

65604-0

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No. 65604-0

WASHINGTON COURT OF APPEALS, DIVISION I

CHRISTOPHER J. CHASE AND TODD E. CHASE,

Plaintiffs,

v.

FREDERIC B. ANDERSON, *et al.*,

Respondents,

and

JAMIE JENSEN, PLAINTIFFS' FORMER ATTORNEY,

Appellant.

RESPONSE BRIEF

Gregory M. Miller, WSBA No. 14459
Justin P. Wade, WSBA No. 41168
Attorneys for Respondents Anderson

[Handwritten signature and stamp]

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

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I. INTRODUCTION

Appellant Jamie Jensen ostensibly brought this appeal to clear his name and guard against malpractice claims from his former client after CR 11 sanctions were entered against him and his client, Todd Chase, for bringing suit and getting an *ex parte* TRO to recover alleged damages to real property Mr. Chase did not own from a landslide and burst pipe. After being warned to drop the suit, they continued and \$5,000 of sanctions were ultimately imposed. Mr. Jensen appealed; Mr. Chase paid the terms. After being warned to stop a frivolous proceeding, Mr. Jensen again chose to proceed. His appeal should be dismissed and fees awarded to Respondent Andersons because the appeal has no basis in law on the undisputed facts.

II. RESTATEMENT OF ISSUES ON APPEAL

1. Did the trial court abuse its discretion in awarding sanctions against the plaintiffs' counsel after finding that the complaint and *ex parte* temporary restraining order were premised on Mr. Todd Chase's alleged ownership of parcel 49 when, in fact, ownership of that parcel had been transferred to his wife six weeks before filing the complaint, on entry of final orders in the unrelated marital dissolution?
2. Is the issue of the "admission" of Mr. Jensen's disciplinary records from Minnesota mooted by the trial court's explicit ruling in the CR 54(b) certification that it did not rely on those records in determining that sanctions should be imposed and where the appellate record does not demonstrate either 1) the claimed improper evidence was in fact admitted for consideration by the trial court; or 2) that Mr. Jensen preserved the error?
3. Should Mr. Jensen's request for attorney's fees on appeal be denied and deemed frivolous where he has not provided any legal or factual basis for the request?

4. Should the Andersons be awarded their attorney's fees and expenses on appeal?

III. RESTATEMENT OF THE CASE

A. Overview and Case Posture.

Jamie Jensen, the "former attorney for the Plaintiffs," filed a notice of appeal from the May 19, 2010 superior court judgment awarding the Andersons \$5,000 in sanctions "pursuant to CR 11 for asserting claims against the Andersons based upon the misrepresentation of plaintiff Todd E. Chase." CP 6, 12. The judgment is against both "plaintiff Todd E. Chase and his former counsel, Jamie Jensen." CP 12. *See* CP 6 (listing both Jensen and Todd Chase as judgment debtors). Todd Chase has not appealed the ruling, but instead has paid the sanctions in full and a satisfaction of judgment was entered on August 6, 2010. CP 291-92.

The underlying case was filed on November 13, 2009, by Appellant Jensen as counsel for the plaintiffs, Christopher and Todd Chase. The dispute arose out of a landslide on real property in late June 2009, the cutting of trees by the Andersons approximately three weeks earlier, and a water pipe break that released a large quantity of water from the Andersons' property. CP 215. At issue is the damage to the property owned by Chris Chase after the tree-cutting and landslide on Chris' property and the property owned by Leona Chase, and the extent to which the Andersons are responsible for that damage. CP 217-18. The Chases' Complaint against the Andersons and the City of Everett¹ included

¹ The City was eventually dismissed by stipulation. CP 71-73.

trespass, intentional or negligent removal of trees, diminution of value, negligent issuance of permits, inverse condemnation, and requested an order of abatement and damages well in excess of \$425,000. *See* CP 260-167. The substantive issues raised in the Complaint related to damage to Christopher Chase's property from the Andersons' tree-cutting have not been resolved and are pending, with a trial date of April 5, 2011.

On the same day Jensen filed the Complaint, he obtained an *ex parte* restraining order against Andersons, without giving them proper notice or opportunity to be heard, restraining them from building a retaining wall on their own property. CP 256-57, CP 110-12. The permanent injunction was successfully resisted and the TRO dissolved five days later, by order dated November 18, 2009. CP 253-255.

Following dissolution of the TRO, the Andersons learned Todd Chase did not own the parcel (the "Gully Property") the Complaint alleged he did when it was filed and the TRO was requested, because it had been awarded to his ex-wife Leona by Judge Kurtz in their divorce proceedings following trial and entry of the final decree on September 29, 2009. CP 154 (App. A), 224 – 252 (Leona Chase Dec. and attachments). The Andersons immediately notified Mr. Jensen of this by letter of November 24, sent by email and U.S. mail. CP 154, (App. A). Consistent with the case law for seeking CR 11 sanctions,² the letter gave Mr. Jensen clear

² *See, e.g., MacDonald v. Korum Ford*, 80 Wn. App. 877, 891-92, 912 P.2d 1052 (1996) ("an attorney should informally notify the offending party by telephone call or letter before filing, preparing and serving a CR 11 motion"), citing *Biggs v. Vail*, 124 Wn.2d 193, 198 n.2, 876 P.2d 448 (1994).

notice of the Andersons' intent to seek sanctions against both Mr. Jensen and his clients if the suit was not dismissed immediately, since it was established that Todd Chase did not have title to the property in question when the complaint and motion for TRO were filed.

B. Andersons' Motion to Dismiss and for Sanctions.

The suit was not dismissed. The Andersons therefore moved to dismiss Todd Chase and his claims, and also moved for sanctions and attorney's fees from Todd Chase and Mr. Jensen on December 4, 2009, noting the matter for January 6 since it was a dispositive motion. CP 214-52. There is no dispute Mr. Jensen was served with these papers as counsel of record for the Chases.

