

NO. 63211-6-I

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION ONE

DENNIS AND BERNADENE DOCHNAHL,

APPELLANTS,

V.

INEZ SOMERVILLE PETERSEN

RESPONDENT.

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APPELLANTS' REPLY BRIEF

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Appellant Robert S. Green, formerly counsel for the plaintiffs in the underlying defamation action, and now the party of interest on this appeal, replies as follows to the response briefs of The Buck Law Group (“Buck”) and Davies Pearson P.C., (collectively “Defense Counsel”):

REPLY

Green has raised three issues on appeal,¹ all of which were properly raised in the proceedings below. First, Green has raised the issue of delay in filing the motion for sanctions. Buck’s 391 day delay in filing the motion for sanctions was completely unreasonable under the circumstances of this case and should act as a complete bar to any award of sanctions. Second, Green has raised the issue of Defense Counsel’s failure to mitigate. The complete failure of Defense Counsel to make any effort to mitigate its damages should also act as a complete bar to any award of sanctions. Finally, Green has raised the issue of notice. Here, there was an *actual failure of notice* (as opposed to a hypothetical or technical failure of notice) that arose when Buck withdrew without filing the CR 11 motion or renewing its objections, and substitute counsel did not give notice of intent to seek sanctions under CR 11. This provides yet

¹ It is worth noting that Green has not appealed on the grounds that the fees were excessive, only that the award of sanctions was excessive. These are two separate issues, a fact that has apparently been lost on Defense Counsel, which has argued the issue extensively in its briefs. The issue before this Court is the *avoidability* of Defense Counsel fees, not their size.

a third grounds for completely vacating the award of sanctions imposed by the lower court.

On all three issues, the responses of Defense Counsel entirely miss their mark. With respect to the delay in filing the motion, it is *North Coast Electric Co. v. Selig*, 136 Wn.App. 636, 151 P.3d 211 (2007), and not *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994), that provides the controlling precedent for this appeal. Specifically, this Court's opinion in *North Coast Electric* stands for the proposition that CR 11 imposes an affirmative duty of prompt filing on the part of complaining counsel.

While the burden that accompanies this duty is not defined by a bright line rule, the lack of a bright line rule should not be taken (as argued by Defense Counsel) as the absence of any rule at all. **There is a rule: A party should move for CR 11 sanctions as soon as it becomes aware that they are warranted.** *North Coast Electric*, 136 Wn.App. at 649. Defense Counsel's abject failure to comply with this rule should be dispositive of this appeal and, if so, the Court does not need to reach the other two issues raised.

With respect to the issue of mitigation, Defense Counsel wrongly believes that the duty to mitigate is a unilateral, *i.e.*, that the duty falls *only*

on offending counsel and does not apply *at all* to complaining counsel.²

This woeful argument contradicts well established case law and, moreover, is nonsensical on its face. In conducting its mitigation analysis, this Court should classify the damages awarded as “unavoidable” and “avoidable,” and vacate all damages falling into the latter category. That, of course, would massively reduce the sanctions imposed in this case. Indeed, given Defense Counsel’s refusal to even recognize that it is subject to the duty to mitigate, and given Defense Counsel’s genuinely egregious failure to even attempt mitigation, the more appropriate remedy is to hold that the failure to mitigate is complete bar to sanctions.

Finally, with respect to the requirement of notice on the part of substituting counsel, the requirement is certainly implicit in *MacDonald v. Korum Ford*, 80 Wn.App. 912 P. 1052 (1996). Further, we are not merely arguing that there was a technical or theoretical failure of notice in this case. Instead, there was an *actual* failure of notice. Due to the acts and omissions of Defense Counsel, Green literally *did not know* that he was laboring under the threat of sanctions. Requiring notice from substituting counsel places virtually no additional burden on the litigants, but would eliminate the possibility of litigation by ambush, as occurred in this case.

² Davies Pearson Response (“DPR”) at 12-14, arguing that it was Green, and Green alone, who failed to mitigate.

A. ALL ISSUES RAISED IN THIS APPEAL WERE PROPERLY RAISED AND PRESERVED IN THE PROCEEDINGS BELOW.

In his response to the motion for sanctions, Green focused on the merits of the underlying case.³ The issues of delay, mitigation, and notice were raised only obliquely in the Statement of Facts,⁴ but not discussed in the Argument section of the brief. However, these issues were directly raised by Green's motion for reconsideration and were thus properly before the lower court.

