IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Matter of the Estate of CHARLES CRESS EICKHOFF, Deceased. BRIAN CHARLES EICKHOFF and CATHY NEGELSPACH, Petitioners, v. DIANE EICKHOFF, as Executrix and Personal Representative of the Estate; DIANE EICKHOFF, individually, Respondent.	No. 45729-6-II ORDER DENYING MOTION TO RECONSIDER AND AMENDING OPINION

On July 16, 2015, the respondent served a letter on the Court addressing the fact that the Court's unpublished opinion filed on July 14, 2015 did not address her request for attorney fees on appeal. We treat this letter as a motion to reconsider the unpublished opinion filed July 14, 2015.

In her brief, respondent made only one passing reference to attorney fees on appeal in the last line of her concluding paragraph. Thus, she did not devote a separate section of her brief on the issue of attorney fees on appeal. This is not sufficient to meet the mandatory requirements under RAP 18.1(b). Therefore, it is hereby

ORDERED, that the motion for reconsideration is denied. It is further

ORDERED, that the opinion shall be amended as follows:

On page 12, the second paragraph is amended to read as follows:

Finally, Brian and Diane request an award of appellate attorney fees. RAP 18.1(b) requires a party requesting attorney fees to devote a section of its opening brief to the request for fees or expenses. Because both Brian and Diane dedicate only one sentence to their request and do not explain why they are entitled to such costs, they failed to comply with the mandatory requirements in RAP 18.1, and we deny their attorney fee requests.

DATED this 4TH day of AUGUST, 2015.

Johanson, C.J.
CHIEF JUDGE

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In re the Matter of the Estate of CHARLES CRESS EICKHOFF, Deceased. BRIAN CHARLES EICKHOFF and CATHY NEGELSPACH, Petitioners, v. DIANE EICKHOFF, as Executrix and Personal Representative of the Estate; DIANE EICKHOFF, individually, Respondent.	No. 45729-6-II UNPUBLISHED OPINION

JOHANSON, C.J. — In this will contest dispute, Brian Eickhoff and Cathy Negelspach appeal from superior court orders denying their disqualification motion as frivolous, imposing CR 11 sanctions, and granting summary judgment in Diane Eickhoff's favor. We hold that (1) the superior court abused its discretion by imposing CR 11 sanctions because Brian's[1] disqualification motion was not frivolous and (2) Diane did not waive the protection of the "dead man's" statute,

[1] We use the first names of the Eickhoff family for clarity and mean no disrespect.

RCW 5.60.030. We hold further that because Brian and Cathy fail to establish that genuine issues of material fact exist, Diane is therefore entitled to summary judgment. Accordingly, we affirm the summary judgment, reverse the CR 11 sanctions, and remand to a different judge to recalculate the costs and fees award.

FACTS

In 1988, Charles Eickhoff executed a will in Oregon. Under the will, Charles's wife, Diane, inherited Charles's entire estate if Charles predeceased her. But should Diane[2] predecease Charles, Charles's children, Brian and Cathy (collectively "Brian"), would inherit Charles's property in equal shares. In 2010, now Washington residents, Charles and Diane signed a community property agreement (the Agreement). The Agreement's terms were consistent with the 1988 will insofar as Diane inherited all of the estate's property if Charles predeceased her. In 2011, Charles died.

Diane filed the will in the superior court. Brian filed a will contest seeking an order of intestacy, an estate accounting, and return of certain property. Brian thereafter filed an amended petition alleging that the 1988 will was invalid as drafted and that Charles had executed another will (lost will) sometime in the interim between the creation of the 1988 will and the Agreement. Brian later conceded that the 1988 will was valid, but continued to assert his claim that the lost will revoked the 1988 will. Brian also challenged the Agreement's validity, declaring that Charles was not competent to enter into the Agreement.

On April 2, 2012, Curtis Janhunen filed a notice of appearance on behalf of Diane. The following day, Brian filed a motion to disqualify Janhunen on grounds that Janhunen had

[2] Diane is the stepmother of Brian and Cathy.

previously represented Brian in a sealed paternity and custody matter a number of years earlier. At the disqualification motion hearing, the superior court said that

> [the prior litigation] has absolutely nothing to do with this litigation. And candidly, as a judge, I find it offensive to come in here and drag a gentleman and claim that because a will was drafted in . . . 1988 and he represented a family member 15 years later, irregardless of what kind it is that he should be disqualified from the case. That's what I call CR 11, frivolous motion.
>
> Am I going to disqualify him? No.