The December 4 motion and associated attachments detailed the nature of the negotiations between the parties after the landslide issue arose in the summer of 2009,³ the unproductive tenor of the discussions beginning in September when Mr. Jensen was hired by the Chases,⁴ the fact of Todd Chase's dissolution and the award of the property to Leona Chase,⁵ and Todd Chase's and Mr. Jensen's efforts to bring Leona Chase into the litigation or to acquire the property from her,⁶ to establish the lack of a factual basis for the allegations that Todd Chase owned the property. The motion also emphasized that "Plaintiff Todd Chase seeks alleged

³ CP 105.

⁴ CP 139-43

⁵ CP 224-25.

⁶ CP 225, CP 338-42, esp. ¶¶ 5, 10, 16.

damages exceeding \$300,000 for real property he does not own,” CP 220, and which he attempted to acquire from his ex-wife for either \$25,000 or \$10,900, depending on how the debt from the marriage would be accounted for. *See* CP 218 and associated pleadings.

The December 4 moving papers also detailed the tactics used by Mr. Jensen in the negotiations⁷ and the fact that his firm had represented Leona Chase for a year in the divorce proceedings until July 2009.⁸ The motion and attachments detailed the improprieties in obtaining the TRO, including the manner by which it was obtained with misrepresentations in the moving papers to the court as to the notice given to the Andersons, or that it was adequate to permit the Andersons to appear. CP 109-13.

Finally, the papers included public documents from Minnesota detailing Mr. Jensen’s indefinite suspension by the Minnesota Supreme Court in 1996 (he was reinstated over three years later) for the culmination of at least three instances of improper conduct. CP 191-204. The motion characterized it as the same type of “harassing and frivolous litigation” as had just occurred in the filing of the complaint and orchestrating the wrongful issuance of the TRO which stopped the construction necessary to protect both the Chase properties, as well as the Anderson property, and which required substantial expense to get the TRO dissolved. CP 221. Of particular import is that the Minnesota Supreme Court’s conclusion

⁷ For instance, Mr. Jensen tried to hold restoration of the property hostage to getting the Andersons to purchase it, despite the later claims by the Chases of the long-time Chase family interest and ties to the particular parcels. *See, e.g.*, CP 139-40.

⁸ CP 215 n. 2; RP (May 19, 2010) at 15, lines 15-21 (Judge Kurtz ruling), (App. B).

was based on the established pattern of misconduct: “[Mr. Jensen’s] conduct is such that ‘severe discipline’ is warranted to protect the public *and deter similar misconduct.*” CP 204 (emphasis added).⁹

On December 18, a notice of withdrawal and substitution was filed which Mr. Jensen had signed on December 10 and the new attorneys signed on December 16. CP 81-82. The January 6, 2010 hearing (at which Mr. Jensen appeared) was in front of Judge Kurtz and was continued to January 14 to promote settlement. CP 80 (minute entry). On January 14, again with Mr. Jensen present but with a another new attorney for the Chases, the matter was continued to February as “global resolution” was not possible since Leona Chase was not present and because of the recent involvement of new counsel for the Chases. CP 78. That counsel filed a response for the Chases on April 14, 2010, and served Jensen. CP 313-14, 315-28.

The matter was ultimately heard by Judge Kurtz on May 19, 2010, and a final order entered. CP 74; RP (May 19, 2010). The May 19 transcript confirms that Mr. Jensen was present for both the February 4 and the May 19 hearings. RP (May 19, 2010) 1, 14 (App. B). The motion resulted in dismissal of Todd Chase’s claims, CP 62-66, and the award of sanctions in the amount of \$5,000 against both defendant Todd Chase and Mr. Jensen. CP 5-7. The determination that the sanctions would be

⁹ This would meets the test for admissibility under ER 404(b) to show absence of mistake or accident, or to show intent.

imposed jointly and severally against Todd Chase and Mr. Jensen was made on May 19. RP (May 19, 2010) 14-18 (App. B).

The order dismissing Todd Chase's claims and imposing sanctions did not enter findings of fact specifying that there was no just reason for delay in entry of the judgment and did not purport to dispose of all the claims as to all the parties. After Mr. Jensen filed his opening brief, the Andersons' appellate counsel moved to dismiss the appeal as interlocutory. Commissioner Verellen ruled that the appeal was premature absent proper CR 54(b) findings, but gave Mr. Jensen limited time to obtain the findings. After motion and a hearing in superior court on January 4, 2011, Judge Kurtz entered an order certifying under CR 54(b) that the judgment against Mr. Jensen was ripe for appeal. The January 4 Order also states:

Any possible error here regarding Mr. Jensen's disciplinary history was harmless, as this Court's decision on CR 11 sanctions would have been the same, regardless of whether or not such material was in the record.

CP 288.

C. Sanctions Award and Entry of Judgment.

Following the hearing on February 4, 2010, Judge Kurtz concluded that plaintiff Todd E. Chase misrepresented his ownership of that real property bearing Snohomish County Tax Parcel No. 29043500401600 in his complaint. CP 68. The Court further concluded that the representations of Todd E. Chase were fundamentally misleading and not well grounded in fact. CP 69-70. Accordingly, the trial court determined that CR 11 sanctions should be assessed against Todd E. Chase and his

former counsel, Mr. Jensen, for their assertion of claims against the Andersons based upon the misrepresentations of Todd E. Chase and that judgment should be entered against Todd E. Chase and Mr. Jensen reflecting such sanctions. CP 69-70. In this regard, the Court instructed that the Andersons were entitled to those attorneys' fees incurred in seeking such sanctions. CP 64.

