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CLERK OF SUPERIOR COURT
STATE OF WASHINGTON

COURT OF APPEALS OF
THE STATE OF WASHINGTON DIVISION THREE
No. 30851-1-III

IN RE THE MARRIAGE OF:
RICHARD TODD WIXOM,
Appellant,
and
LINDA BUCHHOLZ WIXOM,
Respondent,
and
ROBERT E. CARUSO,
Additional Appellant.

FILED
E JAN 22 2016 *CPJ*
WASHINGTON STATE
SUPREME COURT

PETITION FOR DISCRETIONARY REVIEW BY THE SUPREME COURT
RAP 13.4

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TABLE OF CONTENTS

INTRODUCTION	2
I. IDENTITY OF PETITIONER	1
II. COURT OF APPEALS DECISION	1
III. ISSUES PRESENTED FOR REVIEW	2
IV. STATEMENT OF THE CASE	2
V. SUMMARY OF ARGUMENT	4
VI. ARGUMENT	5
A. The Issues are Matters of Substantial Public Interest.	5
B. Argument.	7
1. <i>No Finding of Fact There Was a Pleading Which Violated CR 11.</i>	7
2. <i>CR 11 Cases Do Not Support Fees for Intransigence.</i>	8
3. <i>The American Rule in Washington Regarding Attorney Fees.</i>	10
4. <i>Attorneys Fees for Intransigence Under CR 11.</i>	11
VII. CONCLUSION	14

TABLE OF AUTHORITIES

Cases

<i>Biggs v. Vail</i> , 124 Wn.2d 193, 201, 196, 876 P.2d 448 (1994)	6, 7, 9
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 220, 829 P.2d 1099 (1992)	10
<i>In re Kelly and Moesslang</i> , 170 Wn. App. 722, 739, 287 P.3d 12 (2012)	11, 12
<i>In re Marriage of Crosetto</i> , 82 Wn. App. 545, 918 P.2d 954 (1996)	12
<i>In re Marriage of R.E.</i> , 144 Wn. App. 393, 406, 183 P.3d 339 (2008)	12
<i>Just Dirt, Inc. v. Knight Excavating, Inc.</i> , 138 Wn. App. 409, 157 P.3d 431, 437 (2007)	7, 10
<i>MacDonald v. Korum Ford</i> , 80 Wash. App. 877, 892-93, 912 P.2d 1052 (1996)	10
<i>Macri v. Bremerton</i> , 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941)	10
<i>Watson v. Maier</i> , 64 Wn. App. 889, 891, 827 P.2d 311, (1992)	13

Statutes

RCW 26.09.140	-2-, 2, 4, 5, 11, 12
---------------------	----------------------

Rules and Regulations

CR 11 2-5, 7-10, 12-14

CR 11(a) 13

CR 11(a)(4) 14

INTRODUCTION

In this case, and contrary to the law of Washington, the Court of Appeals, Division III, has changed the law in two significant ways.

First, a party in a domestic case can be held responsible for attorney's fees for intransigence under RCW 26.09.140. The court arbitrarily extends this responsibility to the lawyer for the party. This is contrary to law.

Second, the court imposes CR 11 sanctions, without any basis in the findings or conclusions that a violation of CR 11 has taken place as required by CR 11 and decisions pertaining to CR 11, against an attorney for a party in the amount of the opposing party's attorney's fees in direct violation of the fee-shifting prohibition of CR 11 and judicial decisions construing CR 11.

I. IDENTITY OF PETITIONER

Robert Caruso, Additional Appellant, brings this Petition for Discretionary Review by the Supreme Court.

II. COURT OF APPEALS DECISION

The Court of Appeals decision Petitioner wants reviewed is *Wixom v. Wixom*, No. 30851-1-III, October 22, 2015 (Appendix A) and the

denial of Mr. Caruso's Motion for Reconsideration (Appendix B), rendered on December 3, 2015 (Appendix C).

III. ISSUES PRESENTED FOR REVIEW

1. Whether attorney's fees for intransigence of a party in a domestic relations case under RCW 26.09.140 can be extended to allow attorney's fees for intransigence against the attorney for the party.

2. Whether CR 11 sanctions can be imposed without a finding of fact or conclusion of law that the requirements under CR 11 have been violated, and for the attorney's fees of the opposing party.

3. Whether the American Rule regarding attorney's fees can be expanded to allow a court to make a lawyer for a party in a domestic relations case jointly and severally liable for "90% of [opposing party's] attorney's fees (less those fees that have already been awarded and less the work that was done for those matters that those fees were based on) from July 31, 2011 through July 19, 2012 as CR 11 Sanctions and Attorney's Fees based on intransigence." ¹

IV. STATEMENT OF THE CASE

In the domestic relations case between Linda Wixom and Richard

¹ Fourth paragraph of the Order in the case found at CP 1210.

Wixom, the trial judge made certain findings and conclusions of law.

The court entered this Finding:

188. There is a basis for Linda Wixom to receive CR 11 sanctions and attorney's fees based upon intransigence against Richard Wixom and Mr. Caruso.

CP 1242.

The court entered this Conclusion of Law:

1. Richard Wixom shall pay Linda Wixom's attorney fees that she incurred beginning July 31, 2011 through the date of the oral ruling (January 19, 2012) less those fees that have already been awarded and less the work that was done for those matters that those fees were based on.

CP 1246.

The court entered a Judgment and Order in which the fourth paragraph of the Order (CP 1210) provides:

Mr. Wixom and Mr. Caruso, jointly and severally shall pay 90% of Ms. Linda Wixom's attorneys fees (less those fees that have already been awarded and less the work that was done for those matters that those fees were based on) from July 31, 2011 through July 19, 2012 as CR 11 Sanctions and Attorneys Fees based on intransigence.

The Court of Appeals upheld this joint and several order against Mr. Caruso. *Wixom v. Wixom*, 30851-1-III, Court of Appeals Division Three (October 22, 2015). Appendix A.

Mr. Caruso moved the court for reconsideration of the decision.

