scheme and conspired to conceal illegal activity:

Defendant Ellerby through a contrived scheme that included Kitsap's attorney C. Noble withdrew his representation on the very eve of a scheduled hearing under a fraudulent scheme in order to help conceal another fraudulent scheme of the Assessor.

...

Defendant Mr. Ellerby's [sic] ... deliberately, through deceit and unlawful acts refused to perform the duties for which he agreed and indeed mandated by his oath to uphold the law and not conspire to conceal illegal activity[.]

CP 10 ¶6.

Several of Mr. Scheidler's claims depended on the validity of his civil conspiracy claim. However, because Mr. Scheidler had no proof that Mr. Ellerby engaged in any civil conspiracy against him, the superior court correctly dismissed these unsupported claims with prejudice.

3. Mr. Scheidler had no proof that Mr. Ellerby engaged in a civil conspiracy against him.

Mr. Scheidler sued Mr. Ellerby after the WSBA unanimously dismissed his bar grievance based on a purported conspiracy between Mr. Ellerby and the attorney for Kitsap County. Mr. Scheidler admitted that he filed his bar grievance based on nothing more than suspicion:

My **suspicion** at this point in time and based upon the facts that I have come to now know **suggest** Ellerby was coerced into dropping my case against Kitsap County for reasons of a much larger nature. That is to protect the DOR's [sic] grand fraud upon people age 61 or disabled from getting their statutory benefit. Ellerby's resignation was to protect the revenue stream of Counties [sic] that spend more than they take in or have disproportionate number of qualified exemptions by keeping intact the mechanism designed for this purpose by the DOR. [sic]

CP 445 (emphasis added). Mr. Scheidler had no more facts to oppose summary judgment than he did when he filed his bar grievance in 2008. Under Washington law, "mere suspicion" is not sufficient to establish "civil conspiracy." *All Star Gas Inc. v. Bechard*, 100 Wn. App. 732, 998 P.2d 367 (2000). To prove a civil conspiracy, a plaintiff must present clear, cogent, and convincing evidence that:

(1) two or more people combined to accomplish an unlawful purpose or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy.

Newton v. Caledonian, 114 Wn. App. 151, 160, 52 P.3d 30 (2002).

There has never existed even a hint of such conduct by Mr. Ellerby, much less the required clear, cogent, and convincing evidence of conspiracy. Mr. Scheidler has never presented any facts supporting his allegations that Mr. Ellerby and the prosecuting attorney for Kitsap County were involved in any conspiracy against him to somehow deprive him of representation. Mr. Scheidler's claim for civil conspiracy, in addition to being patently false, was clearly based on bare suspicion rather than actual proof. The superior court did not err when it dismissed Mr. Scheidler's claims as a matter of law.

4. Mr. Scheidler's fraud claim failed on its merits.

Mr. Scheidler's fraud claim was apparently based on his conspiracy claim, given that he contended that Mr. Ellerby withdrew his representation under false pretenses in order to help conceal another "fraudulent scheme." CP 10. Fraud requires clear, convincing proof of nine elements: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8)

plaintiff's right to rely upon it; and (9) damages. *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.3d 891, 902 (2008). (internal citation omitted). A plaintiff must plead "the circumstances constituting fraud or mistake with particularity." CR 9(b); *see also Swanson v. Solomon*, 50 Wn.2d 825, 828, 314 P.2d 655 (1957). When fraud is not pleaded with particularity, the claim should be dismissed. *See Haberman v. WPPSS*, 109 Wn.2d 107, 165, 744 P.2d 1032 (1987).

Mr. Scheidler's complaint contains no allegation that Mr. Scheidler had a right to rely upon any alleged misrepresentations, and does not allege with particularity what misrepresentation as to an existing fact was made and when it was made, as required by CR 9(b). Mr. Scheidler's fraud claim was properly dismissed when he failed to plead all nine elements.

Mr. Scheidler has no evidence to support his claim of fraud. Mr. Scheidler's fraud claim relied on the contention that in June 2008, Mr. Ellerby misrepresented the basis for his withdrawal from representation in 1998. CP 12 ¶6. Mr. Scheidler contended that he believed Mr. Ellerby was forced to withdraw due to a conflict of interest in 1998, and then found out in 2008 that Mr. Ellerby was never actually disqualified due to a conflict of interest. App. Br. at 25 ¶3.