1. Mr. Jensen Had An Opportunity To Be Heard.

Jamie Jensen had ample opportunity to be heard on the Andersons' dismissal and sanctions motion. He was at the hearings of January 6 and 14, February 4, and May 19, 2010. CP 79-80; 303-04. Mr. Jensen made no effort to contest the motion at the February hearing. CP 303. The Andersons' trial counsel also informed Judge Kurtz that he understood Mr. Jensen was provided an opportunity to review the Findings of Fact and Conclusions of Law and related order prior to them being forwarded to the Court for entry in March. *Id.* The hearing on the Andersons' Motion for Entry of Judgment (which would decide if sanctions were imposed on Mr. Chase, Mr. Jensen, or both, as well as the amount of sanctions) was continued for over a month to ensure Mr. Jensen was provided proper notice thereof. *Id.*¹⁰

¹⁰ Mr. Jensen has not rebutted or challenged these facts set out in ¶ 7 of CP 303 (emphasis added):

Upon learning that Mr. Jensen had not received proper notice of the hearing on the Andersons' Motion for Entry of Judgment, our office sought to continue the hearing. **Pursuant to Mr. Jensen's request**, we scheduled the hearing for May 19, 2010, a month after it was originally scheduled to take place.

On May 17, just before the hearing on the agreed date of May 19, Mr. Jensen submitted papers setting forth his position. CP 21-53. After argument by all counsel, including Mr. Jensen, on May 19, Judge Kurtz ruled as follows:

Thank you to all counsel, all three counsel for your presentation and arguments. Although this court had previously indicated that CR 11 sanctions would be appropriate, it was preliminary in the sense that the Court had not designated a dollar amount nor designated whom exactly would actually pay, and nothing was final.

I would note that, although I do recall Mr. Jensen was physically present at the hearing, the main hearing we had on February 4, 2010, and perhaps at some other proceedings, he did not ask to speak on February 4. But whatever error in not actually inviting Mr. Jensen's participation on February 4 or in not having him more fully involved earlier, I now see it's, essentially, moot, in that Mr. Jensen has been given a full opportunity to be heard for this hearing where the Court would be making final decisions.

I have been open to any proposed action today offered by Mr. Jensen or anyone. Having considered this further, I am prepared to make final decisions now on possible CR 11 sanctions. But let me recite a little bit of some of the other background. There's a lot more in the record here. But as has been noted, the Plaintiff Todd Chase was involved in a dissolution case with his now ex-wife Leona Chase

. . .

That dissolution case did go to trial before me on September 2, 2009. Todd was represented by attorney Ken Brewe. Leona was pro se at trial. However, I note that up until about six weeks before -- up until, I believe, actually July 24, 2009 -- Leona had been represented for about a year by Ximena West, a partner in Mr. Jensen's former law firm.

The Court gave its oral decision in this dissolution on September 8, 2009, which awarded the real property which is now in question, this so-called gully property, the

real property now in question, to Leona. That award was finalized when the final decree was entered and filed on September 29, 2009. I would point out that, as indicated in a recent Court of Appeals case, Bank of America versus Owens in 153 Wn. App. 115, a dissolution decree is a judgment and is effective, essentially, as such.

At some point last fall, Todd Chase and his brother Chris Chase then apparently did retain Mr. Jensen to represent them in this lawsuit. The pleadings in this lawsuit indicate that on November 9, Mr. Jensen signed the eight-page complaint and had it filed then on November 13, 2009.

Paragraph 2 of that complaint, which asserted that Todd Chase was the owner of the relevant property, was just plain inaccurate. It was misleading. It was not well grounded in fact, and it has led to a waste of time, frankly, and unnecessary expense for the Andersons, among others.

Now who should largely have to pay for these unnecessary costs? Under these facts and pursuant to CR 11, it should not be the Andersons, but instead should be Todd Chase and/or his former counsel Jamie Jensen.

So as between Mr. Chase and Mr. Jensen, who should be responsible? Mr. Jensen is the one who presumably drafted and then filed the complaint. But he was acting as Todd's agent and attorney and, presumably, largely on information presented by Todd. By Todd's own admission, he, at least, saw the complaint by November 22, a full 12 days before the motion to dismiss was filed.

I have reviewed the pleadings, heard the presentations this morning. Based on this record -- although I have received considerable information -- it still is not a full ventilation of all the issues that might be argued on this point. Based on this record, the Court is not prepared to, essentially, determine and allocate fault as between the two of them, as between Mr. Chase and Mr. Jensen. Instead, they will, essentially, be jointly and severally liable, absent some other later agreement or litigation.

...

Arguably, this whole situation regarding Todd's interests could have and should have been rectified quickly -- for example, by plaintiffs seeking to amend the complaint or getting a quick, voluntary dismissal as to Todd -- perhaps, some other action. I won't explore all the possibilities here. But this whole situation could have and

should have been rectified quickly. Those things didn't happen to resolve it quickly; and instead, we had a relatively long battle regarding a motion to dismiss and an inordinate amount of legal effort and expense on all sides.

...

So, the bottom line: The Court will enter a judgment in the round figure of \$5,000, with Mr. Chase and Mr. Jensen jointly and severally liable, essentially. That will be the order of the Court for today.

...

MR. JENSEN: Your Honor, I did suggest that this was harmless error and that Todd was the owner at the time of the damage. I hadn't heard a statement by the Court. I had also asked in my pleadings that a Rule 11 is an equitable action and that Mr. Dippold's actions in putting in my history was inadmissible and would be an equivalent showing of unclean hands, and I would like the Court to comment on it if you would. I am trying to be better at this than I am.

THE COURT: Well, Mr. Jensen, I will just say this: I have certainly considered all the arguments and the pleadings that were presented. As my comments indicate, I did not see this as a harmless error in the sense that there were expenses incurred as a result of a misstatement. I guess, I would just leave it at that. I certainly considered all the arguments and this, ultimately, is the Court's bottom line. Anything else?

RP (May 19, 2010) 14-20, (App. B).

