

**FILED**

SEP 28 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 303802

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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GREGORY ROSE and CATHERINE ROSE, and the marital community  
composed thereof,

*Plaintiffs,*

vs.

FMS, INC., d/b/a OKLAHOMA FMS, INC., an Oklahoma corporation,

*Defendant-Respondent,*

and

ROBERT W. MITCHELL,

*Appellant.*

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REPLY BRIEF OF APPELLANT ROBERT W. MITCHELL

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

REPLY .....1

I. Reply to FMS’s restatement of the case .....1

II. What FMS characterizes as the superior court’s “findings” are inadequate .....3

III. FMS does not meaningfully address the issue of “default” under the FDCPA, and the authority it cites is consistent with Mr. Mitchell’s analysis .....5

IV. The superior court’s erroneous legal conclusion that the Roses’ debt was not in default has been preserved for review because Mr. Mitchell raised the issue in opposition to FMS’s sanctions motion .....7

V. Mr. Mitchell is not precluded from arguing that the Roses’ debt was in default in opposition to FMS’s sanctions motion simply because his clients abandoned their appeal of the superior court’s adverse summary judgment ruling on that issue.....10

VI. FMS’s argument that there is substantial evidence to support the superior court’s summary judgment determination the Roses’ debt was not in default is immaterial; and it is incorrect in any event because it is premised on an incorrect understanding of “default.” .....13

VII. The Court should deny FMS’s request for additional attorney fees and costs on appeal.....16

CONCLUSION.....17

CERTIFICATE OF SERVICE .....18

APPENDIX

## TABLE OF AUTHORITIES

### Cases

<i>Alibrandi v. Financial Outsourcing Servs., Inc.</i> , 333 F.3d 82 (2 <sup>nd</sup> Cir. 2003).....	6-7
<i>Biggs v. Vail</i> , 124 Wn.2d 193, 876 P.2d 448 (1994).....	4, 17
<i>Breda v. B.P.O. Elks Lake City</i> , 120 Wn. App. 351, 90 P.3d 1079 (2004).....	12-13
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	11-12
<i>Engstrom v. Goodman</i> , 166 Wn. App. 905, 271 P.3d 959, <i>rev. denied</i> , --- Wn.2d --- (Sept. 5, 2012).....	4-5, 12
<i>Hicks v. Edwards</i> , 75 Wn. App. 156, 876 P.2d 953 (1994), <i>rev. denied</i> , 125 Wn.2d 1015 (1995).....	11-12
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002).....	14
<i>Jackowski v. Borchelt</i> , 174 Wn.2d 720, 278 P.3d 1100 (2012).....	14
<i>Just Dirt, Inc. v. Knight Excavating, Inc.</i> , 138 Wn. App. 409, 157 P.3d 431 (2007).....	4
<i>Kelly v. Moesslang</i> , 2012 WL 4086819 (Wn.App., Div. III, Sept. 18, 2012).....	12
<i>Kinney v. Cook</i> , 150 Wn.App. 187, 208 P.3d 1 (2009).....	16
<i>MacDonald v. Korum Ford</i> , 80 Wn. App. 877, 912 P.2d 1052 (1996).....	4, 12

<i>Peterson v. Cuff</i> , 72 Wn. App. 596, 603, 865 P.2d 555 (1994).....	17
<i>State v. Dailey</i> , 93 Wn.2d 454, 610 P.2d 357 (1980).....	3
<i>Washington Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.</i> , 168 Wn.App. 710, 282 P.3d 1107 (2012).....	16-17

**Statutes and Rules**

15 U.S.C. § 1692f .....	2
CR 11 .....	4, 8, 11, 16
CR 11(a).....	11
CR 26(g).....	17
CR 26(i) .....	2
CR 56(g).....	17
RAP 1.2(a) .....	5
RAP 3.1 .....	12
RAP 18.1(a) .....	16

## REPLY

### I. Reply to FMS's restatement of the case.

1. FMS states that Mr. Mitchell advised the Roses to keep a log of calls from FMS. FMS Br., at 5 (citing CP 403, internal 36:1-10). This statement is contradicted by the record on which FMS relies. The cited record support for the statement consists of deposition testimony from Gregory Rose that he did not know why his wife started keeping a call log, *see* CP 403 (internal 36:1-4), and that he did not know exactly when she started keeping it, *see id.* (internal 36:11-16). However, elsewhere in his deposition, Mr. Rose testified that his wife started keeping a call log before he retained Mr. Mitchell to stop the calls. *See* CP 407 (internal 51:19-25).