However, Mr. Scheidler admitted to testifying during the November 18, 1998 Board of Tax Appeals hearing that Kitsap County's

purported conflict of interest issue was a “charade” and that Kitsap County’s attorney had “made up” the conflict-of-interest issue. CP 2398. Even a decade later, Mr. Scheidler still represented to Kitsap County that Mr. Ellerby described the purported conflict of interest as “dubious” in 1998. CP 2422 ¶2. Mr. Scheidler lacked any proof (let alone clear, cogent, and convincing proof) that Mr. Ellerby made or knew he made a false representation or that Mr. Scheidler was ignorant of any false statement from Mr. Ellerby. The elements of the claim simply did not exist, and the undisputed facts showed that Mr. Scheidler’s claim was wholly without merit. The trial court did not err in dismissing this claim.

5. Mr. Scheidler’s “breach of duty” and “breach of promise” claims failed as a matter of law.

Mr. Scheidler claimed that Mr. Ellerby conspired with the attorney for Kitsap County to withhold legal representation and that Mr. Ellerby’s “disrespect for the law” exhibited in the alleged conspiracy amounted to a breach of duty. CP 10 ¶7. However, a claim for breach of a fiduciary duty is really an action for legal malpractice. *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). As a matter of law, a lawyer owes his or her client the highest duty of care. *Id.* Breach of that duty is not a separate or distinct claim. *Id.*

Thus, Mr. Scheidler’s claims for “breach of promise” and “breach of duty” were not legally cognizable, especially since Mr. Scheidler also

alleged a claim for negligence arising out of Mr. Ellerby's legal representation. Moreover, Mr. Scheidler based his "breach" claims on his civil-conspiracy claim. Because his civil-conspiracy claim lacked merit, Mr. Scheidler's breach-of-promise and breach-of-duty claims also failed.

6. Mr. Scheidler's negligence claims failed because there was no breach of any duty or promise.

A legal-malpractice plaintiff must prove (1) the existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred. *Hizey*, 119 Wn.2d at 260-261. A plaintiff must prove each element of the claim to avoid dismissal. *Craig v. Wn. Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (1999). If an attorney-client relationship is established, the elements for legal malpractice are the same as for negligence. *Hizey*, 119 Wn.2d at 261.

Mr. Scheidler failed to show that Mr. Ellerby breached any duty or promise, and he could not demonstrate that he was damaged as a result of such a breach. Nevertheless, even if it were assumed that Mr. Ellerby breached a duty to Mr. Scheidler, for Mr. Scheidler to prevail against Mr. Ellerby in a malpractice case, he was required to show that, "but for" Mr. Ellerby's alleged failures, he would have won his appeal before the

Board of Tax Appeals. *See Kommavongsa v. Haskell*, 149 Wn.2d 288, 300, 67 P.3d 1068 (2003). Mr. Scheidler made no effort to make the required showing, and his claims based on negligence failed as a result.

7. Mr. Scheidler’s emotional-distress claims were defective as a matter of law.

a. Mr. Scheidler could not show negligent infliction of emotional distress.

Washington recognizes the tort of negligent infliction of emotional distress. *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976). Although the elements of the claim are the same as those for an ordinary negligence claim, the harm to the plaintiff must have been foreseeable. *Id.* In addition, there must be an objective manifestation of the mental and emotional suffering, and this reaction must be reasonable, *i.e.*, that a reasonable person would have suffered the harm alleged. *Id.* at 436.

To prove negligent infliction of emotional distress, a plaintiff must show that the defendant placed him in actual peril at the time of the alleged negligence. *Branom v. State*, 94 Wn. App. 964, 975, 974 P.2d 995 (1999), *rev. denied* 138 Wn.2d 1023 (1999) (citation omitted). Plaintiff also must offer expert medical evidence that he has a “diagnosable mental disorder” that was **caused by** the alleged negligence. *See Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998) (emphasis added). Mr. Scheidler never produced any such evidence.

Mr. Scheidler’s claim failed as a matter of law. As set forth above,

Mr. Ellerby did not breach any duty he owed to Mr. Scheidler. It was certainly not foreseeable that the purported harm would occur, especially when Mr. Ellerby advised Mr. Scheidler that he could move for a continuance instead of arguing his tax appeal without an attorney. CP 34 ¶3. Mr. Scheidler's claim of negligent infliction of emotional distress failed as a matter of law.

b. Mr. Scheidler failed to demonstrate intentional infliction of emotional distress.