Appendix B . On December 3, 2015, the court denied the motion for reconsideration. Appendix C.

V. SUMMARY OF ARGUMENT

The Court of Appeals Division III seeks to change of law of Washington regarding attorney's fees in domestic relations cases. The court has ordered payment of attorney's fees for the intransigence of a party under RCW 26.09.140 to also be the responsibility of the attorney for the party. This cannot be done because attorney's fees for intransigence under RCW 26.09.140 are restricted to a party to the action. Mr. Caruso was not a party to the action.

Second, the court extends CR 11 so that fee-shifting attorney's fees can be made a part of CR 11 sanctions against an attorney, and without a finding or conclusion that the attorney had filed a pleading which was a prohibited pleading under CR 11.

Third, the court applies joint and several liability of an attorney as to his client's attorney's fees and CR 11 sanctions. This cannot be done because attorneys fees for intransigence under RCW 26.09.140 can only be required by a party to a domestic case.

What the Court of Appeals has done is contrary to the law of

Washington.

VI. ARGUMENT

A. The Issues are Matters of Substantial Public Interest.

The Petition herein involves an issue of substantial public interest that should be determined by the Supreme Court.

The court of appeals has changed the law with respect of attorney's fees for intransigence under RCW 26.09.140. This section only allows attorneys fees against a party. The section in pertinent part provides:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.
[Emphasis added.]

Despite the clear language of the section, the Court of Appeals has amended the statute so as to cause the attorney for the party to be jointly and severally liable for the attorney's fees.

In addition, the Court of Appeals changes CR 11 in two ways. First, it imposes CR 11 sanctions despite requirements that there is no

finding or conclusion a person signed a pleading or paper evidencing CR 11 sanctioned conduct. This requires a proper finding by the court – to wit, "[t]he court must make a finding that either the claim is not grounded in fact, or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose." *See, Biggs v. Vail*, 124 Wn.2d 193, 201, 196, 876 P.2d 448 (1994).

Second, the CR 11 sanctions imposed by the court are clearly for the attorney's fees of Linda Wixom in the action. The sanctions are equal to:

90% of Ms. Linda Wixom's attorneys fees (less those fees that have already been awarded and less the work that was done for those matters that those fees were based on) from July 31, 2011 through July 19, 2012 as CR11 Sanctions and Attorneys Fees based on intransigence.

Judgment and Order, fourth paragraph of the Order, (CP 1210).

In sum, the decision expands the rules regarding attorney's fees in domestic relations cases. Further, court expands the scope of CR 11 sanctions to include the shifting of attorney's fees and costs to the attorney of a party to the action.

The decision of the Court of Appeals is not only contrary to the law, it creates significant confusion in domestic relations cases. It must

be reversed.

B. Argument.

1. No Finding of Fact There Was a Pleading Which Violated CR 11.

There can be no CR 11 sanction without a pleading which violated

CR 11. The law is abundantly clear.

CR 11 requires attorneys to date and sign every pleading, motion, and legal memorandum filed with the court, certifying the pleading motion or memoranda "is well grounded in fact[,] . . . is warranted by existing law or a good faith argument[,] . . . [and] is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *See, Biggs v. Vail*, 124 Wn.2d 193, 196, 876 P.2d 448 (1994).

...

When a trial court imposes CR 11 sanctions, it must specify the sanctionable conduct in its order. *Biggs*, 124 Wn.2d at 201, 876 P.2d 448. "The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose." *Biggs*, 124 Wn.2d at 201, 876 P.2d 448. [Emphasis added.]

Just Dirt, Inc. v. Knight Excavating, Inc., 138 Wn. App. at ___, 157 P.3d 431, 437 (2007).

Here, there is no basis for CR 11 sanctions because there is no pleading or signed statement which violated CR 11. A review of the

Findings of Fact and Conclusion of Law shows there is no pleading or statement which was the basis for a CR 11 sanction.

2. CR 11 Cases Do Not Support Fees for Intransigence.

The Court of Appeals, in the first paragraph of its opinion, begins with the statement "Richard Wixom and his former attorney, Robert Caruso, individually appeal the joint and several CR 11 monetary sanctions imposed by the trial court for their intransigence during a domestic relations case involving Mr. Wixom's former wife, Linda Wixom." Opinion at 1.

At the outset, one can see that the court sees the issue in the case as an issue concerning "CR 11 monetary sanctions for intransigence."

At page three of its opinion, the court says "[t]he court ordered Mr. Wixom and Mr. Caruso, jointly and severally to pay 90 percent of Ms. Wixom's attorney fees from July 31, 2011 through January 19, 2012 'as CR 11 Sanctions and Attorney Fees based on intransigence.' CP at 1210." Opinion at 2-3.

In the last sentence in the Facts section of its opinion, the court says "[t]he sole remaining issue here is whether the trial court erred in ordering Mr. Wixom and Mr. Caruso to be jointly and severally liable for

Ms. Wixom's attorney fees as CR 11 sanctions." (Emphasis added.)

Opinion at 3-4. The important point is that the court acknowledges that the order for the payment of attorney's fees to Mrs. Wixom is a shifting of attorney's fees to Mr. Wixom and Mr. Caruso: The court uses CR 11 for the purpose of shifting attorney's fees.

The court does not see the issue as "'as CR 11 Sanctions and Attorney Fees based on intransigence.'" The court's decision in the matter does not approach the issues of CR 11 sanctions and "Attorney's fees based on intransigence." Opinion at 2-3.

The remainder of the court's opinion tries mightily and wrongly to convince a reader of the opinion that the CR 11 sanctions order included within itself the "attorney's fees based on intransigence."

Moving to the Opinion's "Analysis" part, again one can see that the court equates the matter as "Attorney Fees as CR 11 Sanctions."

The court then proceeds to completely overlook the law which says over and over again that CR 11 is not to be used as a fee-shifting device.