2. FMS states that Mr. Mitchell never asked FMS to stop calling the Roses, but only sought a monetary settlement. FMS Br., at 5-6 (citing CP 296 & 314-15). This statement is contradicted by the record on which FMS relies. The cited record support for the statement consists of a letter from Mr. Mitchell to FMS. CP 315. The letter does not mention injunctive or monetary relief. Instead, it states "I encourage you to contact my office to resolve this matter." CP 315. The letter encloses a copy of the complaint, which includes requests for both injunctive and monetary relief. CP 315.

3. FMS states that Mr. Mitchell never addressed the default status of the Roses' debt in pre-filing correspondence. FMS Br., at 6-7 (citing, *inter alia*, CP 323-25). This statement is contradicted by the record on which it relies. The cited record support for the statement consists of email correspondence between Mr. Mitchell and FMS, in which Mr. Mitchell states "I disagree with your interpretation of 15 U.S.C. § 1692f." CP 324-25.

4. FMS raises a number of complaints about discovery to the Roses and from Mr. Mitchell on their behalf. FMS Br., at 11-16. While the discovery requests and answers speak for themselves, disputes regarding the requests were resolved pre-judgment by means of CR 26(i) conferences between counsel. *See* CP 536 & 538-39. No motion to compel or for a protective order was ever filed by FMS.

5. FMS states that Mr. Mitchell misread FMS's call log, regarding the number of messages left on the Roses' home, cell and work phones. FMS Br., at 17. FMS fails to acknowledge that the call log misstates which numbers were called. *See* CP 586-92. In fact, Mr. Mitchell accurately read the call log. *See id.* FMS's actual complaint is that he failed to recognize that FMS's own call log was apparently incorrect.

6. FMS complains about a motion for reconsideration filed by Mr. Mitchell on behalf of the Roses, but inadvertently not served on FMS. FMS Br., at 17-20. FMS fails to acknowledge that Mr. Mitchell voluntarily withdrew the motion. *See* RP 29.

7. FMS complains about the Roses' discovery of certain discovery documents after summary judgment was entered against them. FMS Br., at 18 & 21. FMS provides no record support for the claim that Mr. Mitchell was responsible for the failure to discover them earlier. *See id.*

**II. What FMS characterizes as the superior court's "findings" are inadequate.**

FMS does not dispute the findings required to support a sanctions award. *See* Mitchell Br., at 23-24. Instead, FMS argues that the superior court entered findings in its letter ruling regarding the entitlement to sanctions. *See* FMS Br., at 22-24 (quoting CP 998). These ostensible findings are not labeled as such by the superior court. *See* CP 998. The superior court describes them as a "ruling," *see* CP 997, and uses language typically indicative of conclusions of law, *see* CP 988 (stating "I further conclude ..."). The letter contemplates a subsequent written order, *see* CP 999 & 1135, which was drafted by FMS and approved by the court, *see* CP 1142-46. The written order includes Findings, but does not incorporate

the letter ruling by reference, nor does it reproduce any of the ostensible findings contained therein. *See* CP 1142-46; *cf. State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980) (holding final written order supersedes court's earlier oral comments).

At any rate, the letter ruling contains inadequate findings to support the sanctions award. None of the ostensible findings describes the sanctionable conduct in anything more than general terms, *see* CP 998, even though "it is incumbent upon the court to specify the sanctionable conduct in its order." *Biggs v. Vail*, 124 Wn.2d 193, 201-02, 876 P.2d 448 (1994) (remanding for "*explicit* findings as to which filings violated CR 11, if any, as well as *how* such pleadings constituted a violation"; emphasis added). Moreover, crucial findings are omitted. For example, There are no findings regarding the amount, type, and effect of the sanctions warranted by specific conduct at issue. *See MacDonald v. Korum Ford*, 80 Wn. App. 877, 892-93, 912 P.2d 1052 (1996); *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 415-16, 157 P.3d 431 (2007). There is not even a finding that Mr. Mitchell's allegation of default on the part of the Roses was baseless. *See Engstrom v. Goodman*, 166 Wn. App. 905, 917, 271 P.3d 959 (indicating pleading must be *both* baseless *and* signed without reasonable inquiry to warrant sanctions), *rev.*