The conduct of Mr. Ellerby in no way supported a claim of intentional infliction of emotional distress, or the tort of outrage. To prove intentional infliction of emotional distress, a plaintiff must show: (1) extreme and outrageous conduct; (2) that intentionally or recklessly inflicts emotional distress; and (3) severe emotional distress to the plaintiff. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195-96, 66 P.3d 630 (2003). The bar for outrageous conduct is set very high. *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998). It is not enough that defendant's conduct is tortious or criminal, or even that it was intended to cause emotional distress. *Id.* The conduct must be so egregious that it is outside the bounds of common decency and is "utterly intolerable in a civilized community." *Id.*

Mr. Scheidler's allegations regarding Mr. Ellerby's conduct here are clearly insufficient to show that it was "utterly intolerable in a civilized

community.” No reasonable jury could find that Mr. Ellerby’s alleged actions approached the requisite level of atrocity. Mr. Scheidler’s outrage claim was properly dismissed as a matter of law.

D. The superior court properly dismissed claims allegedly arising from events in 2008.

Mr. Scheidler’s defamation and false-light claims were based on Mr. Ellerby’s internal communication to Mr. Mills, the president of Mr. Ellerby’s law firm. Mr. Scheidler alleged that Mr. Ellerby communicated false statements to Mr. Mills about the reasons for his withdrawal:

[T]he information about Plaintiff communicated by Defendant Ellerby to Mills consisted of the following words: “you and your wife decided not to have Ellerby represent you at the hearing before the Board of Tax Appeals”; “Ellerby never declined to represent you” and was never disqualified from representing you ... because of Kitsap County’s suggestion that Ellerby and our firm may have a conflict of interest.”

CP 2409 ¶4.

Mr. Scheidler claimed that the information communicated to Mr. Mills was false because in a letter dated November 16, 1998, Mr. Ellerby requested that opposing counsel, the attorney for Kitsap County, waive “any arguable” conflicts of interest to allow Mr. Ellerby to continue representing the Scheidlers. CP 17 ¶1. Mr. Scheidler further contended that the information was false due to Mr. Ellerby’s signature on a notice of withdrawal which contained a notation that the withdrawal was

based on a “conflict of issue raised for the first time on November 17, 1998.” CP 19.

Mr. Scheidler alleged that Mr. Ellerby’s statements to Mr. Mills about the reasons for his withdrawal, and that he never declined to represent the Scheidlers, were false. CP 9-10. Mr. Scheidler based this allegation on the theory that in 1998, Mr. Ellerby represented to the Board of Tax Appeals that a conflict of interest was the basis for his withdrawal, yet Mr. Ellerby allegedly later claimed in 2008 that no conflict of interest actually existed in 1998. *Id.* These allegations were untrue and did not support either a defamation or a publication in a false light invasion of privacy claim.

1. Mr. Scheidler did not establish a prima facie defamation claim.

Defamation requires a showing of: (1) a false statement, (2) an unprivileged communication, (3) fault, and (4) damages. *Eubanks v. N. Cascades Broad.*, 115 Wn. App. 113, 119, 61 P.3d 368 (2003). Summary judgment plays a particularly important role in defamation cases. *Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768 (2005). “To survive a defense motion for summary judgment, a defamation plaintiff must allege facts that would raise a genuine issue of fact for the jury as to each element.” *Id.* at 822 (citing *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981)). A defamation plaintiff must present clear, cogent, and

convincing proof in opposing a summary judgment motion. *Guntheroth v. Rodaway*, 107 Wn.2d 170, 175-76, 727 P.2d 982 (1986).

Defamatory statement liability arises when it is communicated or “published” to someone other than the defamed. *Pate v. Tyee Motor Inn, Inc.*, 77 Wn.2d 819, 821, 467 P.2d 301 (1970). **Internal business communications among employees, when acting in the ordinary course of business, are not considered “published” in the context of a defamation claim.** *Id.* at 820 (emphasis added). Further, an otherwise defamatory statement may be privileged under the “common interest” qualified privilege if “the declarant and the recipient have a common interest in the subject matter of the communication.” *Moe v. Wise*, 97 Wn. App. 950, 957-58, 989 P.2d 1148 (1999). The privilege applies unless the declarant abuses the privilege by “know[ing] the matter to be false or act[ing] in reckless disregard as to its truth or falsity [through actual malice] ... [or] knowingly publish[ing] the matter to a person to whom its publication is not otherwise privileged.” *Id.* at 963.