"[A] court awarding attorney's fees as a CR 11 sanction must award only what is reasonably expended in responding to the sanctionable filing." *Biggs v. Vail*, 124 Wn.2d 193,201, 876 P.2d 448

(1994). *See also, Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992) (“CR 11 is not a fee shifting mechanism but, rather, is a deterrent to frivolous pleadings. If a trial court grants fees under CR 11, it "must limit those fees to the amounts reasonably expended in responding to the sanctionable filings." *Biggs*, 124 Wn.2d at 201, 876 P.2d 448.”

In *MacDonald v. Korum Ford*, 80 Wn. App. 877, 892-93, 912 P.2d 1052 (1996), the court said that fees in a CR 11 sanction which were the same as fees billed and an “award based on those amounts appears to be a fee shifting mechanism, which CR 11 does not provide for.” *See also, Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 157 P.3d 431, 437 (2007).

3. The American Rule in Washington Regarding Attorney Fees.

Washington follows the American Rule on attorney fees awards against a party to the action. In absence of contract, statute, or recognized ground of equity, a court has no power to award an attorney's fee against a party to the action as part of the costs of litigation. *Macri v. Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941).

In this case, the court has ordered the payment of attorney fees

for intransigence against the attorney for the party who has been found to have caused attorney's fees as a result of the party's intransigence.

There is no law in Washington which gives the court authority to make a lawyer jointly and severally liable for attorney's fees ordered to be paid by the lawyer's client. RCW 26.09.140.

Further, the American Rule regarding attorney's fees of a party to the action under RCW 26.09.140 does not extend to the attorney for a party.

4. *Attorneys Fees for Intransigence Under CR 11.*

The court, in reaching its decision concerning Mr. Caruso's obligations, if any under the decision, makes a number of significant mistakes.

The court says, "Attorney fees may be awarded as part of a CR 11 sanction" citing *In re Kelly and Moesslang*, 170 Wn. App. 722, 739, 287 P.3d 12 (2012) for its authority. But this is meaningless. In *Kelly and Moesslang* the court did not deal with attorney's fees for intransigence as part of a CR 11 sanction. The court was aware of the idea but did not make a decision regarding the idea. Here is what the court said:

Although Mr. Moesslang moved for attorney fees as CR 11 sanctions, the court here awarded attorney fees based on "need, ability, and intransigence." We have concluded this is not a

dissolution proceeding. We then reverse the court's award of attorney fees based on any need or ability.

And, as for CR 11 sanctions based on intransigence, we conclude that the issues here are novel, complex, and no doubt charged with a bit of emotion. We are uncomfortable affirming an award of fees and costs given this record.

We therefore affirm the summary dismissal of the suit and reverse the award of fees.

In re Kelly and Moesslang, 170 Wn. App. at 740-41.

At page seven of the court's opinion in this matter, the court says, "[i]n sum, we hold the trial court was authorized under CR 11 and *In re Marriage of Crosetto*, 82 Wn. App. [545] at 564 [918 P.2d 954 (1996)] to order Mr. Caruso and Mr. Wixom to pay Ms. Wixom's attorney fees for intransigence." The case of *In re Marriage of Crosetto* does not support the court's statement. The case was not an "intransigence case" under CR 11. It was an intransigence case of attorney's fees owing by a party under RCW 26.09.140. *Id.*

Further on, the court says, "CR 11 sanctions may be based on intransigence" and cites *In re Marriage of R.E.*, 144 Wn. App. 393, 406, 183 P.3d 339 (2008) for the statement. Once again, the court is proved wrong. The court, *In re Marriage of R.E.*, did not make a decision regarding CR 11.

Yet again in the court's opinion at 9, the following is found:

"Notably, as Mr. Wixom points out, '[A]bout half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.'" *Watson v. Maier*, 64 Wn. App. 889, 891 827 P.2d 311, (1992). The court goes on to say, "[s]anctions, therefore, are appropriate for 'lawyers who do not know when to stop.'"

Again, the court is in error because it improperly uses *Watson v.*

Maier. The whole quote reads:

A famous lawyer once said:

About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop. [Footnote omitted].

Consistent with that admonition, CR 11 allows courts to sanction lawyers who do not know when to stop. In this case, an attorney filed a suit against a Dentist for medical malpractice who was not present during the operation where the alleged malpractice occurred. The trial court, concluding that the lawsuit was not well founded, entered a judgment against the lawyer in the amount of \$4,200 for attorney's fees, pursuant to CR 11. We affirm the judgment against him and also assess reasonable fees on appeal.

Watson v. Maier, 64 Wn. App. 889, 891, 827 P.2d 311, (1992).

This quote refers to CR 11 sanctions in a case where the lawsuit was not well grounded in fact as in CR 11(a), and in which the court

entered a judgment for attorney's fees pursuant to CR 11(a)(4) meaning the attorneys fees necessary to respond to the inappropriate filing in the case.²

The quoted material has nothing to do with this case.

What is at issue here has to do with whether CR 11 can be used as a fee-shifting device for attorneys fees. It cannot.

VII. CONCLUSION

The decision here is one of substantial public importance. One way or another, it will have broad-ranging impact regarding every domestic relations case in Washington.

If the court upholds the decision of the Court of Appeals Division III, an entirely new basis for fee-shifting attorney's fees will become the law of the state. Further, it will become the law of this state that a

² CR 11 (a)(4) provides:

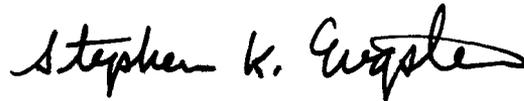
If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee. [Emphasis applied.]

lawyer in an action may be ordered to be jointly and severally liable for attorney's fees and CR 11 sanctions imposed on the lawyer's client.

If the decision is upheld, an entirely new landscape will be created in domestic relations cases. And, if the decision is upheld, the American Rule regarding attorney's fees in Washington will be substantially and significantly changed.

Respectfully submitted this 29th day of December, 2015.

EUGSTER LAW OFFICE PSC

A handwritten signature in black ink that reads "Stephen K. Eugster". The signature is written in a cursive style with a long, sweeping underline.