*denied*, --- Wn.2d --- (Sept. 5, 2012). For all of these reasons, the superior court's letter ruling should not be deemed to be "findings."<sup>1</sup>

**III. FMS does not meaningfully address the issue of "default" under the FDCPA, and the authority it cites is consistent with Mr. Mitchell's analysis.**

In his opening brief, Mr. Mitchell noted that the protections of the federal Fair Debt Collection Practices Act (FDCPA) are not triggered unless a debt is in default, and that the Act does not define the term "default." *See Mitchell Br.*, at 14. FMS seems to agree with these points. *See FMS Br.*, at 24-25.

Mr. Mitchell also noted that the existence of a default is determined according to the terms of the contract creating the indebtedness and applicable state law, and that the Roses were in default under their contract with Kohl's and state law. *See Mitchell Br.*, at 14. Their contract with Kohl's provides in part:

**Default/Collection Costs.** You will be in default if you fail to pay any Minimum Payment by the time and date it is due, if you breach any other promise or obligation under

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<sup>1</sup> FMS contends that Mr. Mitchell cannot argue that the superior court erred in omitting crucial findings because he has not assigned error to the ostensible findings contained in the letter ruling. *See FMS Br.*, at 26-28. Aside from the problem of assigning error to a finding that is not designated as such, this argument wrongly assumes that the letter ruling contains findings that should be read into the court's written order. In any event, Mr. Mitchell's assignment of error and statement of issues relating to the assignment of error adequately present these issues for review. *See Mitchell Br.*, at 2; *see also* RAP 1.2(a) (requiring liberal interpretation of rules to facilitate decision on merits).

this Agreement, if you become incapacitated or die, or if you file for bankruptcy.

CP 566 (bold in original). This definition accords with the meaning of default under state law. *See Mitchell Br.*, at 16-17. It is undisputed that the Roses had failed to pay minimum payments and had also declared bankruptcy, rendering them in default under the terms of their contract and state law and triggering application of the FDCPA.

Without specifically addressing the foregoing analysis, FMS cites *Alibrandi v. Financial Outsourcing Servs., Inc.*, 333 F.3d 82, 86-87 (2<sup>nd</sup> Cir. 2003), for the proposition that “the classification of a debt collector depends upon the status of a debt, rather than the type of collection activities used.” *See FMS Br.*, at 25. Of course, Mr. Mitchell agrees with this proposition to the extent that the FDCPA does not apply unless the debt in question is in default.

*Alibrandi* does not alter the default status of the Roses’ debt because it follows the same contract-based analysis of default, explaining:

Until Congress ends the statutory silence surrounding the term “default,” we conclude that the interests of debtors, creditors, collectors, and debt service providers will best be served by affording creditors and debtors considerable leeway contractually to define their own periods of default, according to their respective circumstances and business interests. Once the parties have contractually set the period of delinquency preceding default, it will be a relatively simple matter to determine whether the Act applies.

333 F.3d at 87 n.5.

The facts of *Alibrandi* are distinguishable, however. In *Alibrandi*, the court rejected the debtor's argument that his debt was in default immediately after payment became due, in the absence of a contractual provision defining default in this way. *See* 333 F.3d at 87 & n.5. It appears that the contract between the debtor and the original creditor was not part of the record before the court in *Alibrandi*, and the debtor relied solely on the dictionary definition of default. *See id.* at 86-87.<sup>2</sup> In contrast, the Roses' contract with Kohl's is in the record, and it clearly indicates default occurs upon missing any minimum payment or filing bankruptcy, both of which occurred in this case. In sum, the authority that FMS cites is entirely consistent with Mr. Mitchell's analysis of default under the FDCPA.

