

NO. 66595-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NOSWORTHY TELECOMMUNICATION DISTRIBUTOR, INC., a
Washington corporation, and AMIR BASHIR, a married man,

Appellants,

v.

SAMSUNG TELECOMMUNICATION AMERICA, L.L.C., a Delaware
limited liability corporation, and SAMSUNG TELECOMMUNICATION
AMERICA, L.P.,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

As Respondent Samsung Telecommunications America, L.L.C. (“STA”) emphasizes, represented parties sometimes *do* have to suffer for the sins of their attorneys. For example, if a party’s attorney inexcusably fails to submit a timely response to a summary judgment motion, the trial court may properly grant the motion, regardless of the facts that might have been offered in evidence by more competent counsel. Critically for this case, however, the general principle of client vicarious liability has no application in the context of monetary sanctions under CR 11. STA’s novel argument to the contrary is refuted by the text of the rule, relevant Washington case law, and persuasive authority interpreting the analogous Fed. R. Civ. P. 11. Absent vicarious liability, there was no basis in this case for imposing \$51,164.89 in sanctions on Appellants Amir Bashir (“Mr. Bashir”) and Nosworthy Telecommunication Distributor, Inc. (“NTD”) as opposed to on their trial counsel, Mr. Osemene. The trial court’s holding to the contrary was an abuse of discretion, and this Court should reverse.

II. ARGUMENT

1. Overview

This Reply Brief is structured as follows: Section 2 shows why STA’s claim that Rule 11 allows clients to be held vicariously liable for their attorneys’ sanctionable conduct is untenable. Section 3 reviews the record and the law to establish that without vicarious liability, there was no basis for imposing sanctions on Mr. Bashir and NTD. Section 4

considers the procedural defects that provide additional grounds to invalidate the sanctions decision. Finally, Section 5 explains why this Court should consider Appellants' arguments, even though many of them were not raised by their conflicted counsel below.

2. CR 11 does not allow represented parties to be held vicariously liable for their attorneys' sanctionable conduct.

It is not clear from the record why the trial court imposed \$51,164.89 in CR 11 sanctions on Mr. Bashir and NTD as opposed to on Mr. Osemene. Neither STA nor the trial court ever addressed this issue below. Mr. Osemene certainly didn't bring it up. Now that the matter is on appeal, one of STA's key arguments in support of the judgment is its claim that represented parties are vicariously liable for their attorneys' sanctionable actions under CR 11.¹ This claim is incorrect. Indeed, the text of the rule, its purpose, relevant Washington case law, and authority interpreting the analogous Fed. R. Civ. P. 11 are all clearly inconsistent with vicarious liability for clients.

First of all, the text of the Rule focuses attention on signatures and certifications, and—when necessary—on sanctions *for improper*

¹ See Respondent's Brief, pp. 1-2; 30-33. STA also makes this claim by implication throughout Respondent's Brief. It is of course an accepted convention in brief writing to refer to a party filing a document, or making an argument, even though it is actually the party's attorney that performs the action. Appellants do not object to STA's adherence to this convention in Respondent's Brief. Reliance on this convention, however, is not itself an *argument* for holding Mr. Bashir and NTD responsible for any sanctionable conduct by their former counsel.

*certifications.*² As the United States Supreme Court put it, “[t]he essence of Rule 11 is that *signing* [a document] is no longer a meaningless act; it denotes merit.”³ Moreover, “the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, non-delegable responsibility . . . to validate the truth and legal reasonableness of the papers filed.”⁴

Of course, the text of the rule also states that “[i]f a pleading . . . is signed in violation of this rule, the court . . . may impose upon the person who signed it, a represented party, or both, an appropriate sanction.”⁵ Read in conjunction with the signature requirement, and the fact that it is an improper signature that triggers liability, this language is plainly not a warrant for automatic vicarious liability of represented parties who—as was the case here—may not have even signed the offending pleading.⁶

² CR 11(a).

³ *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 546, 111 S.Ct. 922 (1991) (emphasis added).

⁴ *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126, 110 S.Ct. 456 (1989) (superseded by statute in 1993) (emphasis added). As previously noted in Appellant’s Opening Brief at pp. 32-33, between 1985 and 1993 Fed. R. Civ. P. 11 was “substantially similar” to the current version of CR 11. See, e.g., *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 338 n. 68, 858 P.2d 1054 (1993) (noting “substantial” similarity). Both *Pavelic* and *Business Guides*, cited above in note 2, were decided at this time of “substantial” similarity. See *Business Guides*, 498 U.S. at 541-42 (citing full text of the then-current version of Fed. R. Civ. P. 11).

⁵ CR 11(a).