IV. RESPONSE ARGUMENT

A. Standard of Review and Appellant's Burdens on Appeal.

The standard of review for an award of CR 11 sanctions is abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

The appellate process and its rules place the burden on the appellant to present all the information to the appellate court necessary for it to evaluate the claimed errors. RAP 9.2, 9.6. The appellate court will deny the appeal and affirm if there is an inadequate record for review,

particularly where the matter appealed is a decision in the broad discretion of the trial court, such as evidentiary rulings. *State v. Wade*, 138 Wn.2d 460, 465-66, 979 P.2d 850 (1999) (record inadequate to review claimed error admitting evidence under ER 404(b)); *Am Oil Co. v. Columbia Oil Co*, 88 Wn.2d 835, 842-43, 567 P.2d 637 (1977) (refused to consider claimed error due to gap in verbatim reports). Thus, an appellant must support his arguments with legal authorities and adequate citations to the record as part of the brief. It has long been the rule that the failure to provide adequate citations or legal authorities such that the appellant's contentions cannot be evaluated means the judgment will be affirmed. *State ex rel. City of Seattle v. Wong*, 67 Wn.2d 996, 406 P.2d 772 (1965) (judgment affirmed because the record brought up by the appellant was "inadequate to review the trial court's judgment").

B. Judge Kurtz's Imposition of Sanctions Was Well Within His Discretion and Should Be Affirmed.

1. Mr. Jensen Had Notice of the Andersons' Intent to Seek Sanctions, Was Given the Opportunity to and Did Present All the Arguments He Wanted to Contest the Sanctions, and Was Not Denied Due Process.

Mr. Jensen cites *Bryant v. Joseph Tree*, and an internal cite to a Ninth Circuit case, for the proposition that he was entitled to due process before sanctions were imposed, specifically, notice and an opportunity to be heard. 119 Wn.2d 210, 224, 829 P.2d 1099 (1992), citing *Tom Growney Equip., Inc. v. Shelley Irrig. Dev., Inc.*, 834 F.2d 833, 835 (9th Cir. 1987). However, the courts in both cases held that less notice than that given to Mr. Jensen was sufficient for imposition of sanctions against

the attorneys. In *Bryant*, the Supreme Court held that the complaining party received adequate notice of the possibility of sanctions when it was raised in the *reply* brief and the sanctioned party had the chance to appear and argue at the hearing where the issue was determined.

Here, the Andersons gave Mr. Jensen immediate notice by letter of November 24, 2009, that they intended to seek sanctions if he continued with the suit, CP 154, and also in their December 4, 2009 motion. CP 89-223. Mr. Jensen received the papers as the attorney for the Chases. He also was present at the hearings that were scheduled in early 2010, as recounted in the statement of the case. Finally, Mr. Jensen presented his arguments to the court at least three times: as an exhibit to the motion to dismiss in January 2010; in his own May 17, 2010 filing which Judge Kurtz considered at the May 19 hearing; and at the May 19 hearing when Mr. Jensen spoke and was given every opportunity by Judge Kurtz to make whatever argument he felt appropriate. *See* RP (May 19, 2010) 2, 9-12, 14, 22.

As the attorney who filed the challenged pleading and an officer of the court, Mr. Jensen was before the court and subject to its continuing jurisdiction as part of the trial court's inherent authority to control the litigation before it. Once Mr. Jensen was served with the papers, he chose to abandon the case by withdrawing, knowing at the time that there was a sanctions motion pending against himself, personally. From that point on he absented himself from the proceedings at his peril. Mr. Jensen has no debatable argument that he was denied due process given Judge Kurtz's

and the Andersons' efforts to assure that the May 19 hearing was scheduled when Mr. Jensen could attend, and the fact that Mr. Jensen did attend it, filed written arguments in advance, was given every opportunity to present his arguments, and did present them. Mr. Jensen was given more opportunity than was the attorney in *Bryant*. Under the circumstances of this case, his argument that he was denied due process has no proper basis in law or fact, and he provides no case which supports his theory given the undisputed facts. His argument is frivolous.

2. The Gully Property Was Misrepresented Because Todd Chase's Divorce Decree Immediately Transferred it to Leona Chase Six Weeks Before the Complaint Was Filed.

Mr. Jensen argues that Todd Chase still "owned" the Gully Property when the Complaint was filed and TRO granted because he had not recorded transfer in title. This argument fails to recognize the factual context supporting Judge Kurtz's ruling, especially since he had made the rulings in the Chase dissolution and entered the Decree.

The Decree addressed the parties' interest in the Gulley Property. CP 229-52. Paragraph 3.3 of the Decree awarded the Gulley Property to Leona G. Chase. CP 230. As a matter of law, as of September 29, 2009, Todd Chase was divested of any rights he previously had related to the Gulley Property.

In a dissolution, the trial court has "practically unlimited power" over the parties' property and has a duty to decide the parties' respective interests in all property brought to its attention. *In re the Marriage of*

Kowalewski, 163 Wn.2d 542, 550, 182 P.3d 959 (2008), quoting *Arneson v. Arneson*, 38 Wn.2d 99, 102, 227 P.2d 1016 (1951). A dissolution decree awarding property located within the State of Washington has “the operative effect of transferring title.” *Kowalewski*, 163 Wn.2d at 548, citing *United Benefit Life Ins. Co. v. Price*, 46 Wn.2d 587, 283 P.2d 119 (1955). The distribution of property made by a trial court pursuant to a decree of dissolution is effective immediately. *United Benefit*, 46 Wn.2d at 593. A dissolution decree not only vests in the spouse designated the property awarded to him or her, but divests the other spouse of all interest in the property unless otherwise designated in the decree. *Id.* at 589. Moreover, the rights of the parties to decree of dissolution ***become final upon entry of the decree*** and may only be altered by an application to the trial court for a modification of the decree. *Smith v. Smith*, 56 Wn.2d 1, 5, 351 P.2d 142 (1960).

By Todd Chase’s own admission, the Decree contained no language addressing the alleged damage to the Gulley Property or any claims related thereto. CP 326. More specifically, the Decree contained no language whereby Chase reserved any right to bring any claims whatsoever regarding any damages to the Gulley Property. *Id.*; CP 229-52. To date, Chase has made no application to modify the Decree to address the claims he currently tries to pursue against the Andersons. Todd Chase thus had no present personal stake in the outcome of this matter and, in turn, had no standing to bring this action against the Andersons. Since his Right of First Refusal is a future interest, it is not

sufficient to provide Todd Chase with standing to bring suit against the Andersons. *Primark, Inc. v. Burien Garden Assocs.*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992).

