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IF

NO. 69847-8-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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PATRICK SMITH, Respondent,

vs.

CONGRUENT SOFTWARE, Inc., Appellant.

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BRIEF OF RESPONDENT

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COGDILL NICHOLS REIN WARTELLE ANDREWS  
By: Ian M. Johnson, WSBA #39724  
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Attorney for Respondent

## TABLE OF CONTENTS

<u>Section:</u>	<u>Pages:</u>
A. Identity of Respondent	1
B. Statement of the Case	1
C. Summary of Argument	1
D. Arguments of Respondent	2-7
C. Conclusion	8
D. Appendix	A1-A15

## TABLE OF AUTHORITIES

### **Cases**

<i>Ambach v. French</i> , 141 Wash.App. 782, 786-787, 173 P.3d 941, 943 (Wash.App. Div. 3, 2007).....	5,6
<i>Corey v. Pierce County</i> , 154 Wn.App. 752, 225 P.3d 367 (2010).....	2
<i>Davidson v. State</i> , 116 Wash.2d 13, 25, 802 P.2d 1374 (1991).....	6
<i>Real Progress, Inc. v. City of Seattle</i> , 91 Wash. App. 833, 843-44, 963 P.2d 890 (1998).....	6
<i>Right Price Recreation, LLC v. Connells Praire Cmty. Council</i> , 105 Wn. App. 813, 820, 21 P.3d 1157 (2001) .....	5
<i>Smukalla v. Barth</i> , 73 Wash.App. 240, 868 P.2d 888, 892 (Wash.App. Div. 2, 1994), <i>overruled on separate grounds by Malted Mousse v. Steinmetz</i> , 150 Wash.2d 518, 79 P.3d 1154 (2003). .....	4

*State v. State Credit Ass'n. Inc.*, 33 Wn. App. 617, 622, 657 P.2d 327 (1983)..... 5

**Statutes**

RCW 4.84.185.....passim

**Rules**

CR 11.....passim

CR 54.....passim

CR 60.....7

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**A. IDENTITY OF RESPONDENT**

Respondent, Patrick Smith, respectfully request this Court to deny review of and affirm the decision of the trial court dated January 2, 2013.

**B. STATEMENT OF THE CASE**

Generally respondent agrees with the appellant's statement of the case with regard to the procedural history.

There are, however, a few additions that must be noted.

First, after Congruent filed its CR 11 motion for sanctions on October 10, 2011 Smith filed a brief in opposition. Appendix pp. 1-6. Smith maintained, and continues to maintain, that the claim of constructive discharge was not frivolous nor was it advanced without reasonable cause. The trial court's finding of such was in error.

Second, as noted in plaintiff's response to Defendant's motion submitted December 27, 2012 after the court's October 24, 2011 order appellant failed to file any type of motion until December 2012. There was an e-mail in January 2012 that indicated some intent to file, but nothing was done until December 2012.

Third, while the court in its January 2, 2013 order cited specifically CR 54(d) and RCW 4.84.185 the respondent, in his response to Congruent Software's motion, raised the argument of Latches that could have provided the court with yet another justification upon which to deny Congruent Software's motion as untimely.

**C. SUMMARY OF ARGUMENTS**

The trial court did not commit error when it denied petitioner's motion as untimely when it was filed fourteen months after the Findings of Fact and Conclusions of

Law were entered. This Court should affirm the order of the trial court.

**D. ARGUMENT**

**1. CR 54(d) Barred Congruent Software's Motion as Untimely.**

CR 54(d) governs motions and claims for costs, fees and expenses. The rule provides that "Unless provided by statute or order of the court, the motion must be made no later than 10 days after entry of judgment." In *Corey v. Pierce County*, 154 Wn.App. 752, 225 P.3d 367 (2010), the plaintiff in that matter had prevailed with regard to a wage claim against Pierce County. Plaintiff then failed to file her request for fees within the 10 day period prescribed by CR 54, and the court upheld the trial court's determination that plaintiff, therefore, was not entitled to request attorney's fees at such a late date. The court found "No excusable neglect" for delay in making the request for fees, and accordingly denied the same. *Id.*

Here, the court's order was entered on October 24, 2011. Appellant failed to file any type of motion until fourteen months later in December 2012. There was no excusable neglect shown or argued for the delay. Indeed, one cannot imagine what excusable neglect would allow for an almost fourteen month delay where the court rules clearly require the motion for fees/sanctions to be filed within ten days of the order.