⁶ *Business Guides*, interpreting a version of Fed. R. Civ. P. 11 that included identical language about “the person who signed it, a represented party, or both,” nonetheless dwelt at length on the importance of a signature as a trigger for liability for sanctions. *Business Guides*, 498 U.S. at 540-51. If the Federal Rule imposed vicarious liability, this would have mooted the

On the contrary, the phrase is a grant of discretion that must be used to impose “appropriate” sanctions. In view of the Rule’s emphasis on signatures and certifications, it simply would not be appropriate to impose a substantial monetary sanction on a represented party who had not signed the offending document and whose only responsibility consisted in hiring the attorney who did sign it.⁷

As Appellants previously noted in their Opening Brief at pp. 34-35, the deterrent purpose of the rule would not be well-served by vicarious liability for clients. Indeed, vicarious liability would serve only to dilute the incentive of attorneys to conduct proper pre-signing inquiries, because they would know that the liability for the sanction would be automatically shared with the client.⁸ That vicarious liability would expand the pool of

entire discussion of when and how a client who had signed pleadings could be sanctioned.

⁷ The point is not that a represented party’s signature on a sanctionable filing is a necessary precondition for sanctioning such a party. Instead, the point is that the Rule’s emphasis on signing and certification means that the existence of a client signature—or the lack thereof—is an important factor to consider in deciding whether it is appropriate to impose a sanction on a party. Since the text of the Rule makes the signature an important factor, the text of the Rule also necessarily forecloses the imposition of vicarious liability, which would lead to sanctions on the client based simply on the fact that the client hired the attorney.

⁸ Since clients are typically not nearly as well informed about what counts as valid legal argument as are attorneys, the likely reduction in attorney diligence due to sharing liability with the client would not be counterbalanced by increased client diligence. By contrast, holding a law firm liable for the sanctionable actions of a member attorney does not undermine the deterrent effect of the rule, because a law firm—unlike the typical client—is well positioned to monitor and inculcate rule compliance in its attorneys’ work. *See, e.g., Madden v. Foley*, 83 Wn. App. 385, 392-

resources available to the party seeking sanctions does not count in favor of this approach, as CR 11 is not intended as a fee shifting mechanism.⁹

Washington case law actually dealing with Rule 11 confirms that the rule does not countenance purely vicarious client liability.¹⁰ The case most directly on point is *In re Cooke*, in which the Court of Appeals noted that “Rule 11 sanctions should be imposed directly on the party *if the party is responsible for the frivolous filing.*”¹¹ If simply hiring an attorney and authorizing his representation in a case made a party responsible for subsequent frivolous filings, there would be no need to independently establish responsibility: clients would always be responsible for their attorneys’ sanctionable behavior. In *In re Cooke*, “it was appropriate that

93, 922 P.2d 1364 (1996) (upholding the imposition of sanctions against an individual signing attorney’s law firm on the grounds that this best serves the deterrent purposes of the rule).

⁹ *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (*Biggs II*).

¹⁰ None of the cases STA cites in support of the general proposition that “the actions of an attorney authorized to appear on behalf of a client are binding on the client” considers Rule 11 in any way. See Respondent’s Brief, p. 30. STA cites in particular to: 1) *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App 125, 133, 896 P.2d 66 (1995) (not citing CR 11; concerning a total of \$3,500 in terms under KCLR 4(h), imposed where attorney’s delay in effecting service allegedly served his client’s interest in avoiding paying rent, and where the Court of Appeals interpreted an ambiguous final order to apply the terms against both the party “and his attorney, jointly and severally”); 2) *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002) (not citing Rule 11; involving sanction of dismissal for violation of discovery orders); and 3) *Haller v. Wallis*, 89 Wn.2d539, 573 P.2d 1302 (1978) (not citing Rule 11; concerning an attorney’s ability to bind a client to a settlement).

¹¹ *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999).

the court sanction [the client] only,” because the sanctionable filing “was prepared and filed by [the client]. Only [the client] signed the filing.” Similarly, in *Miller v. Badgley*, the Court of Appeals remanded for consideration of CR 11 sanctions on a client who had signed a factually incorrect affidavit concerning a supersedeas bond.¹² Counsel for Appellants has found no Washington case upholding Rule 11 sanctions on a represented party who neither signed a sanctionable pleading nor played an instrumental role in creating that pleading.¹³

Finally, federal case law interpreting a “substantially similar” Fed. R. Civ. P. 11 has clearly rejected vicarious liability for clients. In their Opening Brief, Appellants cited to *Calloway v. The Marvel Entertainment Group* for the proposition that:

a party represented by an attorney should not be sanctioned for papers signed by the attorney unless the party had actual knowledge that filing the paper constituted wrongful conduct, e.g., the paper made false statements or was filed or an improper purpose. . . . [F]urther . . . when a party has participated in the filing of a paper signed by the attorney or has signed a paper himself but did not realize that such

¹² *Miller v. Badgley*, 51 Wn. App. 285, 298, 300-301, 753 P.2d 530 (1988).

¹³ In *Biggs II*, 124 Wn.2d 193, the Washington State Supreme Court implicitly held that a trial court could award CR 11 sanctions against a represented party and not his attorney. It is impossible to tell from the face of *Biggs II* whether or not the sanctioned client himself signed any documents in violation of the rule. However, the sanctioned client was an attorney who had almost surely played an instrumental role in shaping the legal arguments presented on his behalf. *Biggs II* does not support the proposition that a client may be held vicariously liable for his attorney’s sanctionable actions.

participation or signing was wrongful, then sanctions against the party are also not appropriate.¹⁴

Appellants also cited the holding of *Kirk Capital Corp. v. Bailey* to the effect that “the principle [of client vicarious liability for their attorney’s actions] . . . simply does not apply in a Rule 11 sanction context.