C. Judge Kurtz May be Affirmed Based on His Inherent Authority.

A trial court may be affirmed on alternate grounds from those it stated. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989) (“an appellate court can sustain the trial court’s judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it”). Even if there is arguably some defect in Judge Kurtz’s sanctions award under CR 11, which the Andersons do not concede, there is ample basis to affirm the award of sanctions under the court’s inherent authority to control litigation in front of it, including sanctioning parties and/or their counsel. *See State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (2000); *Chambers v. NASCO*, 501 U. S. 32, 111 S.Ct. 2123, 115 L. Ed. 2d 27(1991).

D. Mr. Jensen’s Claimed Core Concern – the Admissibility of His Minnesota Disciplinary Record – Is Mooted By the January 4 Order.

Mr. Jensen has asserted that his primary concern and reason for his appeal is to get a ruling that his Minnesota disciplinary record is not admissible in the determination of whether he should be sanctioned for violation of CR 11. But examination of this assertion reveals it cannot be his genuine concern for at least three reasons.

First, the January 4 Order’s finding that the Minnesota disciplinary record did not make a difference to Judge Kurtz’s ruling means that its submission to the trial court in the papers was, at most, harmless error. Since it had no impact on the ultimate result – the award of sanctions – there is no need or basis for the appellate court to actually determine if there was error in its submission. **Second**, Mr. Jensen failed to supply an adequate record to permit evaluation of the claimed error or that it was preserved by his timely objection.

Third, even if Mr. Jensen gets a ruling that admission of the Minnesota disciplinary materials would have been error in this case, a discretionary ruling on the admission of evidence in one proceeding does not dictate the admission or exclusion of that evidence in a later proceeding between different parties. The admission of evidence which is challenged is always subject to evaluation in the context in which it may arise, particularly where the trial court has to evaluate and weigh the probative value versus the claimed prejudicial effect, as a challenge under ER 404(b) requires. In *State v. Wade*, the Supreme Court laid out the analysis required to evaluate the admission of evidence under ER 404(b), which must be evaluated in the context of a fully developed evidentiary record. 138 Wn.2d 460, 465-66, 979 P.2d 850 (1999). In *Wade* the record was inadequate to determine what the basis was for admission of the evidence because it did not contain a transcript of the trial court’s weighing of the evidence’s probative value and its prejudicial effect. Similarly, in this case, there is no record that Judge Kurtz ever “admitted”

that evidence. Thus, Mr. Jensen is seeking an advisory opinion, which our courts do not give,¹¹ and which would not control future cases anyway.

E. Mr. Jensen's Request for Fees on Appeal Should be Denied Because He Failed to Argue a Basis for a Fee Award and Because There is No Proper Basis to Award Him His Fees on Appeal.

Under the appellate rules and long-settled case law, fees on appeal may only be awarded when there is a proper basis in law *and* that legal basis or theory is stated and argued in the opening brief, for otherwise there is no opportunity for the respondent to contest the legal basis for the fees. *Wilson Court Ltd. P'ship v. Tony Maroni's Inc.*, 134 Wn.2d 692, 710 n. 4, 952 P.2d 590 (1998) (fees on appeal denied because “[a]rgument and citation to authority are required ... to advise us of the appropriate grounds for an award of attorney fees as costs.”); *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 363 n. 12, 110 P.3d 1145 (2005) (RAP 18.1(b) requires the appellant to state and argue the applicable theory for fees in its opening brief, denying fees on that basis); *Whidbey General Hosp. v. State*, 143 Wn. App. 620, 636-37, 180 P.3d 796 (2008).

In *Whidbey General Hospital*, the hospital, though it was the prevailing party on the merits of its appeal, was denied fees on appeal because it did not “cite applicable law creating a right to recover attorney fees” in its opening brief, though it did include a general request for fees

¹¹ *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994): “Although courts in some states do render advisory opinions, we do not do so in this jurisdiction,” citing to *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938), and refusing to render a decision on the issue which was not a genuine controversy.

in the end of its conclusion. Mr. Jensen's January 18 "Supplement to Appellants Initial Brief" is virtually identical to what Whidbey General Hospital did, as it simply "reserved the right to retain attorney's fees at the end of the appellate process" without stating any legal basis for the "reserved" request. This is plainly inadequate under RAP 18.1(b) and settled law. The request to "reserve the right to retain attorney's fees at the end of the appellate process", as Mr. Jensen made here, is wholly inadequate. Rather, the fee request is completely lacking in factual or legal basis and therefore is a frivolous request under RAP 18.9(a).

F. Fees on Appeal Should be Awarded to Andersons.

RAP 18.9 allows an award of fees for frivolous claims or defenses. CR 11 sanctions apply to appeals via RAP 18.7. *Bryant*, 119 Wn.2d at 223. The Supreme Court recently restated the test for a frivolous appeal:

An appeal or motion is frivolous if there are "no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility" of success.

In re Recall Charges Against Feetham, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (quotation omitted). Mr. Jensen has presented "no debatable point of law" in favor of his position. Moreover, the facts in the record could not support his claimed legal arguments, particularly his claim of a due process violation for lack of notice of the pending sanctions proceedings against him personally. The standard for the due process rights of an attorney were established nearly 20 years ago and have not changed. *See Bryant*, 119 Wn.2d at 224 (the due process rights an attorney has in regard to CR 11 sanctions is notice and an opportunity to be heard). The facts do

not permit any colorable argument that Mr. Jensen's due process rights were violated. Rather, he was accommodated far more than the law required once he was served with the December 4, 2009 motion papers. From that point on, Mr. Jensen submitted his arguments against sanctions three times, appeared at the hearings, and was given ample opportunity to present his case at the May 19 hearing.

Under these circumstances, the Court should award the Andersons fees for the expense that Mr. Jensen's appeal has imposed on them.