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CERTIFICATE OF SERVICE

I, Stephen K. Eugster, certify that I served this Petition for Discretionary Review by the Supreme Court on the people identified below and in the manner so designated opposite their names, on December 29, 2015.

Paul Beymer Mack 422 W Riverside Ave., Ste 1407 Spokane, WA 99201-0306 paul@paulbmack.com	<input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input type="checkbox"/> Email to email address.
Nichole Swennumson 422 W Riverside Ave., Ste 1407 Spokane, WA 99201-0306 nikki@paulbmack.com	<input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input type="checkbox"/> Email to email address.
Kenneth H. Kato 1020 N Washington St Spokane, WA 99201-2237 khkato@comcast.net	<input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input type="checkbox"/> Email to email address.
Michael John Gainer 1320 N Atlantic St Ste B Spokane, WA 99201-2304 mike@mikegainer.com	<input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input type="checkbox"/> Email to email address.

Signed at Spokane, Washington on December 29, 2015.



 Stephen K. Eugster, WSBA# 2003

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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re:)	No. 30851-1-III
)	
RICHARD WIXOM,)	
)	
Appellant,)	
)	
v.)	PUBLISHED OPINION
)	
LINDA WIXOM,)	
)	
Respondent.)	

BROWN, A.C.J.— Richard Wixom and his former attorney, Robert Caruso, individually appeal joint and several CR 11 monetary sanctions imposed by the trial court for their intransigence during a domestic relations case involving Mr. Wixom's former wife, Linda Wixom. We find no trial court error and affirm.

FACTS

The facts are drawn mainly from *In re Marriage of Wixom*, 182 Wn. App. 881, 332 P.3d 1063 (2014) (*Wixom I*), review denied, 353 P.3d 632 (2015). The Wixoms' marriage was dissolved in March 2009, resulting in a split custody decree. In March 2011, the parties counter-petitioned to modify the parenting plan. Mr. Wixom asked for placement of the couple's youngest child, J.W., alleging J.W.'s two older siblings were a bad influence, Ms. Wixom's failure to supervise, her untreated mental illness, her

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No. 30851-1-III
In re Marriage of Wixom

continuing drug abuse, and ongoing criminal behavior. In April 2011, the trial court found adequate cause to proceed to a trial on the parties' modification petitions. Mr. Wixom retained Mr. Caruso as counsel before trial.

Following a seven-day trial, the trial court dismissed Mr. Wixom's modification request and granted Ms. Wixom's request, entering 195 findings of fact, including:

183. Richard Wixom and Mr. Caruso engaged in a course of conduct that was not in good faith beginning in late July 2011 and continued through trial.

184. Richard Wixom and Mr. Caruso pursued allegation and innuendos not well-grounded in fact. Instead these allegations and innuendos were interposed for the improper purpose of harassing and causing unnecessary and needless increase in the cost of litigation.

185. There has been an ongoing attempt by Richard Wixom and Mr. Caruso to harass, embarrass, threaten, and intimidate the GAL, the Court Commissioner, and Linda Wixom herself.

.....

188. There is a basis for Linda Wixom to receive CR 11 sanctions and attorney's fees based upon intransigence against Richard Wixom and Mr. Caruso.

Clerk's Paper (CP) at 1241-42.

Later, in conclusion of law 9, the court stated, "The Court finds and concludes there was a conspiracy in this case. The conspiracy was between Mr. Caruso and Richard Wixom to wage an all-out war against Linda Wixom, her attorneys, the GAL, and the Court." CP at 1244. The court ordered Mr. Wixom and Mr. Caruso, jointly and severally to pay 90 percent of Ms. Wixom's attorney fees from July 31, 2011 through

No. 30851-1-III
In re Marriage of Wixom

January 19, 2012 “as CR 11 Sanctions and Attorney Fees based on intransigence.” CP at 1210. The court entered judgment in favor of Ms. Wixom for \$51,778.58 in attorney fees and \$3,949.84 in costs.

Represented by Mr. Caruso, Mr. Wixom appealed, raising 53 assignments of error relating to the trial court’s modification and attorney fees/sanctions decision. This court disqualified Mr. Caruso from representing Mr. Wixom because of the apparent conflict, directing independent counsel and additional briefing.

Mr. Caruso, by independent counsel, next asked for reconsideration, asserting unsuccessfully the trial judge should have been disqualified. We reasoned, “The brief would assert a new issue into the appeal. Any such motion for disqualification should have been made before the trial court and before rulings by the trial court.” *In re Marriage of Wixom*, 2015 WL 3549607, at *2, 353 P.3d 632 (Mar. 31, 2015) (quoting this court’s order, denying reconsideration). On review, our supreme court agreed, stating: “The trial judge was not asked to disqualify himself, and based on the facts that were placed on the record it is doubtful his impartiality could reasonably be questioned. Mr. Caruso fails to show that the Court of Appeals erred or departed from accepted practice by refusing to review this claim of error that was not raised in the trial court.” *Id.* at *5.

Mr. Wixom, by new counsel, withdrew all issues relating to the court’s placement decision. The sole remaining issue here is whether the trial court erred in ordering Mr.

Wixom and Mr. Caruso to be jointly and severally liable for Ms. Wixom's attorney fees as CR 11 sanctions.

ANALYSIS

A. Attorney Fees as CR 11 Sanctions

The issue is whether the trial court erred in awarding Ms. Wixom 90 percent of her attorney fees as CR 11 sanctions for intransigence by Mr. Caruso and Mr. Wixom. Mr. Caruso contends no authority exists for the court's sanction order. Mr. Caruso and Mr. Wixom both argue substantial evidence does not support the award.¹

We review *de novo* whether a statutory, contractual, or equitable basis exists for an attorney fees award. *Gander v. Yeager*, 167 Wn. App. 638, 282 P.3d 1100 (2012). Because the trial court has weighed the evidence, our review is limited to determining if the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law and the judgment. *Sac Downtown Ltd. P'ship v. Kahn*, 123 Wn.2d 197, 202, 867 P.2d 605 (1994).