Otherwise every award against an attorney under Rule 11 could also be assessed against the client.”¹⁵ STA’s Response Brief completely fails to discuss *Calloway*, and attempts to distinguish *Kirk Capital* on irrelevant grounds.¹⁶ Moreover, *Calloway* and *Kirk* are not outliers, but instead reflect a strong consensus in the federal courts against applying principles of vicarious liability in the context of Fed. R. Civ. P. 11.¹⁷ Indeed, a

¹⁴ *Calloway v. The Marvel Entertainment Group*, 854 F.2d 1452, 1474, (2nd Cir. 1988) (reversed on other grounds by *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S.Ct. 456 (1989)), cited in Appellants’ Opening Brief at pp. 33-34.

¹⁵ *Kirk Capital Corp. v. Bailey*, 16 F.3d 1485, 1492 (8th Cir. 1994), cited in Appellants’ Opening Brief at p. 31, note 65.

¹⁶ Respondent’s Brief, p. 31, note 15 asserts that *Kirk* “is inapposite in so far as there was no allegation or argument in that case that the factual allegations lacked evidentiary support.” Since the question at this point in the argument is whether Mr. Bashir and NTD can be held vicariously liable for Mr. Osemene’s actions, *Kirk* is plainly directly on point (moreover, *Kirk* applies the version of Fed. R. Civ. P. 11 in effect before the 1993 amendments distinguished it from the current Washington CR 11). *Kirk*, 16 F.3d at 1486-87. STA’s allegations that Mr. Bashir and NTD are *directly* responsible for making demonstrably false factual claims is addressed and refuted in Section 3 below.

¹⁷ See, e.g., *Byrne v. Nezhat*, 261 F.3d 1075, 1117-1118 (11th Cir. 2001) (holding sanctions against a client to be proper only “if she knew or should have known that the allegations in the complaint were frivolous”); *White v. General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990) (“agree[ing] with those circuits that have expressed the view that the sanctioning of a party requires specific findings that the party was aware of the wrongdoing”); and *Independent Fire Insurance Co. v. Lea*, 979 F.2d

leading treatise reviewing the relevant federal case law makes a broader point: “[i]mposing a sanction on the client has met with disfavor.”¹⁸

In summary, the text of CR 11, its deterrent purpose, Washington case law interpreting the rule, and federal case law dealing with the analogous Fed. R. Civ. P. 11 all clearly defeat STA’s claim that the rule permits represented clients to be vicariously liable for the sanctionable acts of their attorneys. The general principle that “the actions of an attorney authorized to appear on behalf of a client are binding on the client” has no application in the context of monetary sanctions imposed under Rule 11.¹⁹ As previously pointed out by Appellants in their Opening Brief, and as reviewed below in Section 3, this conclusion requires reversal of the trial court’s decision.

377 (5th Cir. 1992) (noting that “the ‘represented party’ against which sanctions are levied must be a party who had some direct personal involvement in the management of the litigation and/or the decisions that resulted in the actions that the court finds improper under Rule 11”).

¹⁸ 5A Wright & Miller, *Federal Practice and Procedure*: Civil 3d § 1336.2 (2004).

¹⁹ In addition to serving the deterrent function of the rule, the prohibition of client vicarious liability for Rule 11 violations enhances the perceived the fairness of the legal system. As a practical matter, parties often have to hire attorneys to present their cases. Most parties presumably understand that if their attorney performs poorly, they may lose. What litigants surely do not expect is that by hiring an attorney they also *insure the attorney* against the consequences of his potential Rule 11 violations. This is what would happen if there were client vicarious liability in the Rule 11 context, and it would surely strike many non-attorneys as grievously unfair.

3. Without vicarious liability, there is no basis for CR 11 sanctions against Mr. Bashir and NTD.

The trial court's decision to impose \$51,164.89 in sanctions against Mr. Bashir and NTD cannot be justified without the concept of vicarious liability. The only explanation provided by the trial court for its decision to impose sanctions was that "this is based upon filing a totally frivolous lawsuit." RP 11:4-5.²⁰ The trial court made no findings, either in its written orders or in its oral ruling of December 15, 2010, that Mr. Bashir or NTD was responsible for that filing, or for the frivolous nature of any claims advanced by it. Judging from the face of the Order on Summary Judgment and the trial court's oral ruling, it held the Appellants liable for their attorney's actions simply because he was their attorney. This is vicarious liability, and is improper in this context.