Even though he obtained the required CR 54(b) findings to create an appeal of right from a final order, the findings entered on January 4, 2010 by the trial court (which he has not separately appealed) eliminated what he claims is his principle basis for wanting to appeal. Despite those findings, and despite the fact that the appeal against the Andersons is moot in every meaningful sense since the judgment has been satisfied and Judge Kurtz held the disciplinary records made no difference to his decision, Mr. Jensen chose to continue with the appeal. But he has done so with an inadequate record and with no arguable basis on the facts or law to get relief. The appeal is frivolous and the Andersons therefore should be awarded their attorneys fees on appeal pursuant to RAP 18.9(a).

V. CONCLUSION

Respondents Frederic and Holly Anderson respectfully request the court affirm the sanctions order entered below, deny Mr. Jensen attorney's fees on appeal, and award them their attorney's fees and expenses incurred on appeal.

DATED this 18th day of February, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA No. 14459
Justin P. Wade, WSBA No. 41168
Appellate Counsel for Respondents Andersons

NO. 65604-0

WASHINGTON COURT OF APPEALS, DIVISION I

Christopher J. Chase and Todd E.
Chase,

Plaintiffs,

vs.

FREDERIC B. ANDERSON, et al.,

Respondents,

and

JAMIE JENSEN, plaintiffs' former
attorney,

Appellant.

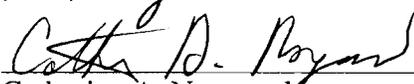
CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused copies of the Respondents Anderson's Response Brief and this Certificate of Service to be served upon counsel of record on Feb 18, 2011 as follows:

Russell James (Jamie) Jensen, Jr. Mukilteo Law Office, PLLC PO Box 105 4605 116 th Street SW Mukilteo, WA 98275-0105 P: 425-212-2100 Email: mukilteolawoffice@gmail.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/>
William B. Foster Hutchison & Foster PO Box 60 4300 198 th Street SW Lynnwood, WA 98048-0060 P: 425-776-2147 Email: bfosteresq@comcast.net	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Email <input type="checkbox"/>

2011 FEB 18 PM 4:42

DATED this 18th day of Feb, 2011.


Catherine A. Norgaard
Legal Assistant

APPENDICES

APPENDIX A: Nov. 24, 2009 letter from Dippold to
Jensen, CP 154 A-1

APPENDIX B: Transcript excerpts of Judge Kurtz’s
ruling on May 19, 2010, RP 1-2, 14-23.....B-1 – B-12

APPENDIX A

CARNEY
BADLEY
SPELLMAN

John C. Dippold

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION

701 FIFTH AVENUE, SUITE 3800
SEATTLE, WA 98104-7010
TEL (206) 622-8020
FAX (206) 467-8215

DIRECT LINE (206) 607-4127

Email: dippoldj@carneylaw.com

November 24, 2009

Via Email and U.S. Mail

Jamie Jensen
Jelsing Tri West & Andrus, PLLC
2926 Colby Avenue
Everett, WA 98201

Re: *Chase v. Anderson*
Snohomish County Court Cause No. 09 2 10550 1

Dear Mr. Jensen

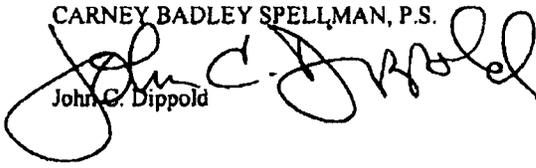
Enclosed please find a copy of the Declaration of Leona G. Chase, which we have also forwarded to the Court, in support of our response to your clients' request for a preliminary injunction in this matter. As you will note, Ms. Chase's Declaration and this Court's Decree of Dissolution dated September 29, 2009 establish that Ms. Chase is the actual owner of the property alleged in your clients' Complaint to be owned by Todd Chase. Given this information, we demand that you immediately dismiss the Chases' lawsuit against the Andersons that was filed on November 13, 2009. In the event, you choose not to dismiss the lawsuit by the end of the day on **Wednesday, November 25, 2009**, we will file a motion with the Court requesting its dismissal, as well as seeking the award of all attorneys' fees and costs incurred to date pursuant to RCW 4.84.185.

Please also consider this letter as formal notification of our intent to seek CR 11 sanctions against you and your clients for pursuing a matter that is clearly not well grounded in fact.

Your immediate attention to this matter is appreciated.

Sincerely,

CARNEY BADLEY SPELLMAN, P.S.


John C. Dippold

JCD:skm

Enclosures

cc: Rick and Holly Anderson
Darlene Adams
David Hall

PEM002 1130 kk244701

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

CHRISTOPHER CHASE, et al,)	
Plaintiff,)	SNOHOMISH COUNTY CAUSE
)	No. 09-2-10550-1
vs.)	
)	
FREDRIC ANDERSON, et al,)	
Defendant.)	

REPORT OF PROCEEDINGS

May 19, 2010

BEFORE THE HONORABLE DAVID A. KURTZ

A P P E A R A N C E S:

MR. WILLIAM FOSTER,
Attorney at Law,

appeared on behalf of the Plaintiff;

MR. JOHN DIPPOLD,
Attorney at Law,

appeared on behalf of the Respondent;

MR. JAMIE JENSEN,
Attorney at Law,

appeared on his own behalf.

JUDITH RAE RIZZO
Official Court Reporter
CSR Reference No. 29906-2082
Snohomish County Superior Court
3000 Rockefeller Avenue, M/S 502
Everett, Washington, 98201-4046

(425) 388-6557

1 DATE: May 19, 2010.

2 THE COURT: Good morning, everyone. Please be seated
3 or remain standing as the case may be. We are here
4 regarding Chase versus Anderson, Snohomish County Cause
5 No. 09-2-10550-1. I would note for the record that among
6 those present are the present attorney for the Plaintiff
7 Chases, Mr. Bill Foster; the former attorney for the
8 Chases, Mr. Jamie Jensen; and the attorney for the
9 Defendant Anderson, Mr. John Dippold.