**IV. The superior court's erroneous legal conclusion that the Roses' debt was not in default has been preserved for review because Mr. Mitchell raised the issue in opposition to FMS's sanctions motion.**

FMS argues that Mr. Mitchell is procedurally barred from arguing on appeal that the Roses' debt was in "default" within the meaning of the FDCPA. *See* FMS Br., at 28-30. This argument is premised upon the factual claim that "Mr. Mitchell never argued that the debt was actually 'in default'" in the superior court. *See* FMS Br., at 29. FMS further claims

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<sup>2</sup> The contract between the creditor and the debt collector in *Alibrandi* provided that the account was not "delinquent," much less in default, for the first 120 days after it came due." *See* 333 F.3d at 86 n.4.

that “Mr. Mitchell acknowledged and did not allege any error in the trial court’s ruling on summary judgment that the debt was not ‘in default’ when the account was assigned to FMS.” *Id.* Adverting to the rule that new issues cannot be raised for the first time on appeal, FMS concludes that Mr. Mitchell has therefore “waived” the right to appeal. *See* FMS Br., at 29.

The factual underpinning for FMS’s waiver argument is incorrect and unsupported by FMS’s reference to the record. FMS supports its factual claims with a “see generally” citation to Mr. Mitchell’s response brief to FMS’s sanctions motion. *See* FMS Br., at 29 (citing CP 626-45). The cited pages reveal that Mr. Mitchell did, in fact, argue that the Roses’ debt was in default and that the superior court’s summary judgment order was erroneous, contrary to FMS’s claims. In the cited pages, Mr. Mitchell states:

Defendant [FMS] asserts that Plaintiff’s counsel [Mr. Mitchell] committed CR 11 violations by failing or refusing to conduct a reasonable investigation into the facts of this case prior to filing this action with the Court. *This allegation is based on the fact that Defendant asserted at the outset that this debt was not in default at the time it was assigned. This assertion too must fail because it is factually and legally inaccurate.*

CP 629 (lines 21-25; brackets & emphasis added).

Plaintiff’s counsel is not obligated to waive litigation based on a debt collector’s self-serving classification of a debt as a non-default debt, especially where the collector’s written

communications stating that an account is “seriously delinquent” would lead any reasonable person to believe otherwise[.]

CP 630 (lines 1-5).

Plaintiff’s counsel’s research proved that Defendant’s defense [based on the default status of the Roses’ debt] was untenable.

CP 630 (lines 20-21; brackets added).

Defendant asserted that the debt was not a “consumer debt” and was not in “default” when it was assigned for collection. These two defenses were tenuous at best because the underlying debt was a Kohl’s Department Store account and the third party debt collector Defendant mailed Plaintiffs a collection letter the same month the debt was assigned for collections which stated that the account was “seriously delinquent.” In fact, not only did Plaintiffs only use the account to purchase consumer goods, but it is unlikely that Kohl’s even issues “commercial” credit card accounts. More importantly, the final collection letter defendant mailed Plaintiffs illustrated that the account was 6 months past due. Plaintiffs and Plaintiffs’ counsel therefore reasonably believed that the account was a consumer account and that it was in default when it was assigned to Defendant for collections. *Therefore, despite the fact that the Court dismissed Plaintiffs’ claims at summary judgment, there is absolutely no evidence that filing this lawsuit was vexatious or frivolous as Defendant’s motion suggests.*

(Emphasis added.)<sup>3</sup>

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<sup>3</sup> This quotation is from p. 10 of Mr. Mitchell’s response brief to FMS’s sanctions motions, which was apparently inadvertently omitted from the Clerk’s Papers. *See* CP 634-35 (reproducing pp. 9 and 11 of the response brief, and omitting p. 10). A Supplemental Designation of Clerk’s Papers for p. 10 is being filed contemporaneously with this brief. In the meantime, a copy of the page is reproduced in the Appendix to this brief.

Quite simply, despite the fact that Defendant prevailed at summary judgment, there is nothing even remotely frivolous about this claim and Plaintiffs' counsel conducted a substantial investigation into the facts and law at issue in this complaint.

CP 635 (lines 18-20); *accord* CP 650 (declaration of Mr. Mitchell filed in opposition to FMS's sanctions motion, describing consultations with other attorneys and legal research regarding default status of the Roses' debt). A fair reading of the record reveals that Mr. Mitchell did raise the default status of the Roses' debt in opposition to FMS's sanctions motion, and that the issue has been preserved for review. FMS's waiver argument should be rejected.