STA cannot rescue the trial court decision on the record before this Court. There is simply no reason to think that Mr. Bashir, or some other employee of NTD, was the "mastermind" who came up with the idea of inflating a basic breach of contract claim into an action alleging fraudulent misrepresentation, unjust enrichment, conversion, breach of the covenant

²⁰ The trial court made a similar comment at RP 21:21 ("the lawsuit is totally frivolous and without merit"). The Order Granting Defendant's Motion for Summary Judgment ("Order on Summary Judgment") stated simply that "the defendant is awarded its reasonable attorney's fees and expenses because of the filing of plaintiffs' claims." CP 180. It bears repeating that Mr. Osemene filed both complaints in this matter, and that he is the only one who signed them.

of good faith, and unfair trade practices.²¹ Assuming for the sake of argument that these added claims were fatally flawed as a matter of law, the responsibility for this was plainly that of Mr. Osemene. This Court may take judicial notice of the fact that Mr. Osemene is an admitted member of the Washington State Bar Association, and that Mr. Bashir is not. On this point, *Kirk* is spot-on: “The trouble here was: the facts alleged would not have formed a legal basis for the relief sought. *This was an issue of law that the law firm, not the lay client, was called upon to make [sic].*”²²

The same is true of the decision to list Mr. Bashir as a plaintiff in the caption of both complaints. This is the province of the attorney, not the client. On the caption issue, however, the Appellants firmly believe that the improper inclusion of Mr. Bashir in the caption could not *conceivably* render the complaint, or any portion of it, frivolous. As STA concedes, the very first paragraph of each complaint makes it clear that NTD and Mr. Bashir were being considered as a single entity, by stating “(hereinafter collectively, ‘Plaintiff’ or ‘NTD’).” CP 371-72, 389.²³

²¹ Compare *Byrne*, 261 F.3d at 1118 (noting that a “client is . . . subject to sanctions when it is clear that he is the ‘mastermind’ behind the frivolous litigation”).

²² 16 F.3d at 1492 (italicized emphasis added). The fact that Mr. Bashir states in his Affidavit that he “asked our Attorney to start this lawsuit” does not establish that Mr. Bashir was making the decisions about the legal form to give his claims. CP 68. Compare Respondents’ Brief, p. 31 (citing to CP 68-69 for the proposition that “NTD and Bashir were responsible for bringing the frivolous lawsuit”)

²³ See Respondent’s Brief, p. 28.

Neither complaint lists any separate claim by Mr. Bashir. In this context, including Mr. Bashir's name in the caption is of no more significance than if NTD had been mis-named "NTBashir," or indeed, if only Mr. Bashir had been listed in the caption.²⁴ There really is "no magic in the caption to an action."²⁵ STA's reference to "Mr. Bashir's" answer to Interrogatory No. 6—which is admittedly almost incomprehensible—does not help it prove either that the complaint is sanctionable because of the caption, or that Mr. Bashir was behind the designation of the parties in this matter.²⁶

With vicarious liability inapplicable, no evidence that Mr. Bashir was the "mastermind" behind the legal packaging of NTD's claims, and no allegation that those claims were filed for an improper purpose, the only *possibly* proper basis for the imposition of CR 11 sanctions against Mr. Bashir and NTD is that Mr. Bashir misrepresented facts in the pleadings.²⁷ More precisely, since neither Mr. Bashir nor anyone else

²⁴ As previously noted at page 26 of Appellants' Opening Brief, CR 17 provides that "no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection" If a complaint cannot be dismissed for a captioning mistake, a party certainly can't be sanctioned for it, at least in the absence of evidence that the captioning mistake was part of a nefarious plot masterminded by the party. There is no such evidence here.

²⁵ *State v. Knutson*, 81 Wash. 47, 49, 142 P. 444 (1914).

²⁶ Respondent's Brief, p. 28 (citing to CP 286). Mr. Osemene also affixed his typewritten signature to "Mr. Bashir's" Responses (CP 296). Common sense suggests that it was Mr. Osemene who not only drafted the "General Objection" part of the Responses (CP 279-281) but also supplied the legalese in the Answer to Interrogatory No. 6 (CP 286).

²⁷ See *Byrne*, 261 F.3d at 1118 (noting that "[t]ypically, sanctions are levied against a client when he misrepresents facts in the pleadings") (citing to *White*, 908 F.2d at 686). See also *McCarty v. Verizon New*

from NTD signed the allegedly offending pleading, the only possibly proper basis for sanctioning Mr. Bashir and NTD is that they misrepresented facts to Mr. Osemene, or convinced him to ignore the facts, and that the complaints consequently came to be based on factual misrepresentations or omissions.²⁸

Unfortunately for STA, the Complaints filed in this case are neither based on nor incorporate factual misrepresentations or omissions.

England, Inc., 731 F.Supp.2d 123, 134 (D. Mass. 2010) (noting that “[i]n the rare instances where courts have found it appropriate to sanction a client rather than an attorney, the client has been directly responsible for the unnecessary burden imposed on the court and the opposing party. . . . Usually this has meant *factually groundless pleadings where a party has clearly lied or misrepresented*”) (emphasis added).