The practical reason for the timelines in CR 54(d) is that there are timelines that must be met by parties that are intending to appeal their matters. Here, if this Court reversed the trial court's order and allowed appellant and other similarly situated parties to wait 14 months past the date that the order was entered, it would effectively allow parties to wait out any appeal timelines that may have existed and then deny the opposing party the opportunity to make a reasonably informed decision whether to appeal a court's order. Alternatively,

allowing a party to file their request for fees fourteen months after an order would allow a party to drag a matter out indefinitely. Indeed, there is no rule that would allow a party to finalize the matter. This would put parties, like the respondent here, in an impossible situation. Either, they have to file a motion to force the other side to file a motion for fees against them or simply wait on the off chance that something may be done years later.

The intention of CR 54(d) is to ensure finality of matters. If this Court was reverse the trial court and allow an order awarding sanctions or fees at such a late date this Court must decide that there are effectively no timelines governing such a request. This Court's decision in allowing such a motion to be filed over a year after the initial order would in effect allow a party to file their request two, four, or ten years after the original order was entered.

The appellant asserts that the motion for fees filed in December 2012 was seeking fees and sanctions and therefore, CR 54(d) does not apply. Brief of Appellant, p. 6. The motion filed by appellant sought fees and included declaration of counsel regarding fees and "billing records" regarding the same. The motion filed by petitioner in December 2012 was functionally the same as a motion for fees pursuant to CR 54(d). Further, arguably RCW 4.84.185 applies only to set a deadline for the *motion* for sanctions not the actual request for judgment. In that case the two could be read as

Notice was given to petitioner regarding the need for such a motion by the court's order in October 2011. CR 54(d) then set a timeline by which such a motion needed to be filed.

Per CR 54(d), this matter was final 10 days after entry of the court's order and this Court should affirm the trial court's order and deny the appeal.

**3. RCW 4.84.185 Requires a Request for Fees, Costs and/or Sanctions To Filed Within 30 days After Entry of the Order.**

Similar to CR 54(d), RCW 4.84.185 states that a party may request attorney fees, costs and sanctions for opposing a frivolous claim or defense. The statute states “In no event may such motion be filed more than thirty days after entry of the order.”

In *Smukalla v. Barth* the defendant moved the court for an award of fees, costs and sanctions for defending against a frivolous claim. 73 Wash.App. 240, 868 P.2d 888, 892 (Wash.App. Div. 2,1994), *overruled on separate grounds by Malted Mousse v. Steinmetz*, 150 Wash.2d 518, 79 P.3d 1154 (2003).

In *Smukalla*, the court held, among other things, since defendant did not move for attorney fees and sanctions until more than four months after the decision had been filed, the motion was untimely pursuant to RCW 4.84.185. *Id.* at 244.

Again, here, the motion was filed by appellant almost 14 months after entry of this court’s order in October 2011. The appellant’s motion was barred by the thirty day time limit in RCW 4.84.185.

It is important to note that here the court’s Findings and Conclusions entered on October 24, 2011 required a *motion* not merely supplemental briefing. If RCW 4.84.185 applies and not CR 54(d), as above, the appellant’s motion filed 14 months later was well past the 30 day deadline.

Again, this Court, in order to find that defendant’s motion was timely filed fourteen months after the court’s order in October 2012, would have to find that no time limits applied to the motion. This Court would have to find that such a motion would have been timely if it had been filed two, three or ten years after entry of the October 2012 order. Such a result is absurd and would cause litigation to remain in place for

years without ever being concluded.

Petitioner may argue in reply that this does not matter because the judgment was not entered in this matter per CR 54(e). That fact, however, should not effect the decision of this court. The order before the court on this motion does not present a situation like that contemplated in CR 54(e) where Smith could have moved this matter forward, on his own, to preserve appeal rights or finalize the matter. Rather, he had to wait an undefined period of time until appellant, at its leisure, filed the motion required by the court's order.

#### **4. Disfavor of Piecemeal Appeals**

As noted above, respondent Smith disagreed fully with the court's determination that the claim of constructive discharge was a frivolous claim. That claim was not brought to harass and it was not brought for improper purposes. In fact, the claim survived a motion for summary judgment on much less strict standards than those that are applied in considering a motion pursuant to CR 11. As such the respondent fully intended to appeal the court's decision.