Under the motion for reconsideration's Third Issue Presented, Green asked, "Should the Court's Order be reconsidered where....defense counsel could have avoided the bulk of the fees in this case by filing a prompt CR 11 motion?"⁵ In presenting the issue, Green clearly raised both the issues of delay in filing the CR 11 motion and failure to mitigate on the part of Defense Counsel.

Under the motion for reconsideration's Fourth Issue Presented, Green asked, "Should the Court's Order be reconsidered where, as here, a question as to notice of intent to seek CR 11 sanctions exists when defense counsel is substituted, then the pleading is amended, and subsequent counsel does not advise his or her intent to seek CR 11 sanctions, thus

³ CP at 230-240.

⁴ CP at 232. "After the Second Amended Complaint was filed, Petersen made no further mention of a CR 11 violation until filing a motion on September 25, 2008."

⁵ CP at 341.

sanctions cannot be imposed for any conduct after that point?”⁶

Notwithstanding possible errors of grammar in the presentation of the issue (and the incorrect sequencing of the events), Green clearly raised the issue of notice before the lower court.

The fact that Green properly raised these issues is also apparent from Judge Middaugh’s written order denying the motion for reconsideration and entering findings of fact. For example, Judge Middaugh concluded: “Nor does it appear that defendant prolonged litigation unnecessarily.”⁷ Other than to address the contested timeliness of the CR 11 motion, there would have been no reason for the judge to make this finding. While we strongly disagree with Judge Middaugh’s conclusion, it is indisputable that she was addressing the issue of the timeliness of the motion for sanctions. Likewise, Judge Middaugh’s finding that “There is nothing in the record to indicate that the fees were excessive or included fees incurred for matters other than responding to plaintiffs’ frivolous complaint,” is clearly directed at the issue of mitigation.⁸ Once again, while we strongly disagree with Judge Middaugh’s conclusion, it is beyond dispute that she considered the issue.

⁶ CP at 341.

⁷ CP at 460.

⁸ CP at 460. This sentence also addresses the issue of excessive fees, but Green has not appealed on that basis.

With respect to the issue of notice, Green clearly raised the issue, although it is far less clear that Judge Middaugh gave the issue any consideration. Inasmuch as Green had no control over this apparent oversight on the part of the lower court, he should not be denied a hearing on the issue before this Court.

B. CR 11 IMPOSES AN AFFIRMATIVE DUTY OF PROMPT FILING ON THE PART OF COMPLAINING COUNSEL. ON THE FACTS OF THIS CASE, BUCK'S 391 DAY DELAY IN FILING SHOULD BE A COMPLETE BAR TO SANCTIONS.

When Buck filed its CR 11 motion on September 25, 2008, the motion was based entirely on facts in Buck's possession for more than a year. There was no reason for Buck to wait a year to file the motion, nor was there any excuse for the delay. Buck could have terminated this case on any date of its choosing, but instead *chose* to hold the motion in abeyance while the costs of litigation skyrocketed out of control.

We agree with Defense Counsel that CR 11 does not on its face impose a particular limitation on when a motion for sanctions may be filed. We also agree that no Washington case has drawn a bright line at 30, 90, or even 390 days. However, the fact that there is no bright line rule does not mean that there is no rule at all. Here is the rule: ***A party should move for CR 11 sanctions as soon it becomes aware they are warranted.*** *North Coast Electric*, 136 Wn.App. at 649. This rule draws a

line that, if not bright, is bright enough. This rule provides clear guidance that can be understood by every lawyer in this state: if you have a CR 11 motion to file, file it.

The position taken by Defense Counsel is that, absent a bright line rule, there is no rule at all.⁹ Accordingly, Defense Counsel argues that because timeliness under CR 11 is not defined, it is literally not possible for a CR 11 motion to be untimely. Taking this argument to its (il)logical conclusion, Defense Counsel believes that Ms. Petersen could have returned to court in 2013 (or 2023, for that matter) and filed her motion without any consequences whatsoever for the delay. Indeed, if Defense Counsel's view of the law holds, Ms. Petersen could have returned to court any time prior to her death and filed the motion for sanctions without any concern for the timeliness of the motion. Can this really be the state of CR 11 law? We don't think so. Instead, the law requires, as we believe it must, that CR 11 motions be filed as soon as it is possible to file them. And on the facts of *this case*, there is no plausible excuse whatsoever for Buck's delay. None.