²⁸ The logic of relevant Washington case law supports the proposition that a represented client who is neither the “mastermind” of legally baseless claims nor responsible for a filing made for an improper purpose is properly sanctionable only if he has at least negligently misrepresented or omitted facts. In *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992), the Washington Supreme Court held that even if a pleading “lacks a factual . . . basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the [pleading] failed to conduct a reasonable inquiry into the factual . . . basis of the claim.” Because the reasonableness of the inquiry is judged by an objective standard, CR 11 sanctions for factually groundless pleadings are only appropriate where the person signing the pleading knew or should have known about the lack of evidentiary support. See, e.g., *Biggs II*, 124 Wn.2d at 197 (noting that “[c]ourts should employ an objective standard in evaluating an attorney’s conduct”). This is a negligent misrepresentation standard. In *Miller*, 51 Wn. App. at 302-303, the Court of Appeals applied this standard to a represented party who had signed a misleading affidavit. If the negligent misrepresentation standard applies to represented parties who have signed an offending pleading, an at-least-equally-stringent standard must apply to who have not signed the offending pleading.

STA has never identified any affirmative factual misrepresentations in the Complaints. There are none. Read charitably, STA's argument appears to be that Mr. Bashir should have known that various agreements he reached (or allegedly reached) with STA completely barred his suit (and that the Complaint is sanctionable because it ignores these "facts"). However, the legal consequences of any agreements that Mr. Bashir may or may not have reached are just that: legal consequences.²⁹ Even if the breach of contract claim were frivolous because it failed to draw the proper legal conclusions from the agreements, this would be Mr. Osemene's responsibility, and not Mr. Bashir's.

Moreover, there is not a stitch of evidence anywhere in the record that Mr. Bashir misled Mr. Osemene (or anyone else) about any facts relating to either the original distributorship agreement or the purported agreement to rescind the original deal. Indeed, a copy of the original distributorship agreement is appended to the original complaint at Exhibit A. CP 403-410. Likewise, the record shows that Mr. Osemene was familiar with Mr. Sutter's factual account of the telephone calls leading to the purported rescission agreement *at least* by August 19, 2010, the date on which NTD's discovery responses were received by counsel for STA. CP. 256. Since Mr. Osemene did not regard Mr. Sutter's account of the

²⁹ See, e.g., *Martinez v. Miller Industries, Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999) (noting that "[d]etermining the legal consequences flowing from a contract term involves a question of law").

facts as dooming NTD's claims (or rendering them subject to sanctions), Mr. Bashir had no reason to draw that conclusion, either.³⁰

By making the immediately preceding argument, Appellants do not intend to concede that their core breach of contract claim lacked either legal or factual support. Appellants stand by their arguments made in their Opening Brief at pp. 17-22 to the effect that the breach of contract claim should have survived summary judgment if only Mr. Osemene had not failed to submit a timely and properly supported response. However, even if the breach of contract claim lacked both legal and factual support, this alone would not warrant the imposition of sanctions against Mr. Bashir and NTD. There is simply no evidence that they masterminded the legal formulation of this (or any other) claim, and likewise no evidence that they negligently misrepresented or omitted any facts about the relevant contracts. Without the crutch of vicarious liability, there is simply no basis in the record for the award of any CR 11 sanctions against Mr. Bashir and NTD.

Appellants' arguments are also plainly not directed toward asking this Court to take a stand on their potential malpractice claims against Mr. Osemene.³¹ CR 11 sanctions can only properly fall on a person (attorney

³⁰ *Compare Cargile v. Viacom International, Inc.*, 282 F.Supp.2d 1316, 1320 (N.D.Fla. 2003) (concluding that where attorney had advised client to dismiss the case, but did not withdraw, client had grounds not to "realize[] that his case was factually and legally without merit"). There is no evidence in this case that Mr. Osemene ever advised Mr. Bashir or NTD that NTD's claims lacked merit.

³¹ *Cf.* Respondent's Brief, p. 3 and p. 32 n. 17.

or client) who is “responsible” for the rule violation.³² Given the facts of this case, it is perfectly appropriate for Mr. Bashir and NTD to argue that they are not responsible for any rule violations that may have occurred. The relief they seek is a ruling that so holds. If that ruling comes with directions for remand to determine what sanctions, if any, may be properly imposed on Mr. Osemene, Appellants would have no objection. But that is simply not the same thing as asking this Court to rule that Mr. Osemene committed malpractice.³³

4. Procedural defects in the request for sanctions, and the trial court’s granting of that request, also require reversal.

Even if all of NTD’s claims were both legally and factually unsupported, and even if Mr. Bashir and NTD were responsible for their attorney’s actions, the trial court still abused its discretion by imposing \$51,164.89 in sanctions. This is so for at least three reasons. First, STA failed to provide either formal or informal advance notice of its intent to seek sanctions. Second, STA did not request, and the trial court did not

³² *In re Cooke*, 93 Wn. App. at 529.

³³ Put another way, liability for legal malpractice requires proof of four elements: (1) the existence of an attorney-client relationship giving rise to a duty of care on the part of the lawyer; (2) an act or omission breaching that duty; (3) damage to the client; and (4) the breach of duty must have been a proximate cause of the damages to the client. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). Mr. Bashir and NTD have not asked this Court to rule on these elements—that would be silly—and the issues connected with proving them are not before this Court. Moreover, Mr. Osemene is not a party to this action, and will not be collaterally estopped by any holding of this Court that might overlap with an element of a potential malpractice claim.

make, any findings about any lack of reasonable inquiry by either Mr. Osemene or Mr. Bashir. Third, the trial court did not consider less severe sanctions, or impose the minimal sanctions necessary to serve the deterrent purpose of CR 11.