The effect of the court finding that Congruent Software's motion is timely would stretch this matter much further than the legislature ever intended. The court rules and statutes exist to ensure timely resolution of disputes and finality of matters and. The courts disfavor piecemeal appeals. See *Right Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 820, 21 P.3d 1157 (2001) (citing *State v. State Credit Ass'n. Inc.*, 33 Wn. App. 617, 622, 657 P.2d 327 (1983))

If this matter is reversed, respondent intends to appeal the same as well as the underlying judgment pursuant to RAP 2.4(b). See e.g. *Ambach v. French*, 141 Wash.App.

782, 786-787, 173 P.3d 941, 943 (Wash.App. Div. 3, 2007). (“When a party seeks review of an award of CR 11 sanctions, the underlying judgment resulting in the sanctions is also subject to review pursuant to RAP 2.4(b).”)

Since this matter had been unaddressed for fourteen months, however, respondent reasonably considered the matter final and took no steps to prepare for appeal such as preserving Exhibits, obtaining transcripts and the like. Respondent Plaintiff could not have moved this matter forward, because he was not entitled to file a motion to finalize the matter.

**5. Appellant’s Request Was Barred By the Doctrine of Laches.**

In his response to the motion Smith raised the defense of laches to bar Congruent Software’s motion as untimely. Appendix 7-15. While the trial court did not need to reach that issue, ruling that the motion was barred pursuant to RCW 4.84.185 and CR 54(d), laches still stands as an equitable bar to the court properly denying Congruent Software’s motion.

Laches is an equitable defense that is based on estoppel. *Real Progress, Inc. v. City of Seattle*, 91 Wash. App. 833, 843–44, 963 P.2d 890 (1998). The doctrine applies when the party asserting Laches affirmatively establishes: (1) knowledge of a party of facts constituting a cause of action; (2) unreasonable delay; and (3) damage to a party resulting from the delay in bringing the action. See e.g. *Davidson v. State*, 116 Wash.2d 13, 25, 802 P.2d 1374 (1991).

Here, all three elements are present. Appellant knew of the facts on which he could petition the court for relief as of the date of the court’s order in October 2011. No facts were presented in appellant’s December 2012 motion which were unknown as of

October 2011.

Second, fourteen months is an extraordinarily unreasonable delay. As discussed above CR 54 provides that such requests must be made within 10 days of the order. Even CR 60 which governs requests for vacation of orders sets a firm time limit of one year because the law favors finality of matters. This motion was made almost 14 months after entry of the court's order in October 2011.

Finally, there was significant damage to the respondent resulting from the delay in bringing the motion. Other than limited contact from the respondent in January 2012, respondent not heard anything from appellant with regard to this matter until the motion was filed. In respondent's view this matter was concluded. If the trial court had granted appellant's, or if this Court reverses the trial court's order, further damage to respondent would be incurred due to, potentially, being unable to pursue his right of appeal.<sup>1</sup>

Further, respondent was harmed by having to re-engage his attorney 14 months after this matter was concluded, incurring addition attorney fees in responding to the current motion.

Accordingly, if the Court determines that the timelines in CR 54(d) somehow do not apply to this matter, the Court should find, on equitable grounds, that the doctrine of laches bars respondent's motion due to his unreasonable delay.

## **F. CONCLUSION**

For the foregoing reasons Plaintiff/Respondent asks this court to deny the appeal and affirm the trial court's order.

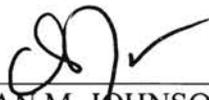
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<sup>1</sup> In part, this is the harm that the timelines in CR 54(d) intended to avoid.

DATED this 5th day of December, 2013.

Respectfully submitted,

COGDILL NICHOLS REIN  
WARTELLE ANDREWS VAIL

A handwritten signature in black ink, appearing to be 'Ian M. Johnson', written over a horizontal line.

IAN M. JOHNSON  
WSBA No. 39724

APPENDIX



1 CR 11 requires that “every pleading, motion, and legal memorandum of a party represented  
2 by an attorney be dated and signed by at least one attorney of record.... A party who is not  
3 represented by an attorney shall sign and date the party’s pleading.... The signature of a party or  
4 attorney constitutes a certificate by the attorney or party that the party or attorney has read the  
5 pleading, motion, or legal memorandum, and that to the best of the party or attorney’s knowledge,  
6 information, and belief, formed after an inquiry reasonable under the circumstances: (1) [the  
7 pleading] is well grounded in fact; (2) it is warranted by existing law ...; [and] (3) it is not  
8 interposed for any improper purpose, such as to harass or to cause unnecessary delay...”