A false statement is actionable only if it “presents a substantial danger to the plaintiff’s personal or business reputation.” *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int’l Union, AFL-CIO, Local 1001*, 77 Wn. App. 33, 44, 888 P.2d 1196 (1995). Where a private individual is involved, plaintiff must prove that “defendant knew or, in the exercise of reasonable care, should have known that the statement was

false, or would create a false impression in some material respect.” *Taskett v. KING Broad. Co.*, 86 Wn.2d 439, 445, 546 P.2d 81 (1976); *Moe*, 97 Wn. App. at 957.

Mr. Scheidler offered no evidence at any time that showed either Mr. Ellerby or Mr. Mills “published” the statements within the meaning of a defamation action because the statements were privileged. Mr. Ellerby and Mr. Mills shared a common interest by virtue of their shared employment at a law firm; they were required to ensure the confidentiality of a former client’s legal representation. In addition, Mr. Ellerby and Mr. Mills were acting in the ordinary course of business as employees of the law firm responding to Mr. Scheidler’s contentions and demand for a refund, and their purely internal communications cannot form the basis of a defamation claim. Moreover, no evidence showed that Mr. Ellerby actually made any false statements, or that Mr. Scheidler suffered any damage as a result of the allegedly false statements.

2. Mr. Scheidler had no facts supporting a “false light invasion of privacy” claim.

A “false light” invasion-of-privacy claim requires that a defendant “publicize” a matter placing another in a false light, where: “(a) the false light would be highly offensive to a reasonable person and (b) the [defendant] knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed.” *Eastwood v.*

Cascade Broad. Co., 106 Wn.2d 466, 470-71, 722 P.2d 1295 (1986).
“Publicity” means “communication to the public at large so that the matter is substantially certain to become public knowledge, and that communication to **a single person** or a small group does not qualify.”
Fisher v. Dep’t of Health, 125 Wn. App. 869, 879, 106 P.3d 836 (2005)
(emphasis added).

Mr. Scheidler failed to show, and indeed could not show, that the statements were “publicized” within the meaning of an invasion-of-privacy claim; he also failed to show that the matter was communicated to the public. Nor did any facts show that Mr. Ellerby made any false statements or placed Mr. Scheidler in a light which would be “highly offensive to a reasonable person.” Even if the facts alleged stated a claim for invasion of privacy, the privilege defeated the claim. The statements in question were protected by the conditional “common interest” privilege. *See, e.g.*, Restatement (Second) of Torts § 596 (“common interest” privilege).

Even if Mr. Scheidler could show that Mr. Ellerby’s communication to Mr. Mills somehow placed Mr. Scheidler in a false light, he lacked the requisite proof of the elements of this cause of action. Mr. Scheidler offers no argument, citation, or fact on appeal to the contrary. The superior court properly dismissed this claim.

E. Mr. Scheidler presented no proof of any damages.

Damages must “be determined on some rational basis and other than by pure speculation and conjecture.” *O’Brien v. Larson*, 11 Wn. App. 52, 54, 521 P.2d 228 (1974). Mr. Scheidler offered no evidence, only bare allegations in his complaint and interrogatory answers, that he suffered any damage from Mr. Ellerby’s actions. *See* CP 198, CP 260 ¶1. These self-serving assertions were nothing more than “speculation and conjecture.” Mr. Scheidler presented no evidence of damage and his claims were properly rejected.

F. The Washington Constitution does not guarantee the right to a jury trial of a frivolous lawsuit.

Mr. Scheidler’s contends the superior court erred by interfering with his constitutional right to a jury trial. App. Br. at 19-20. But, the Washington Constitution does not give a plaintiff the right to drag a defendant into a jury trial on a frivolous lawsuit properly dismissed under CR 56. If this were not the case, all summary judgment proceedings would be unconstitutional. Every published opinion in which a court has affirmed summary judgment dismissal of a case attests to the meritless nature of Mr. Scheidler’s argument. This is a fundamental principle of constitutional analysis. In discussing the federal counterpart to CR 56, U.S. Supreme Court has held:

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are

adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548 (1986).