Report of Proceedings (RP) (May 3, 2012) at 10-11.

The superior court refused to allow Brian to respond further. Later in the hearing, the superior court again referred to Brian's motion as "frivolous" and "offensive." RP (May 3, 2012) at 12. The court, sua sponte, announced that it would order sanctions pursuant to CR 11 and that the sum would be calculated by determining the amount of time necessary for Janhunen to appear in court and to respond to the motion.

Brian filed a motion for reconsideration and a motion for discretionary review.[3] At the reconsideration hearing, the superior court declared that it took "the liberty of getting the files" for the earlier sealed paternity and custody action during which Janhunen represented Brian. RP (June 21, 2012) at 9-10. Based on the paternity and custody file, the superior court reiterated that there was no reason to disqualify Janhunen because the former case was entirely unrelated to the current will contest.

The superior court then concluded that Brian's attorney had not made a reasonable inquiry into the paternity file. Furthermore, the superior court suggested that both parties review the file

[3] We denied discretionary review and entered a certificate of finality in May 2013.

in the paternity case. Significantly, and contrary to its earlier assertion that the files were unrelated, the court said,

> *[T]here is a lot of documentation in [the sealed paternity file] that goes to the issue of why there may have been a falling out between the father and son, and I would suggest that it be reviewed.* I could go through quite a bit of it, and I am not going to elaborate on the record, but by your client shaking his head, he knows exactly what I am saying. There is a lot of documents in here.

RP (June 21, 2012) at 20 (emphasis added).

On May 20, 2013, Diane filed a summary judgment motion and a renewed CR 11 motion for sanctions. Diane argued that summary judgment was appropriate because the will was unquestionably valid and Brian failed to present any evidence to create a genuine issue of material fact. Diane asserted that Brian's lost will theory depended on alleged conversations barred by the dead man's statute.

In response, Brian requested a continuance and both Brian and his sister filed declarations concerning conversations with their father Charles regarding his execution of a new will wherein he purported to devise certain property to each child. Brian believed that the lost will existed in part because he recalled a conversation in 1999 or 2000 during which Charles told Brian that a new will had been prepared. Brian claimed that genuine issues of fact existed that could only be resolved by trial in part because Diane's declaration contained statements favorable to the estate and she therefore waived the dead man's statute's protection.

The superior court granted Brian's continuance motion. Subsequently, Brian filed a motion requesting the superior court judge to recuse himself, alleging the appearance of unfairness and bias based primarily on the court's decision to review the sealed paternity record without first

providing notice to counsel. The superior court judge declined to recuse himself and denied the motion.

At the summary judgment hearing, Brian argued that he had evidence that Charles had drafted the lost will "sometime around . . . 1999 or 2000." RP (Sept. 25, 2013) at 50. According to Brian, the lost will also contained a provision revoking the 1988 will. Brian argued two points: (1) that Diane was not entitled to summary judgment because a genuine issue of material fact existed as to whether the Agreement was valid because Charles lacked testamentary capacity at the time he signed the document and (2) that Diane had waived the "dead man's statute's" protections which would otherwise preclude him from testifying about conversations he and Charles had concerning the lost will because she submitted sworn declarations which disputed Brian's claims. The superior court granted Diane's summary judgment motion. Brian appeals.

ANALYSIS

I. MOTION TO DISQUALIFY OPPOSING COUNSEL

Brian asserts that the superior court erred by ruling that his motion to disqualify Janhunen was frivolous and, therefore, the court abused its discretion by imposing sanctions pursuant to CR 11 on that basis. Because a superior court abuses its discretion by imposing sanctions pursuant to CR 11(a) when an argument is "well grounded in fact" or "warranted by existing law," we reverse the superior court's order awarding such sanctions.

We review a superior court's imposition of CR 11 sanctions for an abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). CR 11(a) addresses two types of problems: filings which are not "'well grounded in fact and . . . warranted by . . . law'" and filings interposed for "'any improper purpose.'" *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829

P.2d 1099 (1992) (quoting CR 11). "Complaints which *are* 'grounded in fact' and 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law' are not 'baseless' claims, and are therefore not the proper subject of CR 11 sanctions." *Bryant*, 119 Wn.2d at 219-20. The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. *Bryant*, 119 Wn.2d at 220. CR 11 is not a mechanism for providing attorney fees to a prevailing party where such fees would otherwise be unavailable. *Bryant*, 119 Wn.2d at 220.

The Rules of Professional Conduct (RPC) govern subsequent representations adverse to former clients. RPC 1.9 provides,

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> . . . .
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known.