9 The court has held that “Because CR 11 sanctions have a potential chilling effect, the trial  
10 court should impose sanctions ‘only when it is patently clear that a claim has absolutely no chance  
11 of success.’ The fact that a complaint does not prevail on its merits is not enough.” Building  
12 Industry Ass’n of Washington v. McCarthy, 152 Wash.App. 720, 745 (2009) (internal citations  
13 omitted); see also Roeber v. Dowty Aerospace Yakima, 116 Wash.App. 127, 141-142 (2003) (The  
14 fact that the complaint ultimately does not prevail is not dispositive).

15 Here, defendant argues that plaintiff’s claims that were dismissed at trial lacked merit. As  
16 noted above, the fact that claims are dismissed at trial does not mean that an order of sanctions is  
17 justified. Significantly, here, plaintiff was successful on his claim for failure to pay wages. As  
18 such, he was also awarded attorney fees pursuant to statute. In order for the court to order CR 11  
19 sanctions, the court must find that a “pleading, motion or legal memorandum” had no basis in fact  
20 or existing law. Here, plaintiff’s complaint was successful, in part. Accordingly, no rational  
21 argument could be made that it was not based on fact or existing law.

22 Further, plaintiff successfully defended against defendant’s motion for summary judgment.  
23 In that motion defendant raised many of the same arguments that he raises here. He specifically  
24 attacked each and every one of plaintiff’s claims. Plaintiff submitted facts and existing law in

1 opposition to that motion for summary judgment. Plaintiff hereby incorporates by reference his  
2 Response to Motion for Summary Judgment and Declarations in support thereof.1

3 The court, after hearing, denied the defendants motion for summary judgment as a whole.  
4 Plaintiff, then, submitted much of the same evidence and testimony that formed the basis for his  
5 opposition to the motion for summary judgment at trial. Since plaintiff was successful in defeating  
6 defendant's motion for summary judgment by showing an issue of law and/or fact on each issue, as  
7 a matter of law, there is no justification for imposing CR 11 sanctions. Plaintiff's successful  
8 opposition to the motion for summary judgment defeats any argument by defendant that it was  
9 "patently clear" that plaintiff's claims had absolutely no chance of success.

10 In addition, due to plaintiff's success in defending the motion for summary judgment and  
11 partial success at trial no rational argument could be made that plaintiff simply pursued this matter  
12 for an improper purpose. In fact, the trial court determined that plaintiff was not paid his correct  
13 wages and awarded a judgment and attorney fees for the same.

14 Other than the complaint, defendant points to no other motion, pleading or legal  
15 memorandum that would support his claim for CR 11 sanctions. He makes claims for delay in  
16 plaintiff's alleged lack of pursuing alternatives to litigation. Specifically, he points to an offer to  
17 open Congruent's books. However, neither CR 11 nor any other applicable law places a duty on a  
18 plaintiff to take any of the steps Mr. Krishnamurthy may have wanted to occur in this case. Indeed,  
19 he raises no applicable law or fact that would impose such a duty. Plaintiffs have the ability and  
20 right to pursue their case as they choose pursuant to applicable law and local rules; including simply  
21 pursuing the matter to trial.

22 Accordingly, defendant's motion for CR 11 sanctions should be denied.

23 1 The entire response to motion for summary judgment is not included herewith in order to save paper and it is in the  
24 court file if the court wishes to review the same.

1           3.     Defendant is Not Entitled to An Award of Costs Pursuant to RCW 4.84.010. CR  
2 54(d)(1) provides that a party shall file a cost bill or affidavit within 10 days after entry of the  
3 judgment. CR 54(d)(2) provides that a motion for claims for attorney fees and expenses shall be  
4 filed no later than 10 days after entry of judgment. No rule or statute applicable to this matter  
5 allows for an extension of time.

6           Here, defendant's motion is unsupported and is untimely. The judgment in this matter was  
7 entered by the court on September 8, 2011. The defendant's motion for costs and fees was filed on  
8 October 11, 2011 more than one month after the judgment was filed in this matter. Accordingly,  
9 the motion is untimely.