Here, the superior court dismissed a case devoid of genuine factual disputes, and Mr. Ellerby was entitled to judgment as a matter of law. There was no error, and the superior court's judgment should be affirmed.

G. The trial court properly awarded Mr. Ellerby his reasonable attorney fees and costs.

A superior court has broad discretion to address CR 11 violations, frivolous pleadings, and discovery abuse. *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994) (CR 11); *Entm't Indus. Coalition v. Health Dep't*, 153 Wn.2d 657, 666, 105 P.3d 985 (2005); *Reid v. Dalton*, 124 Wn. App. 113, 128, 100 P.3d 349 (2004) (RCW 4.84.185); *Wn. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993) (CR 37). The trial court acted well within its discretion to dismiss Mr. Scheidler's claims and award Mr. Ellerby his attorney fees based on Mr. Scheidler's discovery abuses.

1. Mr. Scheidler's repeated discovery violations warranted dismissal.

"A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed absent a clear abuse of discretion." *Mayer v. Sto Indus., Inc.*,

156 Wn.2d 677, 684, 132 P.3d 115 (2006) (internal citation omitted). “A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” *Fisons*, 122 Wn.2d at 339, 858 P.2d 1054 (internal citation omitted). “A discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard; the court’s decision is ‘manifestly unreasonable’ if ‘the court, despite applying the correct legal standard’ to the supported facts, adopts a view ‘that no reasonable person would take.’” *Mayer*, 156 Wn.2d at 684, 132 P.3d 115 (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Since the superior court is in the best position to decide an issue, deference should normally be given to its decision. *Fisons*, 122 Wn.2d at 339, 858 P.2d 1054. A trial court’s reasons for imposing discovery sanctions should “be clearly stated on the record so that meaningful review can be had on appeal.” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). An appellate court can disturb a trial court’s sanction only if it is clearly unsupported by the record. *See Ermine v. City of Spokane*, 143 Wn.2d 636, 650, 23 P.3d 492 (2001) (a reasonable difference of opinion does not amount to abuse of discretion).

Mr. Scheidler’s allegation that Judge Hartman did not consider the facts, evaluate whether a lesser sanction would deter discovery abuse, or

analyze his opposition, is incorrect. App. Br. at 15-16, 60 ¶2. To the contrary, after expressly considering Mr. Scheidler's 227 pages of opposition papers opposing sanctions, Judge Hartman found on the record that Mr. Scheidler willfully violated the discovery order of August 6, 2010 by refusing to appear for his deposition and interfering in the depositions of Mary Scheidler and Dr. Holder. CP 1270. Judge Hartman found that Mr. Scheidler's conduct demonstrated a pattern of discovery abuse, prejudiced Mr. Ellerby's defense, and increased litigation costs. CP 1270. Finally, Judge Hartman found a lesser sanction than dismissal would not suffice. CP 1270. In so doing, Judge Hartman expressly evaluated whether Mr. Scheidler had made any showing that any lesser sanction than dismissal would deter his conduct and concluded he had not. CP 1270.

The superior court's findings and legal conclusions amply identified the offending behavior. Mr. Scheidler cites no authority that this order required any greater detail or specificity. CP 1269-71.

2. Mr. Scheidler's violations of CR 11 and his frivolous suit under RCW 4.84.185 warranted an award of defense fees and costs.

Where an action is not supported by any rational argument based on the law or the facts, it is an abuse of discretion **not** to award attorney's fees under RCW 4.84.185 and CR 11. *See Déjà vu-Everett-Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 263-64, 979 P.2d 464 (analyzing dismissal under CR 11) (emphasis added). A pro se plaintiff

may be subject to CR 11 sanctions if three conditions are met: (1) the action is not well grounded in fact, (2) it is not warranted by existing law, and (3) the party signing the pleading has failed to conduct a reasonable inquiry into the factual or legal basis of the action. *See* CR 11; *Lockhart v. Greive*, 66 Wn. App. 735, 743–44, 834 P.2d 64 (1992). The decision to award attorney’s fees as a sanction for a frivolous action is left to the discretion of the trial court. *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 132, 783 P.2d 82, *rev. denied*, 113 Wn.2d 1001, 777 P.2d 1050 (1989); *Lockhart*, at 744, 834 P.2d 64.