Under established Washington law, a party seeking sanctions under CR 11 must give the other side informal notice of that intent as soon as possible, so that the other side has a chance to mitigate the harm done by its allegedly sanctionable behavior.³⁴ Contrary to STA's contention, there is no reason to think that this notification requirement is excused if the other party subsequently contests the substantive propriety of a sanction motion made without notice.³⁵ Here, STA did not give the required prior notice. The first notice it provided of its intent to seek sanctions was in the motion that requested them. As a consequence, it was *at least* improper to award STA its fees for preparing its Motion for Summary Judgment.

Second, a trial court may not impose CR 11 sanctions without finding that the attorney or the party failed to conduct a reasonable inquiry

³⁴ See, e.g., *MacDonald v. Korum Ford*, 80 Wn. App. 877, 892, 912 P.2d 1052 (noting that "an attorney should informally notify the offending party by telephone call or letter before filing, preparing and serving a CR 11 motion") (citing to *Biggs II*, 124 Wn.2d at 198 n. 2).

³⁵ Cf. Respondent's Brief, pp. 39-40. The notification requirement serves both to give parties alleging CR 11 violations an incentive to help hold the damages caused by such violations to a minimum, and to restrict the use of sanction motions to cases involving "egregious" conduct. *MacDonald*, 80 Wn. App. at 892. If failure to comply with the notice requirement were excused whenever the party accused of the CR 11 violation denied the merits of the accusation, neither of these functions would be well-served.

into the legal or factual underpinnings of the claims.³⁶ No such finding was made here, either in writing or in the court's oral ruling. In arguing the contrary, STA's Brief mischaracterizes the following brief exchange between Mr. Osemene and the trial judge:

MR. OSEMENE: Your Honor, with all due respect, we do not think or lawsuit is frivolous because—

THE COURT: What have you submitted counsel to show that? Nothing.

MR. OSEMENE: We have, Your Honor. With all due respect, Your Honor, you obviously challenged me on this very note, and I am glad I provided you, as you will see on Friday, all the relevant information you will need. Everything is in the motion for reconsideration. I did my due diligence.

RP 11:6-15.³⁷ Contrary to STA's claim, this passage does not show the trial court rejecting Mr. Osemene's prior claim of due diligence; rather, it shows the trial court rejecting Mr. Osemene's prior claim that the lawsuit was not frivolous, on the grounds that Mr. Osemene had submitted nothing to counter the allegation of frivolousness.³⁸ Mr. Osemene subsequently asserted that he had been properly diligent (although perhaps

³⁶ *Bryant*, 119 Wn.2d at 220.

³⁷ Compare STA's characterization of this exchange in Respondent's Brief, p. 37.

³⁸ Appellants previously argued in their Opening Brief that the trial court's refusal to consider the affidavits of Mr. Bashir and Mr. Sutter before quantifying the sanction award was an independent reason warranting reversal. Regardless of whether it would in fact justify reversal *by itself*, the refusal to consider these affidavits has the practical effect here of meaning that the substantial monetary sanctions on Mr. Bashir and NTD flow directly from their counsel's failure to submit a timely response to STA's summary judgment motion. Mr. Osemene's failure to submit a timely response to STA's motion for summary judgment is not a proper basis for imposing \$51,164.89 in sanctions on his clients.

only in reference to the preparation of the motion for reconsideration). The verbatim transcript reveals that the trial court made no direct response to this later claim. In any event, there was plainly no finding of any failure to inquire on the part of Mr. Bashir and NTD, nor even any discussion of what sort of inquiry it would have been reasonable for Mr. Bashir to conduct.³⁹

Third, there is no evidence in the record that the trial court considered, and rejected, a lesser sanction. It is important to note that the trial court decided to impose a monetary sanction in its Order Granting Summary Judgment. There is no evidence in the record that it considered any lesser sanction prior to signing that order. Moreover, the fact that the trial court subsequently listened to Mr. Osemene argue for less than \$51,164.89 in fees does not mean that the court fulfilled its duty to consider a lesser sanction. Indeed, the record makes it clear that the court was focused only on the reasonableness of the fees in the standard manner (e.g., was their duplication in attorney billings?), rather on their effectiveness and necessity as a sanction. RP 21:16 to 22:11. And there is simply no discussion or explanation anywhere in the record concerning how imposing \$51,164.89 in sanctions *on Mr. Bashir and NTD* was necessary to serve the deterrent purposes of the rule.

³⁹ See, e.g., *Business Guides*, 498 U.S. at 550 (noting that “what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney”).

Each of these three reasons, standing alone, require this Court to reverse and remand for further findings.

5. The decisions, issues and arguments raised in Appellants' Opening Brief are properly before this Court.

The trial court imposed monetary sanctions as part of its Order Granting Defendants' Motion for Summary Judgment ("Order on Summary Judgment"). CP 179-180. The last paragraph of this order states that it is:

ORDERED, ADJUDGED AND DECREED that the defendant is awarded its reasonable attorneys' fees and expenses because of the filing of plaintiffs' claims pursuant to CR 11. Defendant is directed to submit a declaration describing those fees and expenses within ten (10) days from the date of entry of this Order.