10           Defendant argues that he was unable to file his motion for costs and fees within the required  
11 time frame for at least two reasons. The first reason is that he was in India; and second he blames  
12 plaintiff's counsel for the delay in filing the judgment.

13           Defendant's arguments should be rejected. First, as noted above, there is no legal basis to  
14 extend the 10 day time frames in CR 54. Second, Mr. Krishnamurthy's argument that he was in  
15 India is not well taken because he was still able to file two (2) separate lengthy motions for  
16 reconsideration within the 10 day time period specified by CR 59. He makes no supportable  
17 argument that would explain why he was able to file those and not this motion. Finally, Mr.  
18 Krishnamurthy could have, on his own, filed for entry of judgment pursuant to CR 54(e) had he so  
19 chosen if the delay impeded him in some way. Accordingly, the court should deny the motion as  
20 untimely.

21           If the court finds, for some reason, that the motion is timely, the court should deny the same  
22 as unsupported. There is no basis for any of the costs or fees requested by Mr. Krishnamurthy. His  
23 declaration provides no support or basis for any of the costs or fees and the exhibit itself is simply  
24 an unsubstantiated word document, not a document that is kept in the regular course of business as  
required.

Response to Motion for Reconsideration -- 4

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1 Further, there is no statute or contract that would award Mr. Krishnamurthy any of the fees  
2 and costs he is claiming. The only statute that may, arguably, apply is RCW 4.84.010 which  
3 provides that costs are defined as filing fees, service fees, notary fees, reasonable expenses incurred  
4 in obtaining records, statutory fees, and deposition fees on a pro rata basis. Those costs may be  
5 claimed by the prevailing party.

6 Plaintiff prevailed on the main claim in this matter which was failure to pay wages and was  
7 awarded fees for the same. Plaintiff was also successful in defending against defendant's counter  
8 claims. Defendant was successful in the court dismissing several of plaintiff's other claims.  
9 Accordingly, both parties prevailed in part and an award of costs pursuant to RCW 4.84.010 is  
10 improper.

11 In addition, the only costs that may be claimed by defendant are fees for the deposition.  
12 None of the other items claimed on his exhibit qualify as "costs" pursuant to RCW 4.84.010. With  
13 regard to the deposition, Mr. Krishnamurthy used less than 5 pages from Mr. Smith's deposition at  
14 trial. Accordingly, at best those pages, at a pro rata cost, could potentially be considered costs if the  
15 court disregarded the arguments above. Mr. Krishnamurthy, however, provides no actual cost bill  
16 or other document kept in the regular course of business that would support his claim that he paid  
17 any amount of money for the deposition.

18 He should not be allowed to submit additional justification for his costs upon reply without  
19 any opportunity to respond.

20 Accordingly, the court should deny defendant's motion for costs.

21 Mr. Krishnamurthy adds in his declaration, but not in his motion a section regarding  
22 "Suffering and Pain" for having to personally defend this matter. This section, if not the whole  
23 declaration, should be stricken by the court as irrelevant to the claims at hand. Mr. Krishnamurthy  
24 decided, on his own, to represent the corporation. It is questionable whether he should have been

1 allowed to do so under Washington law. However, he did so voluntarily and that fact is irrelevant  
2 to the matter now before the court.

3 4. The Court Should Award Plaintiff His Attorney's Fees For Responding to this  
4 Motion. This motion directly relates to the court's award of unpaid wages to plaintiff pursuant to  
5 RCW 49.48.010. RCW 49.48.030 provides that attorneys' fees "shall" be assessed against the  
6 employer in any action resulting in successful recovery of a judgment for wages or salary owed.  
7 The statute applies to all stages in the proceeding.

8 In addition, this motion is brought in bad faith and for the purposes of harassment and delay.  
9 As shown above, defendant's motion for CR 11 sanctions is not well founded in existing law or  
10 fact.

11 The court should award plaintiff \$1500 in attorney fees pursuant to RCW 49.48.030 and CR  
12 11.

13 5. Conclusion. Based on the foregoing, the Court should deny defendant's motion for  
14 CR 11 sanctions and costs and attorney fees. A proposed order is filed herewith.