Similarly, RCW 4.84.185 provides in relevant part:

In any civil action, the court ... may, upon written findings ... that the action ... 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.

Mr. Scheidler has failed to assign error to any of the superior court’s factual findings regarding sanctions. Unchallenged factual findings are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002) (unchallenged findings of fact in support of sanctions award are verities on appeal).

Reasonable legal and factual research would have revealed to Mr. Scheidler: (1) three-year statutes of limitation barred most of his claims; (2) internal communications could not form the basis of either a

defamation or publication in a false light claim; and (3) his action was not well grounded in fact. Indeed, Mr. Scheidler actually sought the opinion of an outside attorney **seven months before** filing his complaint and was warned that the statute of limitations likely applied and his alleged disability would not toll them. CP 2772. Mr. Scheidler's communication to Mr. Avery the next morning, July 29, 2008, asking him to waive statutory limitations, demonstrates that Mr. Scheidler elected to proceed despite this warning. CP 2424 ¶3. After filing, Mr. Ellerby's Answer and discovery responses warned Mr. Scheidler that his lawsuit was frivolous and raised the statute-of-limitations defense. CP 1289, 1314, 1319.

After finding that sanctions were warranted, the superior court reviewed the amounts billed in Mr. Ellerby's defense fully. CP 1787 ¶1. Mr. Ellerby's claim for fees and costs was accompanied by both a declaration of the fees and costs incurred and detailed billing records showing each entry of time and expense. CP 2801. The declaration showed that defense counsel had billed Mr. Ellerby's insurance carrier \$132,427.23, and the superior court awarded the requested amount. *See Koch v. Mut. of Enumclaw Ins.*, 108 Wn. App. 500, 510-11, 31 P.3d 698 (2001), *rev. denied*, 145 Wn.2d 1028, 42 P.3d 974 (2002).

a. Mr. Scheidler's contention that Mr. Ellerby waived his claim for attorney fees by defending against Mr. Scheidler's claim is meritless.

Mr. Scheidler does not challenge the amount of the sanctions directly; rather, he contends that the imposition of sanctions was improper because Mr. Ellerby knowingly tolerated his CR 11 violations for over two years, which he alleges resulted in the waiver of the violations. App. Br. at 56-57. Mr. Scheidler contends that Mr. Ellerby's "waiver" is a complete bar to CR 11 sanctions. App. Br. at 57 ¶1.

Mr. Scheidler's arguments fail. The superior court carefully considered the record and entered detailed findings supporting the award of sanctions. Mr. Ellerby consistently maintained that Mr. Scheidler's claims were baseless and that he would seek his defense fees and costs. Judge Hartman expressly warned Mr. Scheidler that his advancement of meritless litigation was likely to result in an attorney fee award in the range of six figures. CP 2968-69; App. Br. 60 ¶ 4. Mr. Scheidler may not credibly claim that the extent of his own wrongdoing bars Mr. Ellerby's recovery. Any contrary position would undercut the entire deterrent purpose of CR 11 and the frivolous-litigation statute.

b. Judge Hartman demonstrated no bias toward Mr. Scheidler at any time.

Alternatively, Mr. Scheidler alleges that the superior court was biased and that this prejudice is shown by the imposition of the CR 11

sanctions against him. A trial court is presumed to perform its functions regularly and properly without bias or prejudice. *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (internal citation omitted), *rev. denied* 167 Wn.2d 1002, 220 P.3d 207 (2009). The test for determining whether a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988), *cert. denied*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989)). The party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. *State v. Dominguez*, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996).

There are no facts whatsoever demonstrating any bias in Judge Hartman's conduct of this action. By Mr. Scheidler's own admission, Judge Hartman told Mr. Scheidler that his discovery motions lacked merit and that he could face fees in excess of \$100,000 if he persisted. CP 2968-69; App. Br. at 60 ¶ 4. The imposition of CR 11 sanctions evidences only Mr. Scheidler's violations of court rules, not the superior court's bias.

H. The superior court properly evaluated Mr. Scheidler's unsupported requests for accommodation.

The superior court was neither arbitrary nor capricious when considering Mr. Scheidler's unsubstantiated requests for accommodation.