**V. Mr. Mitchell is not precluded from arguing that the Roses' debt was in default in opposition to FMS's sanctions motion simply because his clients abandoned their appeal of the superior court's adverse summary judgment ruling on that issue.**

FMS argues that Mr. Mitchell is collaterally estopped from arguing in response to its sanctions motion that the Roses' debt was in "default," based on the superior court's summary judgment order to that effect. *See* FMS Br., at 30-31. However, FMS has failed to supply the court with any authority applying collateral estoppel to foreclose a lawyer from appealing a sanctions award. *See id.* As FMS recognizes, collateral estoppel does not apply unless the issues are identical, final judgment has been entered, and

application of the doctrine serves the interests of justice. *See id.* Collateral estoppel is inapplicable here on all of these grounds.

Most importantly, the issues involved in FMS's sanctions motion and summary judgment proceedings are different, even if they are overlapping. The issue on a motion for sanctions under CR 11 is whether the pleading in question is baseless, not whether the claim alleged in the pleading ultimately proves to be successful. *See* CR 11(a); *Bryant*, 119 Wn.2d at 217.<sup>4</sup> As explained in *Bryant*,

The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable.

119 Wn.2d at 220. The standard for whether a complaint is well grounded in fact and warranted by law is "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Bryant*, at 220. It requires a showing that the complaint is both baseless and signed without reasonable inquiry. *See Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994) (discussing *Bryant*), *rev. denied*,

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<sup>4</sup> *Bryant* recognizes that CR 11 sanctions can be imposed based either on the "well grounded in fact and ... warranted by ... law" language of CR 11, or the "improper purpose" language of the rule. *See* 119 Wn.2d at 217 (distinguishing the two types of provisions in former CR 11, which are carried forward in current version of the rule). The superior court's imposition of CR 11 sanctions in this case appears to be based on the well-grounded-in-fact-and-warranted-by-law provision. *See* CP 998 (stating "[t]he suit was filed without sufficient inquiry into the facts and the law as required by CR 11(a)"; brackets added).

125 Wn.2d 1015 (1995). To avoid being unduly influenced by hindsight, sanctions should only be imposed “when it is patently clear that a claim has absolutely no chance of success.” *MacDonald v. Korum Ford*, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996) (quotation omitted); *see also Kelly v. Moesslang*, 2012 WL 4086819, at \*9 (Wn.App., Div. III, Sept. 18, 2012) (quoting *MacDonald* for this proposition). Because the issue involved in a sanctions motion is different than the issue involved in summary judgment proceedings on the merits, the identical-issue requirement of collateral estoppel is not satisfied here.

Furthermore, no final judgment has been entered in this case, and Mr. Mitchell’s appeal is obviously still pending. Holding that the Roses’ failure to appeal the adverse summary judgment determination regarding the default status of their debt precludes Mr. Mitchell’s appeal would work an injustice under the circumstances. Mr. Mitchell was not an aggrieved party entitled to appeal the summary judgment order, and his clients are not aggrieved parties entitled to appeal the sanctions order. *See* RAP 3.1 (stating “[o]nly an aggrieved party may seek review”); *Engstrom v. Goodman*, 166 Wn. App. 905, 917, 271 P.3d 959 (indicating client not aggrieved by sanctions order against lawyer), *rev. denied*, --- Wn.2d --- (Sept. 5, 2012); *Breda v. B.P.O. Elks Lake City*, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004) (stating “although an attorney may appeal sanctions

in his own behalf, he may not appeal decisions that solely affect his clients because his rights are not affected by the rulings and he is not an aggrieved party”). Applying collateral estoppel under these circumstances would effectively insulate from review the question of whether the default status of the Roses’ debt was legally baseless. For these reasons, the final judgment and justice requirements of collateral estoppel are not satisfied, and FMS’s collateral estoppel argument should be rejected.

**VI. FMS’s argument that there is substantial evidence to support the superior court’s summary judgment determination the Roses’ debt was not in default is immaterial; and it is incorrect in any event because it is premised on an incorrect understanding of “default.”**

FMS argues that superior court’s summary judgment determination that the Roses’ debt was not in default is supported by substantial evidence. *See* FMS Br., at 31-34. In making this argument, FMS focuses on the record on summary judgment, and oral comments made in connection with summary judgment proceedings. *See* FMS Br., at 32. This argument is immaterial for several independently sufficient reasons, and it is incorrect in any event.