10 This matter is coming on, as I recall, for a hearing
11 regarding the motion for entry of judgment pursuant to CR
12 11. That motion for entry of judgment was made by
13 Mr. Dippold. I would indicate that I have reviewed
14 pleadings from all three counsel that are present today
15 concerning this matter, and I have had a chance to review
16 them fairly carefully and thoroughly. But I am also
17 prepared to hear whatever you wish to say or present this
18 morning as well.

19 Mr. Dippold, as the moving party, I would anticipate
20 that you would go first, and I will, perhaps, hear from
21 Mr. Foster, and then I will hear from Mr. Jensen, along
22 with whatever else you wish to present and also give you,
23 probably, all some time for rebuttal if necessary. So
24 with that said, Mr. Dippold, I will let you proceed.

25 MR. DIPPOLD: Okay. Good morning, your Honor. As you

1 THE COURT: Mr. Jensen?

2 MR. JENSEN: One item I would like to note, your
3 Honor. I was not receiving pleadings on this throughout,
4 and I would reserve my objection to the procedure on
5 that. Other than that, I have nothing else to add.

6 THE COURT: Mr. Dippold?

7 MR. DIPPOLD: Nothing to add, your Honor.

8 THE COURT: Mr. Foster?

9 MR. FOSTER: No.

10 THE COURT: All right. Give me just a moment and then
11 the Court will be prepared to rule. Okay. Thank you to
12 all counsel, all three counsel for your presentation and
13 arguments. Although this court had previously indicated
14 that CR 11 sanctions would be appropriate, it was
15 preliminary in the sense that the Court had not designated
16 a dollar amount nor designated whom exactly would actually
17 pay, and nothing was final.

18 I would note that, although I do recall Mr. Jensen was
19 physically present at the hearing, the main hearing we had
20 on February 4, 2010, and perhaps at some other
21 proceedings, he did not ask to speak on February 4. But
22 whatever error in not actually inviting Mr. Jensen's
23 participation on February 4 or in not having him more
24 fully involved earlier, I now see it's, essentially, moot,
25 in that Mr. Jensen has been given a full opportunity to be

1 heard for this hearing where the Court would be making
2 final decisions.

3 I have been open to any proposed action today offered
4 by Mr. Jensen or anyone. Having considered this further,
5 I am prepared to make final decisions now on possible CR
6 11 sanctions. But let me recite a little bit of some of
7 the other background. There's a lot more in the record
8 here. But as has been noted, the Plaintiff Todd Chase was
9 involved in a dissolution case with his now ex-wife Leona
10 Chase in Snohomish County Cause -- and I actually pulled
11 the file -- it's Snohomish County Cause No. 08-3-01284-2.

12 I might add, I might be referring to the Chases by
13 first names. I mean no disrespect, but it is sometimes
14 clearer to use just the first names.

15 That dissolution case did go to trial before me on
16 September 2, 2009. Todd was represented by attorney Ken
17 Brewe. Leona was pro se at trial. However, I note that
18 up until about six weeks before -- up until, I believe,
19 actually July 24, 2009 -- Leona had been represented for
20 about a year by Ximena West, a partner in Mr. Jensen's
21 former law firm.

22 The Court gave its oral decision in this dissolution on
23 September 8, 2009, which awarded the real property which
24 is now in question, this so-called gully property, the
25 real property now in question, to Leona. That award was

1 finalized when the final decree was entered and filed on
2 September 29, 2009. I would point out that, as indicated
3 in a recent Court of Appeals case, Bank of America versus
4 Owens in 153 Wn. App. 115, a dissolution decree is a
5 judgment and is effective, essentially, as such.

6 At some point last fall, Todd Chase and his brother
7 Chris Chase then apparently did retain Mr. Jensen to
8 represent them in this lawsuit. The pleadings in this
9 lawsuit indicate that on November 9, Mr. Jensen signed the
10 eight-page complaint and had it filed then on November 13,
11 2009.

12 Paragraph 2 of that complaint, which asserted that Todd
13 Chase was the owner of the relevant property, was just
14 plain inaccurate. It was misleading. It was not well
15 grounded in fact, and it has led to a waste of time,
16 frankly, and unnecessary expense for the Andersons, among
17 others.

18 Now who should largely have to pay for these
19 unnecessary costs? Under these facts and pursuant to CR
20 11, it should not be the Andersons, but instead should be
21 Todd Chase and/or his former counsel Jamie Jensen.

22 So as between Mr. Chase and Mr. Jensen, who should be
23 responsible? Mr. Jensen is the one who presumably drafted
24 and then filed the complaint. But he was acting as Todd's
25 agent and attorney and, presumably, largely on information

1 presented by Todd. By Todd's own admission, he, at least,
2 saw the complaint by November 22, a full 12 days before
3 the motion to dismiss was filed.

4 I have reviewed the pleadings, heard the presentations
5 this morning. Based on this record -- although I have
6 received considerable information -- it still is not a
7 full ventilation of all the issues that might be argued on
8 this point. Based on this record, the Court is not
9 prepared to, essentially, determine and allocate fault as
10 between the two of them, as between Mr. Chase and
11 Mr. Jensen. Instead, they will, essentially, be jointly
12 and severally liable, absent some other later agreement or
13 litigation.

14 Now, although the Court does find there should be a
15 significant CR 11 award, I also agree with both Mr. Jensen
16 and with Mr. Foster, who is now, of course, speaking on
17 behalf of Todd, that the amount requested by Mr. Dippold
18 is too much. Mr. Dippold did provide detailed invoices
19 and, at least, the working copies I was provided, which I
20 assume counsel has seen. I will have my working copy
21 marked as Exhibit 1 for purposes of this hearing.

22 I am not questioning anyone's good faith regarding
23 these invoices. It does appear that some requests have
24 been pruned or reduced and so on; but this controversy
25 boils down to a fairly straightforward misstatement

1 concerning Todd's property interests, and one does note
2 that the plaintiffs' side still had a valid party, so to
3 speak, and valid complaint from Christopher Chase.