⁹ Buck Response ("BR") at 33-41. It might be more fair to attribute this position to Buck rather than Defense Counsel, as Davies Pearson's brief is virtually devoid of any discussion of timeliness.

1. Buck's efforts to end the litigation do not excuse the delay in filing the CR 11 motion.

Buck devotes a substantial portion of its brief to describing its efforts to end the lawsuit in 2007,¹⁰ the obvious suggestion being that these *other* actions somehow relieved Buck of any obligation to take the one step that actually would have ended the litigation: filing the CR 11 motion. Buck's argument runs along the lines of: "I did everything possible to put out the fire, except pour cold water on it." Beyond that, the argument that offering to settle the case relieved Buck of its obligation to promptly file the CR 11 motion is specious on its face and should be rejected by this Court.

2. *North Coast Electric Co. v. Selig*, 136 Wn. App. 636, 151 P.3d 211 (2007) is exactly on point and provides controlling precedent for this appeal. Buck's efforts to distinguish this case from *North Coast Electric* are not persuasive.

In *North Coast Electric*, the plaintiff, a supplier of lighting fixtures, sued the owner of a Seattle office building for nonpayment on a contract. *North Coast Electric*, 136 Wn.App. at 640.. The building owner answered the complaint and also asserted various counterclaims against North Coast Electric. *Id.* After the building owner voluntarily dismissed its counterclaims, North Coast Electric moved for sanctions under CR 11.

¹⁰ BR at 7-12. Buck claims that it took all "necessary and appropriate steps" to end the litigation early, although those steps did not include actually filing the CR 11 motion. BR at 27. By this logic, filing the CR 11 motion was not only unnecessary, but inappropriate as well. This assertion strikes us as rather bizarre.

Id. The superior court granted the motion and awarded North Coast Electric \$50,741.50 for attorney fees and \$3,119.79 for costs. *Id.* at 642, On the building owner’s appeal, this Court vacated the award of CR 11 sanctions on the grounds that North Coast Electric’s motion for sanctions was untimely. **“Here, North Coast did not move for sanctions until Selig dismissed his counterclaims, which was over a year after his original pleadings. We hold that the award is not supported as a CR 11 sanction.”** *Id.* at 649.

Applying *North Coast Electric* to the facts of this case leads, we believe, to only one possible conclusion: the sanctions imposed here must be vacated. Otherwise, this Court will be in the awkward position of having two completely contradictory and irreconcilable opinions in circulation. Lawyers attempting to answer the (apparently difficult) question, “Do I file this motion now or a year from now?” will have no guidance whatsoever. Thus our plea to the Court: to thine own self be true.

In its response, Davies Pearson does not even mention *North Coast Electric*. Instead, the best Davies Pearson can offer is the rather pathetic argument that it was “too busy” to file the motion. Where a party does not even address the controlling precedent, its arguments should be given little consideration by the Court.

Buck, to its credit, at least attempts to distinguish *North Coast Electric* from the facts of this case, although its attempt to do so is a complete failure.

The fatal flaw in Buck's *North Coast Electric* analysis arises from the fact that Buck has turned this Court's opinion upside down and inside out. More formally, Buck has transposed the opinion's *ratio decidendi* and its *obiter dicta*. More specifically, Buck incorrectly argues that North Coast Electric's delay in filing its motion for CR 11 sanctions was not a factor in the Court's decision, but was only discussed in passing. Buck is wrong, dead wrong. North Coast Electric's delay in filing was not merely a factor in this Court's decision; it was ***the reason*** behind it and, indeed, ***the only reason*** behind it.

In attempting to distinguish *North Coast Electric* from the facts of this case, Buck argues:

North Coast Electric Co. was decided on very different facts and does not command the outcome sought by Mr. Green. In that case, the plaintiff sought attorneys' fees against defendant based on what it considered to be a number of frivolous counterclaims. See 136 Wn. App. 636, 642, 151 P.3d 211, 214-5. There is no indication, however, that plaintiff ever notified defendant of the possible CR 11 sanctions, contrary to the rule set forth in *Biggs*. Moreover, the trial court failed to make explicit findings as to which of defendant's

pleadings violated CR 11 and how those pleadings violated CR 11, against in violation of the rule set forth in *Biggs*. *Id.* at 649, 151 P.3d at 218. In light of these shortcomings, the court of appeals properly reversed the trial court's imposition of sanctions.