First, the superior court’s sanctions order, not its summary judgment order, is the subject of this appeal. *See* CP 1172-77 (notice of appeal). As noted above, the issue on review of the sanctions order is

whether the allegation in the Roses' complaint that their debt was in default is baseless, not whether it ultimately proved to be correct.

Second, the superior court's summary judgment order does not contain any findings, regarding the default status of the Roses' debt. *See* CP 235-38. Any such findings would have been superfluous, given the nature of summary judgment and review of summary judgment proceedings. *See Hubbard v. Spokane County*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002).

Third, to the extent that review of the superior court's summary judgment order were required in these proceedings, it would have to be reviewed de novo, with the facts viewed in the light most favorable to the Roses. *See Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012). It would not be subject to review for substantial evidence.

In any event, the Roses' debt was in default as a matter of fact. As noted above, they were in default under their contract and state law, triggering application of the FDCPA. Without acknowledging the contractual or state law definitions of default, FMS argues that a declaration of default is necessary, and that no such declaration had occurred. Thus, FMS's general counsel characterizes the Roses' debt as "pre-default," even though they were "five months behind." *See* FMS Br., at 32 (citing declaration of counsel at CP 183-98); *see also id.* at 33 (citing

declaration of counsel at CP 58 & 67-68); *id.* at 25 n.7 & 33 (citing declaration of counsel at 293-95 & 300-01). However, neither FMS nor its general counsel identifies any provision of the Roses' contract that requires a declaration of default. These self-serving statements should not override the terms of the Roses' contract or state law, or the FDCPA, which incorporates the parties' contract and state law on this issue.

FMS also cites what it deems to be admissions by the Roses that their debt was not in default. *See* FMS Br., at 32-33 (citing CP 42 & 174-75). One of the purported admissions comes from the deposition of Gregory A. Rose. *See* CP 174-75. In the deposition, Mr. Rose testified that he did not know what a default was, *see* CP 174 (internal 37:8-14), and Mr. Mitchell objected that questions regarding the meaning of default called for a legal conclusion, *see* CP 174-75 (internal 37:10-11 & 41:1-2). After counsel for FMS equated a default with a declaration of default and a demand for the entire balance due, Mr. Rose testified that there was no default under that definition. *See* CP 174-75 (internal 37:15-21, 39:17-23, 40:18-25 & 41:18-24). This deposition testimony does not constitute an admission of default within the meaning of the contract or state law or the FDCPA.

The other purported admission is based on the joint declaration of the Roses submitted in opposition to summary judgment. *See* FMS Br., at

32-33 (citing CP 42). The declaration merely states that Kohl's placed their account "in a non-default collection status" after they declared bankruptcy. *See* CP 42 (line 6). While this is an apparently accurate statement regarding Kohl's characterization of the Roses' debt at the time, it occurred before the debt was assigned to FMS, *see* CP 42 (line 10), and it does not constitute an admission regarding whether the debt was in default under the contract or state law or the FDCPA at any time.

**VII. The Court should deny FMS's request for additional attorney fees and costs on appeal.**

FMS argues that it is entitled to attorney fees and costs incurred on appeal on grounds that the present appeal is frivolous, as well as the grounds on which the superior court awarded fees and costs. *See* FMS Br., at 41-43. This appeal is not frivolous, and no terms should be imposed under RAP 18.1(a). Even if the court were to reject one or more of Mr. Mitchell's arguments on appeal, it would not render the appeal frivolous. *See Washington Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.*, 168 Wn.App. 710, 719, 282 P.3d 1107 (2012).