Determining intransigence is necessarily factual, but may involve foot-dragging, obstructing, filing unnecessary or frivolous motions, refusing to cooperate with the opposing party, noncompliance with discovery requests, and any other conduct that

¹ In *Wixom I*, this court limited Mr. Caruso and Mr. Wixom from adding to their previous brief on "whether the award entered by the trial court should be upheld." 182 Wn. App. at 909. Thus, solely the arguments originally raised are addressed.

No. 30851-1-III
In re Marriage of Wixom

makes the proceeding unduly difficult or costly. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992) We review attorney fees awards based on intransigence for an abuse of discretion. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 29-30, 144 P.3d 306 (2006). Discretion is abused when the court's decision is outside the range of acceptable choices or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Initially, Mr. Caruso reargues the attorney fees/sanctions are improper because the trial judge should have been recused for conflict of interest. This argument has been decided by our Supreme Court in answer to Mr. Caruso's motion for discretionary review and will not be addressed further.

"[A]ttorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground in equity." *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). Attorney fees in dissolution proceedings may be awarded "after considering the financial resources of both parties." RCW 26.09.140. Intransigence is a basis for attorney fees in dissolution proceedings. *In re Marriage of Crosetto*, 82 Wn. App. 545, 564, 918 P.2d 954 (1996). "Intransigence" may be shown by "litigious behavior, bringing excessive motions, or discovery abuses." *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002).

Mr. Caruso incorrectly argues we must separately address attorney fees for intransigence and CR 11 sanctions. But, this court has clearly held, "Attorney fees may be awarded as part of a CR 11 sanction." *In re Kelly and Moesslang*, 170 Wn. App.

No. 30851-1-III
In re Marriage of Wixom

722, 739, 287 P.3d 12 (2012). The goal of CR 11(a) is to prevent baseless filings and filings made for improper purposes. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). If a party engages in such conduct, “the court . . . may impose . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.” CR 11(a). Thus, the trial court did not err in ordering attorney fees based on intransigence as a CR 11 sanction.

Mr. Caruso and Mr. Wixom next challenge whether the facts support such an award. Our review is limited to determining whether the trial court’s findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law and the judgment. *Sac Downtown Ltd. P’ship*, 123 Wn.2d at 202.

To begin, both challenge the court’s finding (labeled conclusion of law 9), “The Court finds and concludes there was a conspiracy in this case. The conspiracy was between Mr. Caruso and Richard Wixom to wage an all-out war against Linda Wixom, her attorneys, the GAL, and the Court.” CP at 1244. Mr. Caruso and Mr. Wixom argue the court’s use of the word conspiracy amounted to a legal finding of civil conspiracy. We disagree. No argument or legal authority was presented regarding conspiracy. Instead, the court referred to the ordinary meaning of conspiracy, not a claim for relief. The court summarized in finding of fact 185, “There has been an ongoing attempt by Richard Wixom and Mr. Caruso to harass, embarrass, threaten, and intimidate the GAL,

the Court Commissioner, and Linda Wixom herself.” CP at 1242. The court found actions showed Mr. Wixom and Mr. Caruso conspired “to wage an all-out war against Linda Wixom, her attorneys, the GAL, and the Court.” CP at 1244.

Turning to whether substantial evidence supports the court’s conclusions, the trial court painstakingly set forth findings of fact supporting the improper course of conduct pursued by Mr. Caruso and Mr. Wixom. This court repeated most of those findings in *Wixom I*. Relevant now, the record shows Mr. Wixom and Mr. Caruso engaged in a bad faith course of conduct, pursued allegations and innuendos not well-grounded in fact, increased the cost of litigation, and continued to embarrass, threaten, and intimidate participants. These facts support the court’s findings of fact 183, 184, and 185. In turn, these findings support finding of fact 188 stating, “There is a basis for Linda Wixom to receive CR 11 sanctions and attorney’s fees based upon intransigence against Richard Wixom and Mr. Caruso.” CP at 1242. This “finding” is actually a conclusion of law and since it is supported by the findings, it is proper. See *State v. Reader’s Digest Ass’n, Inc.*, 81 Wn.2d 259, 501 P.2d 290 (1972) (finding of fact that is actually a conclusion of law is treated as a conclusion on appeal).

In sum, we hold the trial court was authorized under CR 11 and *In re Marriage of Crosetto*, 82 Wn. App. at 564 to order Mr. Caruso and Mr. Wixom to pay Ms. Wixom’s attorney fees for intransigence. Substantial evidence supports the court’s intransigence findings of fact and conclusions of law.

B. Joint and Several Liability

The next issue is whether the trial court erred in ordering Mr. Wixom and Mr. Caruso to be jointly and severally liable for the attorney fees. Mr. Caruso and Mr. Wixom each argue the other should be solely responsible for the attorney fees. In imposing joint and several liability for the fees, the trial court gave Ms. Wixom the right to recover as much as 100 percent of the fee award from Mr. Wixom, or, alternatively, Mr. Caruso. Whether an award of that type to Ms. Wixom was appropriate is the only matter at issue in this appeal. The men's rights inter se are not before us. Cf. RCW 4.22.040(1).² Any claim that Mr. Wixom or Mr. Caruso might try to assert for contribution would require factual development and legal briefing that has so far not taken place. Whether a legal basis exists for attorney fees is a question of law we review de novo. *Gander*, 167 Wn. App. at 282.

CR 11 sanctions may be based on intransigence. *In re Marriage of R.E.*, 144 Wn. App. 393, 406, 183 P.3d 339 (2008). Courts may order parties and their attorneys to be jointly and severally liable for attorney fees. See *Orwick v. Fox*, 65 Wn. App. 71, 92, 828 P.2d 12 (1992) ("The liability of appellants' attorney for this appeal shall be joint

² RCW 4.22.040(1) provides in relevant part:

A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution among liable persons is the comparative fault of each such person.

and several.”) Considering *Orwick*, Mr. Caruso incorrectly argues he has immunity from the sanctions. Moreover, sanctions may be imposed against the attorney alone. See *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992) (attorney held liable for fees as CR 11 sanctions). Contrary to Mr. Caruso’s arguments, attorneys may become liable in domestic relations contexts. *Lee v. Kennard*, 176 Wn. App. 678, 691, 310 P.3d 845 (2013). In *Lee*, Division One of this court upheld sanctions for an attorney’s intransigence in submitting a false document in a dissolution proceeding. *Id.* Thus, considering these authorities, we hold attorneys and clients can both be liable for intransigence. Because evidence supports the challenged findings, both Mr. Wixom and Mr. Caruso were intransigent during the modification proceedings.