It is true that the *North Coast Electric Co.* court cited the timing of the plaintiff's CR 11 motion as one of several factors weighing against the imposition of sanctions. *See id.* at 649-650, 151 P.3d at 218. The plaintiff's failure to give CR 11 notice and the trial court's failure to enter appropriate findings, however, render this factor immaterial to the outcome. *See Biggs v. Vail*, 124 Wn.2d 193, 198, 876 P.2d 448, 452 ("Without such notice, CR 11 sanctions are unwarranted."). BR at 39-40.

To put it bluntly, ***Buck's analysis of North Coast Electric simply could not be more wrong.*** Indeed, Buck has absolutely butchered this Court's analysis.

First, there is nothing—nothing!—in this Court's opinion to suggest that lack of notice was even an issue in *North Coast Electric*. Since lack of notice was *not* discussed in the opinion, the only reasonable inference is that North Coast Electric did in fact give proper notice. In other words, Buck is basing its argument on a fact that Buck has conjured

out of thin air. *It is a complete fabrication.*¹¹ Further, it should be obvious that if this Court's ruling was based on lack of notice, there would have been no reason to discuss any other issues. Lack of notice, if present, would have been dispositive.

Equally unfounded is Buck's assertion that this Court's decision in *North Coast Electric* was based on the lack of a sufficient record created below. If this were the *reason* for the Court's decision, this Court would have simply remanded to the lower court with instructions to enter findings of fact sufficient to support the award of sanctions. This is obvious, but made even more obvious by the fact that this Court did in fact remand *North Coast Electric* so that the trial court could enter findings with respect to the award of fees under RCW 4.84.185. *North Coast Electric*, 136 Wn.App. at 650.

Finally, and contrary to Buck's assertion, the timeliness of the CR 11 motion was *not* "one of several factors weighing against the imposition of sanctions," nor was the delay in filing "immaterial" to the Court's analysis. It bears repeating: Buck has turned *North Coast Electric* upside down. This Court vacated the CR 11 sanctions in *North Coast Electric* for one reason and for one reason only: North Coast Electric's motion for

¹¹ Indeed, Buck's argument that *North Coast Electric* was decided on the lack of notice is an argument that, standing alone, fails to meet the requirements of CR 11. Sanctions should be imposed.

sanctions was untimely. Conversely, this Court did not decide *North Coast Electric* on notice issues and it did not decide *North Coast Electric* on the basis of an inadequate record below. This Court should not allow Buck to rewrite its opinions to suit its pecuniary interests.

Davies Pearson does not even mention *North Coast Electric*. Buck at least mentions it, but resorts to arguments of staggering dishonesty in its attempt to distance this case from that one. The lack of argument on the one hand and the desperation of argument on the other lays bare the plain truth: there is no intellectually defensible way to distinguish this case from *North Coast Electric*.

3. *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994) is not on point and does not stand for the proposition a party can wait forever to file a CR 11 notice.

Having rejected what is the *obvious* precedent for this case, *North Coast Electric*, Buck argues as expected that *Biggs v. Vail* provides the beacon that this Court should follow. As with its *North Coast Electric* analysis, Buck's analysis of *Biggs* is wrong in every way possible.

Yes, it is true that that the CR 11 motion in *Biggs* was filed five years after the initial complaint. However, this does not by any stretch of the imagination mean that there is a five year rule for filing CR 11 motions in Washington, nor does it mean that a party can wait indefinitely to file

its motion, as Defense Counsel apparently believes. Defense Counsel's reliance on *Biggs* is misplaced for a number of reasons.

First, while most Supreme Court decisions lay out general rules to follow, the *Biggs* decision did exactly the opposite: it carved out a fact-specific exception to the general rule. (The **general rule**, as articulated by the *Biggs* Court: “**Rule 11 sanctions must be brought as soon as possible to avoid waste and delay.**”) *Biggs*, 124 Wn.2d at 198. This does not mean, however, that the *Biggs* Court eliminated the general rule. Indeed, one would be hard pressed to find a Supreme Court ruling where the Court takes greater pains to limit the precedential value of its opinion. “The case at hand, however, *differs from the usual situation* in two crucial respects.” *Id.* at 199.