4 Arguably, this whole situation regarding Todd's
5 interests could have and should have been rectified
6 quickly -- for example, by plaintiffs seeking to amend the
7 complaint or getting a quick, voluntary dismissal as to
8 Todd -- perhaps, some other action. I won't explore all
9 the possibilities here. But this whole situation could
10 have and should have been rectified quickly. Those things
11 didn't happen to resolve it quickly; and instead, we had a
12 relatively long battle regarding a motion to dismiss and
13 an inordinate amount of legal effort and expense on all
14 sides.

15 In studying the invoices in Exhibit 1, there may be
16 some questions posed regarding certain aspects. Arguably,
17 there was some degree of duplication and multiple
18 attorneys were involved; and although I recognize there is
19 some efficiencies in this regard, but also it can lead to
20 some duplications. It wasn't always clear whether the
21 claimed items focused exclusively on the dismissal motion,
22 and I also agree with Mr. Foster that time expended and
23 focused on the CR 11 sanctions themselves would not
24 generally be recoverable.

25 Inevitably, this court has to draw some bright lines,

1 and I have essentially done so, in part, literally, by
2 circling on Exhibit 1, items that upon my review seem
3 clearly appropriate. Other items may seem less so. The
4 items that I have circled happen to total -- I added them
5 up last night -- they happen to total \$4,992. Now as I
6 say, one could certainly question and argue about
7 particular items. But, frankly, given the nature of this
8 particular controversy and the circumstances, an award in
9 that neighborhood seems about right.

10 So, the bottom line: The Court will enter a judgment
11 in the round figure of \$5,000, with Mr. Chase and
12 Mr. Jensen jointly and severally liable, essentially.
13 That will be the order of the Court for today.

14 MR. DIPPOLD: Thank you, your Honor. Do you need a
15 proposed order?

16 THE COURT: Yes. I will give all three counsel a
17 chance to review that quickly. After we have all had an
18 opportunity to review it and to approve it as to form, I
19 will -- Are there any other questions that anyone has?
20 Mr. Jensen, any questions?

21 MR. JENSEN: Your Honor, I did suggest that this was
22 harmless error and that Todd was the owner at the time of
23 the damage. I hadn't heard a statement by the Court. I
24 had also asked in my pleadings that a Rule 11 is an
25 equitable action and that Mr. Dippold's actions in putting

1 in my history was inadmissible and would be an equivalent
2 showing of unclean hands, and I would like the Court to
3 comment on it if you would. I am trying to be better at
4 this than I am.

5 THE COURT: Well, Mr. Jensen, I will just say this: I
6 have certainly considered all the arguments and the
7 pleadings that were presented. As my comments indicate, I
8 did not see this as a harmless error in the sense that
9 there were expenses incurred as a result of a
10 misstatement. I guess, I would just leave it at that. I
11 certainly considered all the arguments and this,
12 ultimately, is the Court's bottom line. Anything else?

13 MR. JENSEN: No.

14 MR. FOSTER: We just wanted to round down. We didn't
15 want to round up. I have signed the order, your Honor.

16 THE COURT: I would like to have Mr. Jensen have an
17 opportunity to review that as well. Apparently, there is
18 a question. The clerk had a request.

19 THE CLERK: Yes. You had an exhibit marked.

20 MR. DIPPOLD: Oh, one, that's right.

21 THE CLERK: So I do need a stipulation order signed by
22 the parties; although, it's not an offered exhibit.

23 THE COURT: Unless there's an issue, I could just file
24 it?

25 MR. FOSTER: Yeah. Or attach it to the order.

1 THE COURT: It is labeled as an exhibit, but we can
2 file it as part of the record. Would anyone have any
3 objection to that?

4 MR. DIPPOLD: No objection.

5 THE COURT: Mr. Foster?

6 MR. FOSTER: None.

7 THE COURT: Mr. Jensen?

8 MR. JENSEN: No.

9 THE CLERK: My only concern is procedurally, if there's
10 an issue I would need it --

11 THE COURT: Well, to call it an exhibit now might be a
12 bit of a misnomer since I am actually having it filed, but
13 I think the record is clear for what purpose I was using
14 it. It will make a permanent record. It will provide
15 some factual basis if there is some challenge or question
16 later on. So I will just have it filed.

17 MR. DIPPOLD: I think what the clerk may be concerned
18 about is that if the clerk's office sees it as an exhibit,
19 they may want to either return it or destroy it within a
20 certain period of time.

21 THE COURT: If we want to just cross off the exhibit
22 number, and just file it, that might be the best. I would
23 just, so the record is clear, indicate -- can I just hand
24 it back for a moment -- it is a document which is
25 stapled. There's multiple pages. There's a document with

1 a cover page -- or a letter from Mr. Dippold to Mr. Foster
2 dated April 12, 2010, which then has all the relevant
3 attached invoices.

4 So, Madam Clerk, I will let you take off the sticker
5 then, and what I have referred to as Exhibit 1 will now
6 just be filed as a document to provide a factual basis for
7 the Court's decision.

8 MR. DIPPOLD: Thank you, your Honor.

9 MR. FOSTER: Thank you for your time, your Honor.

10 THE COURT: Let me just review the proposed judgment.
11 Okay. I have before me the proposed judgment. I see that
12 there have been some handwritten changes which have been
13 initialed. I will also initial them on the left side. I
14 am dating it this 19th day of May. It appears to have
15 been signed now by all counsel, at least, as to form. Any
16 final comments? Mr. Dippold?

17 MR. DIPPOLD: No, your Honor.

18 THE COURT: Mr. Foster?

19 MR. FOSTER: No, your Honor.

20 THE COURT: Mr. Jensen?

21 MR. JENSEN: No.

22 THE COURT: Very well. The Court is signing the
23 document, and I am handing it down for processing, and I
24 believe that concludes this matter.

25 MR. DIPPOLD: Thank you, your Honor.

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MR. FOSTER: Thank you.

PROCEEDINGS ADJOURNED