Indeed, those requests were granted in whole or in part on four occasions. CP 50 (6/22/09), 2178 (8/21/09), 761(4/16/10), 1121 (12/10/10). Mr. Scheidler's requests for accommodation were denied only after he openly violated Judge Hartman's December 10, 2010 order that he provide medical proof supporting the request for accommodation. CP 1122 ¶ 1.

GR 33 provides litigants with disabilities a process for requesting and obtaining reasonable accommodation to access Washington's courts.

GR 33(a)(2) defines a "[p]erson with a disability" as:

person with a sensory, mental or physical disability as defined by the Americans with Disabilities Act of 1990 (§ 42 U.S.C. 12101 et seq.), the Washington State Law Against Discrimination (RCW 49.60 et seq.), or other similar local, state, or federal laws.

GR 33(a)(2). Further, GR 33(b)(3) expressly provides that the court assessing the request for accommodation "may require the applicant to provide additional information about the qualifying disability to help assess the appropriate accommodation." GR 33 (b)(3).

Here, Mr. Scheidler received stays and continuances that extended the litigation over five months on at least four separate occasions. CP 50, 2178, 761, 1121. The only accommodation requests the superior court denied outright were the requests Mr. Scheidler made after he defied its order that he provide current medical information regarding the nature of his claimed disability and the accommodation being sought. CP 1122 ¶ 1. By 2011, the superior court had ample proof that, far from being disabled,

Mr. Scheidler had been able to pursue his case vigorously without accommodation and indeed had pursued other litigation during periods when he had obtained stays. CP 1121-22, 1278 ¶ 3; *see also* CP 763, 2722, 2724, 2730.

I. Mr. Ellerby should be awarded fees and costs under RAP 18.9(a).

RAP 18.9(a) provides that:

(t)he appellate court on its own initiative ... may order a party or counsel who uses these rules for the purpose of delay ... to pay terms or compensatory damages to any other party who has been harmed by the delay . . .

RAP 18.9(a) permits an appellate court to award a party its attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action. *Reid v. Dalton*, 124 Wn. App. 113, 128, 100 P.3d 349 (2004). An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005); *Yurtis v. Phipps*, 143 Wn. App. 680, 693, 181 P.3d 849 (2008) (*pro se* litigant's multiple, frivolous appeals and motions to modify warranted imposition of attorney fees and costs).

Mr. Ellerby should be awarded his attorney fees and costs under RAP 18.9. Mr. Scheidler's request for direct review is without merit and

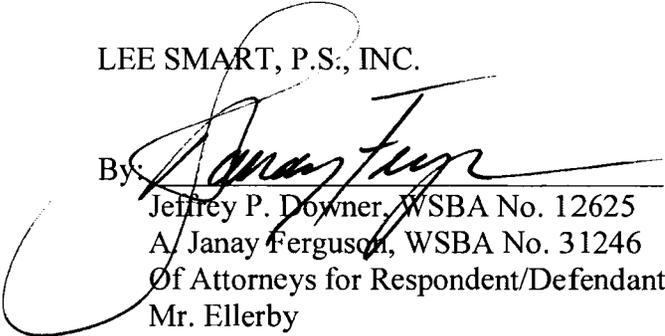
intended only to delay. It is procedurally deficient, thereby unnecessarily increasing the time required for Mr. Ellerby's counsel to respond. This is precisely the abuse RAP 18.9 is intended to address. Mr. Ellerby should be awarded his reasonable attorney fees and costs incurred in opposing Mr. Scheidler's request for direct review.

VI. CONCLUSION

Mr. Scheidler's assignments of error underlying his request for direct review are speculative, contrary to undisputed facts, and wholly unsupported by the record. He has offered no compelling authority whatsoever to establish that the superior court misapplied the law or abused its discretion. This court should affirm the superior court's decisions in their entirety and award Mr. Ellerby his reasonable attorney fees and costs pursuant to RAP 18.9.

Respectfully submitted this 35th day of June, 2011.

LEE SMART, P.S., INC.

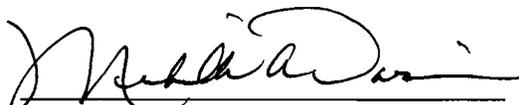
By: 

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Mr. Ellerby

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on June 30, 2011, I caused service of *Petition for Review* via ABC Legal Messengers, Inc., to:

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Court of Appeals, Division I
One Union Square
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(Original with \$200 check)


Michelle A. Davidson, Legal Assistant
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