In carving out an exception to the general rule, the *Biggs* Court relied in part on the fact that the motion was brought under the former CR 11, which made the imposition of sanctions mandatory. “The second distinguishing factor about this case is that these sanctions are being sought under former CR 11, which made the imposition of sanctions mandatory once a violation of the rule has occurred.” *Id.* In other words, *Biggs* was decided against the backdrop of a different CR 11 than now exists, and the obvious implication of the Court's discussion is that it would have reached a different decision under the current rule.

Regardless, an opinion applying a rule that has since been amended can hardly be said to provide precedent for a case to be decided under the post-amendment rules.

Defense Counsel's reliance on *Biggs* suffers from yet another fatal defect (besides the fact that *Biggs* was an exceptional case decided under a different rule) in that if Defense Counsel is correct, and parties can wait forever to file their CR 11 motions, then *North Coast Electric* was wrongly decided. Once again, we believe that upholding the sanctions in this case would require that this Court completely overturn and abandon its ruling in *North Coast Electric*. Given the genuinely horrible message that such a move would send to the lawyers of this state, we also believe that it would be a grievous error for this Court to reverse itself.

4. *MacDonald v. Korum Ford*, 80 Wn.App. 877, 912 P.2d 1052 (1996), does not stand for the proposition that a party can wait indefinitely to file a CR 11 motion.

Ignoring, once again, the *obvious* precedent of *North Coast Electric*, Buck argues that *MacDonald v. Korum Ford* stands for the proposition that a party can move for CR 11 sanctions at its leisure.¹² In *MacDonald* the motion for CR 11 sanctions was filed 19 months after the

¹² BR at 38,

deposition that exposed the emptiness of the plaintiff's case. With respect to the issue of delay, Buck's reliance on *MacDonald* is misplaced.¹³

First, for reasons that are known only to history, the issue of timeliness was not even before the *MacDonald* court. Given that the issue of timeliness was not before the court, it can hardly be argued that that the *MacDonald* court created a rule or, for that matter, gave any guidance whatsoever with respect to the issue. By contrast, *North Coast Electric* actually discussed the issue, so it must trump *MacDonald*.

Additionally, to the extent this Court perceives a conflict between *MacDonald* and *North Coast Electric*, it must resolve that conflict by adhering to *North Coast Electric*. It must do so because a) *North Coast Electric* was decided after *MacDonald* and b) because *North Coast Electric* was decided by **this Court** while *MacDonald* was decided by Division Two.

North Coast Electric gives this Court all the precedent it needs to decide this appeal. Neither *Biggs* nor *MacDonald* in any way alters that equation.

¹³ Of course, we are not arguing that *MacDonald* is entirely without precedential value, as Green relies on the case with respect to the issues of mitigation and notice, issues that were actually addressed in the opinion.

C. CR 11 IMPOSES A DUTY TO MITIGATE ON COMPLAINING COUNSEL. DEFENSE COUNSEL'S FAILURE TO MITIGATE IN THIS CASE WAS EGREGIOUS, AND SHOULD ACT AS A COMPLETE BAR TO SANCTIONS.

It is a universally recognized principle of law that injured parties have a duty to mitigate their damages. Well, *almost* universally recognized, as this case has exposed a cadre of holdouts, *i.e.*, Defense Counsel.

The fact that the duty to mitigate applies to virtually all claims and causes of action was articulated by the Washington State Supreme Court in *Young v. Whidbey Island Board of Realtors*, 96 Wn.2d 729; 638 P.2d 1235 (1982).

The rule as stated in C. McCormick, *Damages* § 33, at 128 (1935) is that where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. ***The person wronged cannot recover for any item of damage which could thus have been avoided.*** See *Ward v. Painters' Local 300*, 45 Wn.2d 533, 276 P.2d 576 (1954).
Young, 96 Wn.2d at 732. (emphasis added)