CP 180. Mr. Bashir and NTD explicitly listed the Order on Summary Judgment in their Notice of Appeal. CP 2. Pursuant to RAP 2.4(a), the trial court's decision to impose "reasonable attorneys' fees" as a Rule 11 sanction is thus properly before this Court on appeal.

STA nonetheless contends that because the trial court set the dollar amount of sanctions in a separate order not listed in the Notice of Appeal, this Court should not consider issues relating to that amount.⁴⁰ STA's position on this point distorts both common sense and RAP 2.4. As a matter of common sense, since Mr. Bashir and NTD properly appealed the decision to impose monetary sanctions (the Order on Summary Judgment), this Court must be able to consider whether the correct level of sanctions

⁴⁰ Respondent's Brief, p. 3, note 1 and p. 38.

against Bashir and NTD should be zero. That is a critical part of what it means for the decision to be on appeal. Moreover, the issues STA seeks to exclude from this Court’s consideration—issues of mitigation and lesser sanctions—both concern matters that the trial court should have considered *before* imposing “reasonable attorneys’ fees.”⁴¹ By explicitly appealing from the decision that imposed the monetary sanctions, Mr. Bashir and NTD properly noted for appeal the question of whether the trial court complied with the procedural preconditions for making a sanctions award.⁴²

A liberal application of RAP 2.4(b) and (c) to the procedural facts of the case on appeal confirms this common-sense approach.⁴³ RAP 2.4(c) states that “the appellate court will review a final judgment not designated in the notice . . . if the notice designates an order deciding a

⁴¹ See, e.g., *Biggs II*, 124 Wn.2d at 202 n. 3 (noting that “[i]n fashioning any sanction, the trial court must remain cognizant of the fundamental deterrent purpose of the law”, thereby at least strongly implying that the question of optimal deterrence is part of the question as to what type of sanction to impose, and not just part of the question about the monetary value of any sanction).

⁴² It is also worth noting that STA relies on the trial court’s oral ruling on December 15 in its attempt to show that trial court made the necessary findings about a lack of reasonable inquiry. Cf. Respondent’s Brief, pp. 36-37. If STA can treat the November 24, 2010 Order Granting Summary Judgment and the trial court’s oral ruling on December 15, 2010 as one order for the purpose of justifying the imposition of sanctions, Mr. Bashir and NTD should be allowed to treat them as one order for the purpose of appeal.

⁴³ Pursuant to RAP 1.2(a), the Rules of Appellate Procedure “will be interpreted liberally to promote justice and facilitate the decision of cases on the merits.”

timely posttrial motion based on . . . CR 59.” Here, Mr. Bashir and NTD filed a CR 59 motion. CP 161-178. The Notice of Appeal expressly lists the Order Denying Motion for Reconsideration, and thus under RAP 2.4(c) brings up the final judgment. CP 2. That judgment, in turn, quantifies the CR 11 sanctions in the amount of \$51,164.89. CP 10. The Order Setting Amount of CR 11 Sanctions clearly “prejudicially affects” the final judgment, as the latter could not have been entered without the former.⁴⁴ The Order Setting Amount of CR 11 Sanctions was also entered before this Court accepted review.⁴⁵ Under the required liberal interpretation of the appellate rules, the Order Setting Amount of CR 11 Sanctions is properly before this Court under RAP 2.4(b).⁴⁶

The *arguments* made in Appellants’ Opening Brief are also properly before this Court. It is certainly true that the record below reveals no arguments by either STA or Mr. Osemene to the effect that Mr.

⁴⁴ RAP 2.4(b) provides that “[t]he appellate court will review a trial court order or ruling not designated in the notice . . . if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.” Whether the non-designated order “prejudicially affects” the designated order turns on whether the designated order would have happened absent the non-designated order. *See, e.g., Right Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002).

⁴⁵ The Order Setting Amount of CR 11 Sanctions was entered December 15, 2010. CP 421. Review was accepted on January 24, 2011. CP 1. See also RAP 6.1 (stating that review is accepted upon filing of a proper notice of appeal).

⁴⁶ RAP 1.2(a). Indeed, the only “liberality” required is in accepting that a final judgment designated *by implication* via RAP 2.4(c) counts as the “decision designated in the notice” for the purposes of RAP 2.4(b).

Osemene, and not Mr. Bashir or NTD, should be solely liable for any sanctions. CP 21-25; 52-53; 369-70; 202-205; and 182-184. Nor is there any evidence that the trial court considered this possibility *sua sponte*. RP 1-24; CP 7-8. It is also beyond dispute that RAP 2.5(a) gives this Court the discretion to “refuse to review any claim of error which was not raised in the trial court.”⁴⁷ However, Mr. Bashir and NTD have offered a powerful reason why this Court should consider their new arguments: once sanctions were threatened, their trial counsel, Mr. Osemene, was clearly conflicted, and that conflict surely played a role in his ensuing silence.⁴⁸ It simply is not consistent with justice—and indeed verges on a classic Catch-22—to tell a party who needs to appeal because his clearly conflicted attorney failed to raise arguments below that he can’t raise those arguments on appeal . . . because his conflicted attorney failed to raise them below.