Notably, as Mr. Wixom points out, “[A]bout half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.” *Watson v. Maier*, 64 Wn. App. 889, 891, 827 P.2d 311 (1992) (quoting *McCandless v. Great Atl. & Pac. Tea Co.*, 697 F.2d 198, 201-02 (7th Cir.1983)). Sanctions, therefore, are appropriate for “lawyers who do not know when to stop.” *Id.*

Finally, Mr. Caruso argues the trial court violated his due process rights by ordering him to be jointly and severally liable for Ms. Wixom’s attorney fees. U.S. CONST. amend, XIV; WASH. CONST. art. I, § 3. Due process requires, at a minimum, notice and an opportunity to be heard before a property taking. *Olympic Forest Products, Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422-23, 428-29, 511 P.2d 1002 (1971). Mr. Caruso fails to provide relevant legal authority showing he was entitled to

further due process than afforded before the court imposed sanctions. Bald assertions of a violation of constitutional rights are insufficient to warrant reversal. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2005). Both Mr. Caruso and Mr. Wixom were intransigent during the modification proceedings. Accordingly, we hold the trial court did not err in ordering joint and several liability for 90 percent of Ms. Wixom's attorney fees.

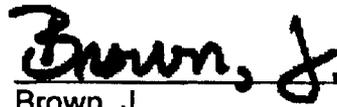
C. Attorney Fees on Appeal

In the last sentence of Mr. Wixom's brief he baldly asks us to sanction Mr. Caruso on appeal "for pursuing his attacks on appellant." Mr. Wixom's Br. (Sept. 8, 2014) at 8. Because his request does not set forth the applicable law to warrant fees and does not comply with RAP 18.1(b) (requiring party to dedicate a section of brief to fee request), we deny Mr. Wixom's request. Ms. Wixom requests RAP 18.9(a) attorney fees for defending against what she considers is a frivolous appeal. An action is frivolous if, considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 785, 275 P.3d 339 (2012). While many aspects of this case are irregular, because this court previously directed the parties to brief the attorney fees/sanctions issue we cannot now say this appeal is entirely frivolous. However, the custody issues originally raised by Mr. Wixom, and subsequently withdrawn, are devoid of merit. As such, pursuant to RAP 18.9(a), and conditioned on her further compliance with RAP 18.1, we grant Ms.

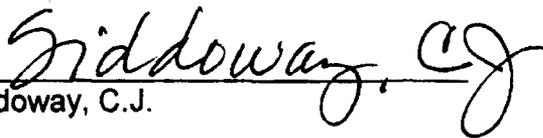
No. 30851-1-III
In re Marriage of Wixom

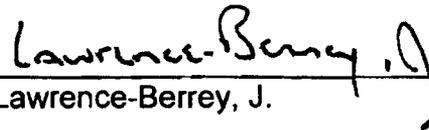
Wixom's request for attorney fees incurred defending against the custody issues on appeal.

Affirmed.


Brown, J.

WE CONCUR:


Siddoway, C.J.


Lawrence-Berrey, J.

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS OF
THE STATE OF WASHINGTON DIVISION THREE
No. 30851-1-III

IN RE THE MARRIAGE OF:
RICHARD TODD WIXOM,
Appellant,
and
LINDA BUCHHOLZ WIXOM,
Respondent,
and
ROBERT E. CARUSO,
Additional Appellant.

MOTION FOR RECONSIDERATION OF
ADDITIONAL APPELLANT

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B

MOTION FOR RECONSIDERATION

I. Moving Party

Robert Caruso, Additional Appellant, brings this Motion for Reconsideration.

II. Statement of the Relief Sought

The relief the moving party seeks is this:

1. That the court overrule the trial court decision that Additional Appellant be sanctioned under CR 11 for attorneys fees for intransigence.

2. That the court overrule the trial court decision that Additional Appellant be held jointly liable with Appellant for attorney fees of Respondent for domestic relations proceedings intransigence.

III. Copies of Parts of the Record Relevant to the Motion

A. Findings

188. There is a basis for Linda Wixom to receive CR 11 sanctions and attorney's fees based upon intransigence against Richard Wixom and Mr. Caruso.

B. Conclusions

1. Richard Wixom shall pay Linda Wixom's attorney fees that she incurred beginning July 31, 2011 through the date

of the oral ruling (January 19, 2012) less those fees that have already been awarded and less the work that was done for those matters that those fees were based on.

C. Judgment

Fourth paragraph of the Order (CP 1132):

Mr. Wixom and Mr. Caruso, jointly and severally shall pay 90% of Ms. Linda Wixom's attorneys fees (less those fees that have already been awarded and less the work that was done for those matters that those fees were based on) from July 31, 2011 through July 19, 2012 as CR Sanctions and Attorneys Fees based on intransigence.

IV. Grounds for Relief Sought and Argument

A. Summary of Argument

The court misapprehends when CR 11 sanctions may be imposed.

The court believes that CR 11 can be used to shift attorneys from one party to another.

The court also believes that a CR 11 sanction standing on its own as a sanction can be the shifting of attorney's fees from one party to the other. This is not the law of Washington.

The court is dealing with the trial judge's order for the payment of the wife's attorneys fees in this action as CR 11 Sanctions and Attorney Fees based on Intransigence. CP 1210. In the court's findings it said in Finding 188 "there is a basis for Linda Wixom to receive CR 11 sanctions

and attorneys fees based upon intransigence." CP 1242.