Our courts have also regularly affirmed that attorneys complaining under CR 11 have a duty to mitigate their damages. Indeed, many of the cases cited by Defense Counsel feature remands to reduce damages in

light of a failure to mitigate. For example in *Biggs*, the darling of Defense Counsel, the instructions on remand included a directive that the award “should be further limited by the apparent absence of any attempts to mitigate on the part of Vail.” *Biggs*, 124 Wn.2d at 202. In *MacDonald*, another favorite of Defense Counsel, the remand directed that “the award should not include fees and expenses that were self-imposed or that Korum Ford reasonably could have avoided by notifying Cain of its concerns.” *MacDonald*, 80 Wn.App. at 893. Thus, on remand, the lower court was to vacate damages related to, for example, discovery. *Id.* Additionally, the lower court was under orders to vacate damages occurring after substitute counsel, who did not give independent notice, appeared. The duty of complaining counsel to mitigate its damages was also articulated by this Court in *Miller v. Badgley*, 51 Wn.App. 285, 753 P.2d 530 (1988), “A party resisting a motion that violates CR 11 has a duty to mitigate and may not recover excessive expenditures.” *Miller*, 51 Wn.App. at 303.

In the face of this overwhelming and incontrovertible authority, Defense Counsel offers arguments that are, at best, pale. The best argument that Davies Pearson can muster is that it was Green, and Green

alone, who failed to mitigate.¹⁴ “[T]his discovery battle was all of his own doing.”¹⁵ Of course, it takes two to tango. Green’s attempts to compel discovery occurred in January and June of 2008, five and ten months respectively after Buck had full knowledge of all facts animating its subsequent motion for sanctions. Does Davies Pearson really believe those long gaps in the litigation did not provide it with an opportunity to file a CR 11 motion? Further, the fact that it was Green and not Defense Counsel attempting to compel discovery has no bearing on whether Defense Counsel had a duty to mitigate its damages. Indeed, we know of no reported case where complaining counsel has been relieved of this duty for any reason. If such a case exists, we would appreciate it if Defense Counsel would bring it forward.

Buck’s argument on this issue is even weaker than that put forth by Davies Pearson. The essence of Buck’s argument is that since the lower court found that there was no failure to mitigate, there was in fact no failure to mitigate.¹⁶ This argument ignores the very reason we have courts of appeal. We have courts of appeals because trial courts sometimes commit errors. If we are forced to assume that the trial court was correct, as Buck urges, there would be no reason for this Court to

¹⁴ DPB at 12-14.

¹⁵ *Id.*

¹⁶ BR at 27.

exist. It is an extremely weak argument. Beyond that, Buck's mitigation argument hinges on this Court's willingness to believe that Buck took "all necessary and appropriate steps to deter Mr. Green..."¹⁷ By this logic, filing the CR 11 motion in 2007 instead of 2008 would have been both unnecessary and inappropriate. The question raised, of course, is by what measure it would have been *inappropriate* for Buck to file the motion in 2007?

With respect to mitigation, the arguments of Defense Counsel are weak and the facts are damning. Buck could have filed a \$5,000.00¹⁸ motion in 2007 but instead filed a \$75,000.00 motion in 2008. That is the very definition of failure to mitigate.

It bears repeating that Buck spent \$22,477.32 on outside counsel between August 4 and August 25 of 2008 in order to fight a discovery battle.¹⁹ ***Buck spent the bulk of this money while Davies Pearson had a summary judgment motion pending.*** That is the very definition of profligate spending. Further, with respect to whether fees can be awarded to outside counsel under CR 11, the burden of proof is not on Green to

¹⁷ *Id.*

¹⁸ This figure is only an approximation.

¹⁹ Given that Buck represented Petersen *pro bono*, and give that Buck does not need these sanctions to pay its associates, it should be clear that the driving force behind Buck's quest for sanctions is the money paid by Buck to Allied Law Group. Thus, the damages that Buck is most desirous of are also the damages to which it is least entitled.

show that such an award is barred, the burden is on Buck, the party seeking sanctions. *Biggs*, 124 Wn.2d at 202.²⁰

It is unlikely that this Court will ever see another case with a failure to mitigate as glaring as that presented here. The Court should respond accordingly by slashing the award or, better still, by eliminating it entirely.