15 DATED this 18th day of October, 2011.

16 COGDILL NICHOLS REIN WARTELLE ANDREWS

17 By   
18 Ian M. Johnson, WSBA #39724  
19 Attorneys for Plaintiff

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JUDGE MICHAEL HEAVEY  
HEARING DATE January 2, 2013  
ORAL ARGUMENT REQUESTED

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

PATRICK SMITH, a married man filing	)	NO. 09 2 26040 1
individually,	)	
Plaintiff,	)	RESPONSE TO DEFENDANT'S MOTION
vs.	)	FOR ORDER OF SANCTIONS UNDER CR 11
	)	AND RCW 4.84.185
CONGRUENT SOFTWARE, a Washington	)	
Corporation,	)	
Defendant.	)	

I. INTRODUCTION

Plaintiff Patrick Smith submits this response to Congruent's Motion for Order of Sanctions under CR 11, and RCW 4.84.185. This matter comes on following an order by the court entered October 24, 2011. Defendant's motion is somewhat difficult to follow due to the fact that it appears to re-argue the basis for the court's order that was entered October 24, 2011.

Plaintiff continues to disagree with the court's original order of October 24, 2011. For purposes of this response, however, plaintiff will not repeat his response and objection that was originally filed in this matter in October 2011, but by reference herein incorporates in full the same.

Defendant then goes on to request attorney's fees and sanctions that were allowed pursuant to the court's order of October 24, 2011.

Plaintiff's Response to Defendant's Motion for Sanctions - 1

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1 Said request is untimely pursuant to CR 54(d)(2) which provides "Claims for attorney's fees  
2 and expenses . . . shall be made by motion . . . Unless otherwise provided by statute or order of the  
3 court, the motion must be filed no later than 10 days after entry of judgment."

4 Similarly, RCW 4.84.185 states that a request for fees, costs and sanctions may be made in  
5 favor of a party opposing a frivolous claim or defense, however, "In no event may such motion be  
6 filed more than thirty days after entry of the order."

7 Here, the court's order was entered on October 24, 2011. Defendant's motion was filed on  
8 or about December 11, 2012, almost 14 months after the court's original order. Far more than the  
9 10 day time period in CR 54(d) and more than the 30 day time period in RCW 4.84.185.

10 Accordingly, defendant's motion is untimely and must be denied.

11 **II. EVIDENCE RELIED UPON**

12 Plaintiff bases his response on the records and files herein.

13 **III. ARGUMENT**

14 a. CR 54 requires that a motion for attorney's fees and expenses must be made within 10  
15 days after entry of Judgment.

16 CR 54 is clear that "Unless provided by statute or order of the court, the motion must be  
17 made no later than 10 days after entry of judgment." In *Corey v. Pierce County*, 154 Wn.App. 752  
18 (2010), the plaintiff in that matter had prevailed with regard to a wage claim against Pierce County.  
19 Plaintiff then failed to file her request for fees within the 10 day period prescribed by CR 54, and the  
20 court upheld the trial court's determination that plaintiff, therefore, was not entitled to request  
21 attorney's fees at such a late date. The court found "No excusable neglect" for delay in making the  
22 request for fees, and accordingly denied the same. Id.

1 Here, the court's order was entered on October 24, 2011. Defendant failed to file any type  
2 of motion until December 2012. It should be noted that defendant did apparently send an email to  
3 the court on January 10, 2012, indicating that he had been in a trial and stated that he had intended  
4 to file the matter within "the next three weeks." E-mail attached as Exhibit A. That did not happen  
5 and defendant chose not to file until 14 months had passed on this matter.

6 In addition, there is no excusable neglect shown or argued for defendants' delay. Indeed,  
7 one cannot imagine what excusable neglect would allow for an almost 14 month delay where the  
8 court rules clearly require the motion for fees/sanctions to be filed within 10 days of the order.

9 The practical reason for the timelines in CR 54(d) is that there are timelines that must be met  
10 by parties that are intending to appeal their matters. Here, allowing defendant to wait 14 months  
11 past the date that the order was entered by this court would affectively allow defendants, in general,  
12 to wait out any appeal timelines that may have existed and then not allow a plaintiff to make a  
13 reasonably informed decision whether to appeal a court's order. Alternatively, allowing a party to  
14 file their request for fees 14 months after an order would allow a party to drag a matter out  
15 indefinitely.

16 The intention of CR 54(d) is to ensure finality of matters. If the court was to enter an order  
17 awarding sanctions or fees at such a late date the court must also decide that there are effectively no  
18 timelines governing such a request. The court's decision would in effect allow a party to file their  
19 request two, four, or ten years after the original order was entered.