There may be a basis for awarding attorneys fee in a CR 11 matter but only allowed as they may relate to the conduct which can be sanctioned under CR 11.

If there is CR 11 conduct then the court may order attorneys fee in relation to the conduct prohibited by CR 11. Conduct prohibited by CR 11 is found in the rule has to do with pleadings which the attorney has signed. The attorney by signing is making a certificate that the pleading meets certain requirements. At the end of CR 11 (a)(4) the following is found:

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee. [Emphasis added.]

CR 11 speaks to attorney fees but they are limited to an "appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee." *Id.*

That is, the fees have to be related to the "expenses incurred because of the filing of the pleading, motion, or legal memorandum, reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee." CR 11 (a)(4).

CR 11 by its very terms is not a fee shifting provision in the widest sense.

B. Grounds for Relief Sought

The grounds for asking the court to reconsider its decision are based on the following:

1. CR 11 does not allow for fee shifting.
2. CR 11 sanctions may only be imposed against a lawyer if the lawyer has violated CR 11.
3. CR 11 sanctions may include an attorney's fee amount but only as related to the sanctions not as a separate amount. That is the fees must relate to the trouble of the sanctions. The shifting of fees for intransigence cannot be accomplished under CR 11 (a)(4).
4. No case can be found which holds as a rule of law that a party's fees for intransigence in a domestic relations matter under (RCW

26.09.040) can be made a joint and several liability of the party and his lawyer.

C. Argument

1. CR 11 Sanctions

The court entered judgment against in favor of Ms. Wixom for \$51, 778 in attorney fees and \$3, 949.84. Opinion at 3.

The trial court ordered the joint and several by Appellant and Additional Appellant "as CR 11 Sanctions and Attorney Fees based on intransigence." See Fourth paragraph of the Order (CP 1132):

Mr. Wixom and Mr. Caruso, jointly and severally shall pay 90% of Ms. Linda Wixom's attorneys fees (less those fees that have already been awarded and less the work that was done for those matters that those fees were based on) from July 31, 2011 through July 19, 2012 as CR Sanctions and Attorneys Fees based on intransigence.

The court misapprehends the law regarding attorneys fees under CR 11. It has long been the law that CR 11 is not a fee shifting mechanism. This is clear from a reading of CR 11 (a) (4). Attorneys fees may be part of a CR 11 sanction order if the fees relate the sanctionable conduct in the CR 11 sanctions order. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). In *Bryant* the court said:

CR 11 is not a mechanism for providing attorneys fees to a

prevailing party where such fees would otherwise be unavailable. *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 111, 780 P.2d 853 (1989).

In *Just Dirt v. Knight*, 138 Wn. App. 409, 417-18, 157 P.3d 431

(2007), the court upheld the rule that CR 11 is not a fee shifting mechanism. The court said "CR 11 is not a fee shifting mechanism but, rather, is a deterrent to frivolous pleadings." *Id.* Wn. App. at 418.

Attorney's fees may be part of a CR 11 sanction, but only to the extent they relate to CR 11 sanctionable conduct. "The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose." *Biggs*, 124 Wn.2d at 201 [*Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994)]." *Just Dirt v. Knight*, Wn. App. at 418. [

If the court seeks to impose attorney fees as part of a CR 11 sanctions, such fees must be limited to ensure the fees relate to amounts to fees reasonably to those expended for responding to the sanctionable filings. *Id.*

The court has said if a trial court grants fees under CR 11, it "must limit those fees to the amounts reasonably expended in responding to

the sanctionable filings." *Biggs v. Vail*, 124 Wn.2d at 201. "The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose." *Biggs*, 124 Wn.2d at 201.

2. *Marriage of Crosetto*

In its Opinion, the court states "[i]n sum, we hold the trial court was authorized under CR 11 and *In re Marriage of Crosetto*, 82 Wn. App. at 564 to order Mr. Caruso and Mr. Wixom to pay Ms. Wixom's attorney fees for intransigence." Opinion at 7. This is a misapprehension of the case.

In re Marriage of Crosetto does not hold that attorneys fees for intransigence can be made a CR 11 sanction. Attorney fees for intransigence in the domestic relations setting have long been allowed under RCW 26.09.140. They certainly are not allowed as CR 11 Sanction.

In re Marriage of Crosetto, 82 Wn. App. 545, 563-64, 918 P.2d 954 (1996) The court said:

RCW 26.09.140 states in pertinent part:

The court from time to time after considering the financial resources of both parties may

order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment . . .

Generally, when determining an award of attorney fees, the trial court must first balance the needs of the spouse requesting them against the ability of the other spouse to pay. *Knight*, 75 Wn. App. at 729. The court may also consider the extent to which one spouse's intransigence caused the spouse seeking a fee award to require additional legal services. *In re Marriage of Morrow*, 53 Wn. Page 564 App. 579, 590, 770 P.2d 197 (1989). If intransigence is established, the financial resources of the spouse seeking the fees are irrelevant. *Morrow*, 53 Wn. App. at 590.

3. *In re Kelly and Moesslang*

Later, at pages 5-6 of its Opinion, the court says:

Mr. Caruso incorrectly argues we must separately address attorney fees for intransigence and CR 11 sanctions. But, this court has clearly held, "Attorney fees may be awarded as part of a CR 11 sanction." *In re Kelly and Moesslang*, 170 Wn. App. 722, 739, 287 P.3d 12 (2012).

The statement that "Attorney fees may be awarded as part of a CR 11 sanction" as found in *In re Kelly and Moesslang* came at the beginning of a discussion by the court. The statement cannot be used to

mean that CR 11 sanctions can be imposed enforce a attorneys fees beyond those necessarily related to sanctionable conduct. Here is the discussion and the conclusion of the discussion. Here is what the court said in *In re Kelly and Moesslang*, 170 Wn. App. 722, 740-41, 287 P.3d 12 (2012):

Although Mr. Moesslang moved for attorney fees as CR 11 sanctions, the court here awarded attorney fees based on "need, ability, and intransigence." We have concluded this is not a dissolution proceeding. We then reverse the court's award of attorney fees based on any need or ability.