D. DUE TO FAILURE OF NOTICE, ALL SANCTIONS FOR FEES INCURRED AFTER BUCK WITHDREW AS COUNSEL SHOULD BE VACATED.

- 1. Under *MacDonald v. Korum Ford*, 80 Wn. App. 877, 912 P.2d 1052 (1996), all sanctions for fees incurred after October 5, 2007 should be vacated.**

We agree with Defense Counsel that the *MacDonald* court did not say that substituting counsel *must* give independent notice of intent to seek sanctions under CR 11. However, what the *MacDonald* court *did* say is that where substituting counsel does not give notice, there are consequences, *i.e.*, no recovery for fees incurred after substituting counsel failed to give notice. *MacDonald*, 80 Wn.App. at 893. Thus, if one looks at the remedy imposed by the *MacDonald* court rather than merely looking at the language of the decision, it is clear that the court imposed and enforced a rule requiring that substitute counsel give independent

²⁰ Buck argues that the *Biggs* court only discussed the burden of proof on remand, as if the burden of proof would be reversed at the appellate level. There is no authority for this argument and it is illogical on its face.

notice, although the court did not articulate the rule as clearly as it could have. That gives this Court an excellent opportunity to erase any ambiguity and articulate the rule: substituting counsel must give independent notice of intent to seek CR 11 sanctions. Conversely, if this Court is unwilling to articulate such a rule, it should at least follow the *MacDonald* court in determining the consequences that flow from the failure to give notice, *i.e.*, no sanctions from the date of substitution.

2. Buck's acts and omissions vitiated the effectiveness of the original CR 11 notice and induced reliance on the part of Green. This constitutes an actual failure of notice.

We are not arguing that Buck had a legal obligation to answer the Second Amended Complaint before withdrawing. We are also not arguing that Buck had a legal obligation to file the CR 11 motion prior to withdrawing, although the fact that Buck did not do so shows how little Buck thought of the motion at the time.²¹ What we are arguing is that by withdrawing a) without answering the Second Amended Complaint; b) without renewing its CR 11 objections in light of the amended pleadings; and c) without filing the CR 11 motion, Buck created the impression, relied upon by Green, that Buck would not be pursuing CR 11 sanctions.

²¹ Once again, we believe Buck's interest in actually pursuing sanctions did not arise until almost a year later, when Buck hired and paid Allied Law Group to participate in a discovery battle that Defense Counsel could have easily avoided by filing the CR 11 motion.

Green's reliance was reinforced by the fact that Davies Pearson did not give CR 11 notice, although that failure also provides a separate basis for vacating sanctions.

While the *MacDonald* court did not discuss notice in terms of reliance, the facts cut close to this case. In *MacDonald*, the offending lawyer withdrew offending pleadings in an effort to satisfy Korum Ford's first attorney. "In response, Cain withdrew the motions." *MacDonald*, 80 Wn.App. at 893. It was precisely because Cain had addressed, or attempted to address, the first lawyer's complaints that the court held that the second lawyer was under a duty to give notice of intent. "Had attorney two similarly notified Cain that she considered his pursuit of the case sanctionable, she might have deterred some of the litigation abuse." *Id.* Once again, the court did not mention reliance, although it is not a stretch to suggest that Cain, having acted in response to a CR 11 notice from the first lawyer, relied on the second lawyer's silence in pursuing the litigation. However, regardless of whether the issue is framed as lack of notice or reasonable reliance on the other party's inaction, the result is the same. This Court should follow *MacDonald* by vacating the sanctions imposed for expenses incurred after the date on which substituting counsel could have given its CR 11 notice, *i.e.*, October 5, 2007.

CONCLUSION

We believe this case can be resolved through a very simple analytical process. Specifically, we ask the Court to engage in the following three step process:

1. Read *North Coast Electric*.
2. Read Buck's analysis of *North Coast Electric*.
3. Decide the appeal.

If, after taking the steps, the Court is still undecided, the Court should move on to its mitigation analysis and vacate all damages for "avoidable" expenses, which are all those expenses incurred after Buck had knowledge of the facts supporting the motion for sanctions. Finally, if this Court is not willing to vacate the sanctions on the basis of timeliness or failure to mitigate, it should ask whether it is fair to impose the sanctions when Green, relying on the acts and omissions of Defense Counsel, had every reason to believe that he was not operating under the threat of sanctions.

Dated this the 14th of October, 2009.

A handwritten signature in black ink, appearing to read 'Lee H. Rousso', with a long horizontal line extending to the right.

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CERTIFICATE OF SERVICE

I certify that on the 14th day of October 2009, I caused a true and correct copy of Appellant's Reply Brief to be served on the following in the manner indicated below:

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