At least two circuits of the United States Court of Appeals recognize this point, and will raise the issue of a client’s responsibility for his or her attorney’s sanctionable conduct *sua sponte* if the conflicted

⁴⁷ See, e.g., *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011) (noting that “[n]othing in RAP 2.5(a) expressly prohibits an appellate court from *accepting* review of an issue not raised in the trial court”).

⁴⁸ That a conflict of interest, and not mere incompetence, played a role in Mr. Osemene’s failure to argue for his own responsibility is strongly supported by the fact that Mr. Osemene has previously been personally sanctioned under Rule 11. As in Appellants’ Opening Brief, the following unpublished case is not cited as authority for any legal principle, but instead to establish the fact that Mr. Osemene has been previously sanctioned: *Colmex, Inc. v. Harris*, 2008 WL 2487991 (Div. 1, 2008). A copy of *Colmex* was attached to Appellants’ Opening Brief as Appendix F.

attorney continues to represent the sanctioned party on appeal. As the Tenth Circuit put it:

There is an obvious conflict of interest between [plaintiffs], on the one hand, and their counsel, on the other, on the issue of who should be liable for the sanctions imposed by the district court. The matter was not raised in plaintiffs' briefs; this may have resulted, however, from the very conflict to which we refer. An attorney in the circumstances before us who argues that her clients were ignorant of any wrongdoing in the filing of the papers leading to sanctions essentially argues that she should bear sole liability for those sanctions. *We therefore raise this joint and several liability issue sua sponte.*⁴⁹

Here, the Court need not raise this issue *sua sponte*, but simply needs to exercise its discretion to consider the arguments made in Appellants' Opening Brief. Apart from citing to RAP 2.5(a), STA has offered no reason for the Court not to consider those arguments. On the other side of the discretionary scale, considering the arguments serves to "promote justice" in this particular case.⁵⁰ There is simply no justification for requiring Mr. Bashir and NTD to pay for sanctionable behavior by their attorney. Moreover, considering the arguments raised by Appellants on

⁴⁹ *White v. General Motors Corp.*, 908 F.2d 675, 687 (10th Cir. 1990) (emphasis added). *See also Calloway v. The Marvel Entertainment Group*, 854 F.2d 1452, 1456 (2nd Cir. 1988)) (noting that the attorney and his firm representing Calloway "had a blatant conflict of interest and should have withdrawn as Calloway's counsel in defending the motions for sanctions. Because of this representation, no argument was made on Calloway's behalf that [the attorney] was solely responsible for pursuit of the [unfounded] claim Nor was an argument made that even if sanctions should be imposed on Calloway, [the attorney] and his firm should be jointly and severally liable for them," and raising this issue *sua sponte* on appeal).

⁵⁰ RAP 1.2(a).

appeal will help prevent Rule 11 from becoming a vicarious liability rule by default.⁵¹ This Court should exercise its discretion under RAP 2.5(a) to consider Appellants' arguments.

III. CONCLUSION

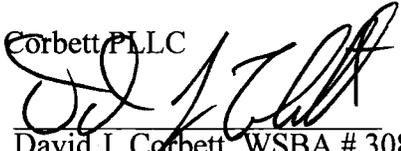
Washington law clearly establishes that represented parties are not vicariously liable for the sanctionable conduct of their attorneys under CR 11. Client vicarious liability for Rule 11 violations would turn clients into the insurers of their attorneys, and undermine the deterrent purpose of the rule. Here, given the absence of vicarious liability, there was no proper basis for sanctioning Mr. Bashir and NTD. Moreover, both STA and the trial court failed to follow the required steps precedent to a proper award of sanctions. In this context, the imposition of \$51,164.89 in CR 11 sanctions on Mr. Bashir and NTD was an abuse of the trial court's discretion, and a significant miscarriage of justice. This Court should reverse.

⁵¹ If followed as a general rule, a refusal to consider a represented party's arguments about whether sanctions should be imposed on them or their attorney because conflicted counsel did not raise them below would mean such arguments might not be heard by *any* court, precisely in those cases where the attorney is most culpable. They wouldn't be heard by the trial court if the attorney compounded his alleged Rule 11 violation by failing to advocate in his client's interest on the sanctions issue. Then, because they weren't raised below, they wouldn't be heard on appeal. Hence, for clients of attorneys who violate Rule 11 *and* subsequently betray their clients' interests, Rule 11 would tend toward a strict liability rule.

Respectfully submitted this 16th day of June, 2011

David Corbett PLLC

By:

A handwritten signature in black ink, appearing to read "D. J. Corbett", written over a horizontal line.

David J. Corbett, WSBA # 30895
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on June 16, 2011 I sent a copy of the attached Reply Brief of Appellants via email PDF attachment to Bryan C. Graff of Ryan, Swanson and Cleveland PLLC, attorney for Respondent, at graff@ryanlaw.com. Mr. Graff has agreed to accept service of pleadings in this matter via email.

Dated this 16th day of June, 2011 at Tacoma, Washington.

By: _____


David J. Corbett