Whether there is a statutory, contractual, or equitable basis for an award of attorney fees is a question of law that we review de novo. *Gander v. Yeager*, 167 Wn. App. 638, 282 P.3d 1100 (2012). We review the reasonableness of an attorney fees award, including CR 11 sanctions, for abuse of discretion. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004).

In awarding attorney fees and sanctions, the court here considered the "need, ability, and intransigence" of the parties. CP at 1046. The court went on to outline Ms. Kelly's intransigence, including (1) filing an amended complaint alleging a cause of action nearly identical to the one the court had rejected and that realleged facts that were "blatantly false" or "not candid," (2) her refusal to move out of the Spokane house because the court's decision was not captioned "Order," and (3) failing to bring to the court's attention a lis pendens at a hearing on Mr. Moesslang's motion to dismiss despite the lis pendens being filed three days earlier. CP at 1047-48.

"[A]ttorney fees may be awarded only when authorized by

a private agreement, a statute, or a recognized ground in equity." *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). The court may award attorney fees in a dissolution proceeding "after considering the financial resources of both parties."

RCW 26.09.140. Washington courts have recognized intransigence Page 740 as a basis for attorney fees in dissolution proceedings. *In re Marriage of Crosetto*, 82 Wn. App. 545, 564, 918 P.2d 954 (1996). "Intransigence" may be shown by "litigious behavior, bringing excessive motions, or discovery abuses." *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002). Washington courts have also used the phrase to describe parties motivated by their desire to delay proceedings or to run up costs. See *id.* (citing *Gamache v. Gamache*, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965); *Eide v. Eide*, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969)).

[Next the court said:]

And, as for CR 11 sanctions based on intransigence, we conclude that the issues here are novel, complex, and no doubt charged with a bit of emotion. We are uncomfortable affirming an award of fees and costs given this record.
[Emphasis added.]

We therefore affirm the summary dismissal of the suit and reverse the award of fees.

Thus, it is a misreading of *In re Kelly and Moesslang* to say that a CR 11 sanction itself can be an award of attorney fees for intransigence.

4. Joint and Several Liability.

Further the court misapprehends the issue regarding joint and

several liability for fees based on intransigence. In the joint and several part of the opinion the court says:

CR 11 sanctions may be based on intransigence. *In re Marriage of R.E.*, 144 Wn. App. 393, 406, 183 P.3d 339 (2008). Courts may order parties and their attorneys to be jointly and severally liable for attorney fees. *See Orwick v. Fox*, 65 Wn. App. 71, 92, 828 P.2d 12 (1992) ("The liability of appellants' attorney for this appeal shall be joint and several.")

The issue in *Orwick* had to do with attorney's fees on appeal.

We grant the State's request for an award of its reasonable attorney fees against Orwick, Angel and their attorney for this appeal. The State, in order to perfect the award, must timely comply with RAP 18.1.

Id.

RAP 18.1 provides:

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

V. Conclusion

In light of the foregoing – the wording of the CR 11 attorney fees may be included as part of the sanctions only if the fees relate to effort regarding the sanctioned conduct (that is, as a limited part of the sanctions) CR 11 (a)(4). The rule clearly does not provide that CR 11 can

be used to shift attorney's fees in general. The cases also establish the rule that CR cannot be used a fee shifting mechanism.

November 12, 2015

Respectfully submitted,

EUGSTER LAW OFFICE PSC

A handwritten signature in black ink that reads "Stephen K. Eugster". The signature is written in a cursive style with a large, stylized initial 'S'.

Stephen K. Eugster, WSBA #2003
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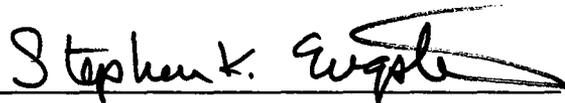
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CERTIFICATE OF SERVICE

I, Stephen K. Eugster, certify that I served this Motion for Reconsideration of Additional Appellant Robert Caruso on the people identified below and in the manner so designated opposite their names, on November 12, 2015.

<p>Paul Beymer Mack 422 W Riverside Ave., Ste 1407 Spokane, WA 99201-0306 paul@paulbmack.com</p>	<p><input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input checked="" type="checkbox"/> Email to email address.</p>
<p>Nichole Swennumson 422 W Riverside Ave., Ste 1407 Spokane, WA 99201-0306 nikki@paulbmack.com</p>	<p><input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input checked="" type="checkbox"/> Email to email address.</p>
<p>Kenneth H. Kato 1020 N Washington St Spokane, WA 99201-2237 khkato@comcast.net</p>	<p><input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input checked="" type="checkbox"/> Email to email address.</p>
<p>Michael John Gainer 1320 N Atlantic St Ste B Spokane, WA 99201-2304 mike@mikegainer.com</p>	<p><input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input checked="" type="checkbox"/> Email to email address.</p>

Signed at Spokane, Washington on November 12, 2015



Stephen K. Eugster, WSBA # 2003

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COURT OF APPEALS
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STATE OF WASHINGTON
By _____

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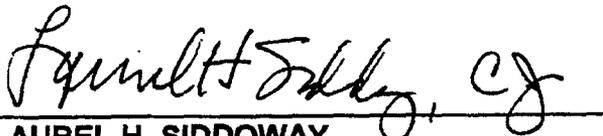
In re:)	No. 30851-1-III
)	
RICHARD WIXOM,)	ORDER DENYING MOTION
)	FOR RECONSIDERATION
Appellant,)	
)	
v.)	
)	
LINDA WIXOM,)	
)	
Respondent.)	

THE COURT has considered appellant's motion for reconsideration of this court's decision of October 22, 2015, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, appellant's motion for reconsideration is hereby denied.

PANEL: Jj. Brown, Siddoway, Lawrence-Berrey

FOR THE COURT:


LAUREL H. SIDDOWAY
CHIEF JUDGE

C