20 Per CR 54, this matter was final 10 days after entry of the court's order. Accordingly, this  
21 petition should be dismissed and plaintiff should be awarded attorney's fees for having to respond to  
22 the same.

1 b. RCW 4.84.185 Requires a Request for Fees, Costs and/or Sanctions To Filed Within  
2 30 days After Entry of the Order

3 Similar to CR 54(d), RCW 4.84.185 states that a party may request attorney fees, costs  
4 and sanctions for opposing a frivolous claim or defense. The statute states "In no event may  
5 such motion be filed more than thirty days after entry of the order."

6 In *Smukalla v. Barth* the defendant moved the court for an award of fees, costs and  
7 sanctions for defending against a frivolous claim. 73 Wash.App. 240 (1994), *overruled on other*  
8 *grounds*. The court held, among other things, that since defendant did not move for attorney fees  
9 until more than 4 months after the decision had been filed, the motion was untimely pursuant to  
10 RCW4.84.185. *Id.* at 244.

11 Again, here, the motion was filed by defendant almost 14 months after entry of this  
12 court's order in October 2011. The defendant's motion is barred by the thirty day time limit in  
13 RCW 4.84.185.

14 c. Defendant's Request is Barred By the Doctrine of Laches.

15 Laches is an equitable defense that is based on estoppel. *Real Progress, Inc. v. City of*  
16 *Seattle*, 91 Wash. App. 833, 843-44, 963 P.2d 890 (1998). The doctrine applies when the party  
17 asserting Laches affirmatively establishes: (1) knowledge of a party of facts constituting a cause  
18 of action; (2) unreasonable delay; and (3) damage to a party resulting from the delay in bringing  
19 the action. See e.g. *Davidson v. State*, 116 Wash.2d 13, 25, 802 P.2d 1374 (1991).

20 Here, all three elements are present. Defendant knew of the facts on which he could  
21 petition the court for relief as of the date of the court's order in October 2011. No facts are  
22 presented in defendant's current motion that were unknown as of October 2011.

23 Second, fourteen months is an extraordinarily unreasonable delay. As discussed above

24 CR 54 provides that such requests must be made within 10 days of the order. Even CR 60 which

1 governs requests for vacation of orders sets a firm time limit of one year because the law favors  
2 finality of matters. This motion was made almost 14 months after entry of the court's order in  
3 October 2011.

4 Finally, there is significant damage to the plaintiff resulting from the delay in bringing  
5 the motion. Other than the limited contact from the defendant in January 2012, Plaintiff had not  
6 heard anything from defendant with regard to this matter. In plaintiff's view this matter was  
7 concluded. If the court granted defendant's motion, further damage to plaintiff would be  
8 incurred due to, potentially, being unable to pursue his right of appeal.<sup>1</sup>

9 Further, plaintiff is harmed by having to re-engage his attorney 14 months after this  
10 matter was concluded, incurring addition attorney fees in responding to the current motion.

11 Accordingly, if the court determines that the timelines in CR 54(d) somehow do not  
12 apply to this matter, the court should find, on equitable grounds, that the doctrine of laches bars  
13 defendant's motion due to his unreasonable delay.

14 d. The requested amount for fees and/or sanctions is not based on fact or law.

15 As stated above, this matter should be dismissed as the defendant failed to file its request  
16 within the timelines required by CR 54.

17 However, if the court decides to award sanctions, defendant's request is not based on  
18 supportable facts.

19 First, defendant requests a general sum of \$50,000. The defendant states "The Plaintiff  
20 incurred roughly \$50,000 of attorney fees and costs. That amount is thus, by definition what it costs  
21 to pursue a case such as this...." The amount incurred by plaintiff is irrelevant and should not be  
22

23 <sup>1</sup> In part, this is the harm that the timelines in CR 54(d) intended to avoid.

1 considered by the court. Further, the primary complaint in this matter was the claim for unpaid  
2 wages, plaintiff incurred the vast majority of fees and costs in pursuing that claim. See e.g. Billing  
3 records already submitted to this court in support of Plaintiff's motion for attorney fees.

4 Further, the request for \$50,000 is unreasonable and unfairly punishes an employee who  
5 was ultimately successful in this matter.