CR 11 sanctions are not available on appeal. *See Kinney v. Cook*, 150 Wn.App. 187, 194-95, 208 P.3d 1 (2009). Review of CR 11 sanctions does not warrant an additional award of fees and costs on appeal unless

the appeal itself is frivolous. *See Peterson v. Cuff*, 72 Wn. App. 596, 603, 865 P.2d 555 (1994).<sup>5</sup>

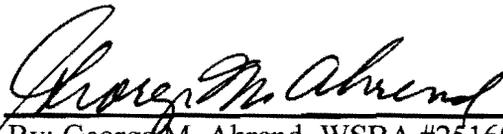
Mr. Mitchell acknowledges that fees and costs are available on appeal for discovery sanctions under CR 26(g), *see Washington Motorsports*, 168 Wn.App. at 719, but only if FMS prevails and the other prerequisites for an award of sanctions are satisfied, *see Biggs*, 124 Wn.2d at 201-02.

#### CONCLUSION

Based on the foregoing, Robert Mitchell respectfully asks the court to reverse and vacate the sanctions order entered by the superior court, and the related letter rulings on which it is based. CP 996-99, 1135-36 & 1142-46.

Submitted this 26th day of September, 2012.

AHREND ALBRECHT PLLC

  
By: George M. Ahrend, WSBA #25160  
Attorneys for Appellant Robert W. Mitchell

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<sup>5</sup> Counsel has been able identify no authority regarding the award of fees and costs on appeal under CR 56(g), but urges that the same standard should apply as under CR 11.

**CERTIFICATE OF SERVICE**

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On September 26, 2012, I served the document to which this is annexed as follows:

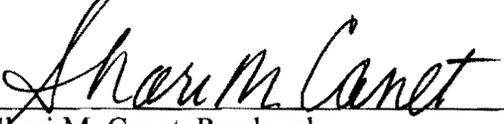
facsimile transmission to (206) 709-2722,

email to: [rmartens@martenslegal.com](mailto:rmartens@martenslegal.com)  
[jchee@martenslegal.com](mailto:jchee@martenslegal.com)  
[ssolle@martenslegal.com](mailto:ssolle@martenslegal.com)

First Class Mail, postage prepaid, and/or  hand delivery, to the following address(es):

Richard L. Martens  
Jane Jessica (Chee) Matthews  
Steven A. Stolle  
Martens & Associates PS  
705 5th Ave. S., Ste. 150  
Seattle, WA 98104-4436

Signed at Ephrata, Washington on September 26, 2012.

  
Shari M. Canet, Paralegal

# APPENDIX

1 **B. There Is Nothing Even Remotely Frivolous About This Case And Plaintiffs'**  
2 **Attorney Conducted More Than A Reasonable Investigation Into The Facts And**  
3 **Law.**

4 In this case, Defendant admitted telephoning Plaintiffs 149 in less than 6 weeks. The  
5 FDCPA prevents debt collectors from communicating in a manner that harasses a debtor. Our  
6 State Collection Statute and Consumer Protection Statute prohibit collectors from telephoning  
7 a debtor more than three times in a single week. It is a *per se* violation of our State Consumer  
8 Protection Act to communicate with a debtor more than three times in a single week.  
9 Therefore, Plaintiffs filed a lawsuit for violations of the above statutes.

10 Defendant asserted that the debt was not a "consumer debt" and was not in "default"  
11 when it was assigned for collection. These two defenses were tenuous at best because the  
12 underlying debt was a Kohl's Department Store account and the third party debt collector  
13 Defendant mailed Plaintiffs a collection letter the same month the debt was assigned for  
14 collections which stated that the account was "seriously delinquent." In fact, not only did  
15 Plaintiffs only use the account to purchase consumer goods, but it is unlikely that Kohl's even  
16 issues "commercial" credit card accounts. More importantly the final collection letter  
17 Defendant mailed Plaintiffs illustrated that the account was 6 months past due. Plaintiffs and  
18 Plaintiffs' counsel therefore reasonably believed that the account was a consumer account and  
19 that it was in default when it was assigned to Defendant for collections.

20 Therefore, despite the fact that the Court dismissed Plaintiffs' claims at summary  
21 judgment, there is absolutely no evidence that filing this lawsuit was vexatious or frivolous as  
22 Defendant's motion suggests.

23 Additionally, Defendant's CR 11 claim that Plaintiffs filed this claim without  
24 conducting a reasonable investigation misses the mark completely. Plaintiffs allowed  
25 Defendant almost two months to investigate this matter before filing it with the Court. After  
26 investigating the matter, the only response Defendant gave was a self-serving statement that