6 Alternatively, defendant requests \$40,275.60 for costs incurred in defense of a frivolous  
7 claim and loss of income. The claim is unsupported by any information that would allow the court  
8 to award fees on those bases. The loss of income specifically is not supported by law or fact as a  
9 basis to award sanctions. The defendant would have lost the same amount of time had plaintiff not  
10 pursued the constructive discharge claim.

11 Further, the documents submitted specifically with regard to the attorney, Mr. Donaldson,  
12 assisting the defendant are not billing records kept in the regular course of business as required by  
13 case law and should be disregarded by this court. The Exhibit H1 appears to be in the exact same  
14 format as defendant's time (Exhibit H) and, as such is, apparently defendant's records, not the  
15 attorney's records. There is no billing statements from the attorney to support the Exhibit.

16 They are also not trustworthy because they were apparently created 14 months after this  
17 case was completed in October 2011, and almost 20 months after trial was completed in this matter.  
18 Accordingly, the court should disregard those billing records.

19 The documents submitted by Mr. Krishnamurthy similarly lack any guarantees of  
20 trustworthiness. They were likely created sometime in the last 14 months and represent, at best, an  
21 estimate of time only. Further, the time is double billed in that Mr. Krishnamurthy adds thousands  
22 of dollars in his request (Defendant's Exhibit H) for time spent consulting Mr. Donaldson and then  
23 includes Mr. Donaldson's time as well (Defendant's Exhibit H1). No existing law or rule allows a

1 litigant to request fees, not only for the attorney's time, but for their time as well. This is double  
2 dipping and is improper.

3 The defendant's Exhibit H also includes excessive, unreasonable amounts. For example,  
4 Exhibit H includes 40 hours of time spent gathering personnel records. The number of personnel  
5 records obtained in discovery were minimal and could not have required 40 hours to gather. It is  
6 notable that the 40 hours is in addition to another 40 hours spent gathering documents.

7 Defendant also includes costs and fees for filing and responding to the motion for summary  
8 judgment in this matter. That summary judgment motion included a request for summary dismissal  
9 of the constructive discharge claim in this matter. The court found, in denying the motion for  
10 summary judgment that there was existing law and fact sufficient to support plaintiff's claim for  
11 constructive discharge.

12 To allow defendant to recover fees and costs incurred in the summary judgment motion  
13 would in effect be this court substituting its judgment for the unappealed order entered by this court  
14 a full two years after the fact. Such a result is absurd.

15 Similarly, defendant sought and was denied attorney fees for his motion to compel. Again,  
16 awarding fees for such things would allow defendant fees for a motion, where attorney fees were  
17 already denied two years ago is improper.

18 e. The court should award plaintiff his attorney's fees for having to respond to this  
19 motion.

20 As stated above, this matter was concluded as of 10 days after the court's order in October  
21 2011. Plaintiff has moved on given the fact that this case has not been active for over 14 months.  
22 Plaintiff should not have to respond at this extraordinarily late date and plaintiff requests his  
23 attorney fees for having to respond to the same. There is no excuse for the delay in this matter.

1 Litigants should not have to simply have their cases open at the other party's whim for such a long  
2 time, only to be brought back up at their leisure.

3 The court rules specify specific deadlines to ensure that cases are final and that matters are  
4 concluded.

5 IV. CONCLUSION

6 Plaintiff requests that if the court deny the motion as untimely pursuant to CR 54(d) and  
7 RCW 4.84.185. If the court is unwilling to simply dismiss this matter on grounds of timeliness,  
8 plaintiff requests oral argument to address this matter in person.

9 Based on the foregoing, the court should deny defendant's motion for award of sanctions  
10 under CR 11 and RCW 4.84.185. A proposed order is filed herewith.

11 DATED this 27 day of December 2012.

12 COGDILL NICHOLS REIN  
13 WARTELLE ANDREWS

14 By   
15 Ian M. Johnson, WSB #39724  
16 Attorneys for Plaintiff

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DECLARATION OF SERVICE

I, Ann Michael, declare under penalty of perjury under the laws of the state of Washington that on December 27, 2012, I caused the within and foregoing document to be sent by Email and First Class Mail to the following:

Mani Krishnamurthy  
Congruent Software  
4205 148<sup>th</sup> Ave NE, Ste 100  
Bellevue WA 98007

and

mani@congruentsoft.com.

Signed at Everett, Washington, this 27 day of December, 2012.

  
Ann Michael

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