To determine whether the two representations are substantially related, courts must (1) reconstruct the scope of the facts of the former representation, (2) assume the lawyer obtained confidential information from the client about all these facts, and (3) determine whether any former factual matter is sufficiently similar to a current one that the lawyer could use the confidential information to the client's detriment. *Sanders v. Woods*, 121 Wn. App. 593, 598, 89 P.3d 312 (2004).

Here, Brian filed the motion to disqualify Janhunen, asserting that Janhunen likely obtained confidential information by virtue of his work on the sealed paternity and custody suit that can now be used to advance Diane's position in the present case. In Brian's view, Janhunen became privy to information regarding Brian's "family situation," his relationship with Charles and Diane, and his income among other things. The implication was that this information could be used to undermine Brian's credibility with regard to his lost will claim.

Although the superior court denied Brian's motion to disqualify Janhunen, ruling that the paternity case and the current litigation were not substantially related, it did not find that the motion was not "well grounded in fact" or "warranted by existing law." CR 11(a)(1)-(2). Significantly, and contrary to its earlier assertion that the files were unrelated, the superior court then concluded that Brian's attorney had not made a reasonable inquiry into the paternity file and suggested that both parties review the file in the paternity case. The court said,

> *[T]here is a lot of documentation in [the sealed paternity file] that goes to the issue of why there may have been a falling out between the father and son, and I would suggest that it be reviewed.* I could go through quite a bit of it, and I am not going to elaborate on the record, but by your client shaking his head, he knows exactly what I am saying. There is a lot of documents in here.

RP (June 21, 2012) at 19-20 (emphasis added). Also during the reconsideration hearing, the court reserved ruling on whether it would impose the CR 11 sanctions.

The record establishes that Brian's motion was "well grounded in fact" because he was in fact represented by the same attorney in an earlier case who now represents an adverse party. CR 11(a)(1). Brian's motion was also warranted by existing law because, as described above, the RPC and cases from our courts make clear the prohibition on subsequent representations of this nature in certain instances. *Teja v. Saran*, 68 Wn. App. 793, 796-97, 846 P.2d 1375 (1993). The fact that

the superior court determined that the particulars of this case did not compel Janhunen's disqualification does not mean that the motion was frivolous.

Because CR 11 sanctions have a potential chilling effect, superior courts are cautioned to impose sanctions only when it is "patently clear that a claim has absolutely no chance of success." *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004). It is evident from the superior court's own statements on the record that it was not clear Brian's motion had no chance of success.

Accordingly, we hold that Brian's motion to disqualify Janhunen was not frivolous and, therefore, the superior court abused its discretion by awarding sanctions pursuant to CR 11. These sanctions should be stricken on remand.[4]

II. SUMMARY JUDGEMENT AND THE DEAD MAN'S STATUTE

Brian contends that the superior court erred by granting summary judgment to Diane by ruling that Diane did not waive the dead man's statute's protection. After review of the record and the applicable law, we conclude that Brian has failed to satisfy his burden to establish the existence of a genuine issue of material fact exists regarding a lost will because Diane has not waived the protection of the dead man's statute as a matter of law. Therefore, Brian cannot satisfy his burden on summary judgment.

We review a superior court's decision to grant summary judgment de novo. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014). Summary judgment is appropriate

[4] The exact amount of the CR 11 sanctions imposed by the superior court is not clear from the record. On remand, the superior court should exercise its discretion to determine the amount of sanctions that should be subtracted from the total judgment in this case. The superior court could subtract from the judgment the amount of Diane's attorney fees incurred in responding to this nonfrivolous motion as that may have been the basis of the amount of the sanction.

where there is only no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A fact is material if it affects the outcome of the litigation. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012). We review the facts in Brian's favor as the nonmoving party and make all reasonable inferences in his favor. *Lyons*, 181 Wn.2d at 783.

The dead man's statute, RCW 5.60.030,[5] bars testimony by a "party in interest" regarding "transactions" with the decedent or statements made to him by the decedent. *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 174, 29 P.3d 1258 (2001). A "'party in interest'" under RCW 5.60.030 is "'one who stands to gain or lose in the action in question.'" *Estate of Lennon*, 108 Wn. App. at 174 (quoting *Bentzen v. Demmons*, 68 Wn. App. 339, 344, 842 P.2d 1015 (1993)).

But not all testimony by a party in interest about the words or acts of the decedent is prohibited. The bar extends only to words or acts involving a transaction. *Bentzen*, 68 Wn. App. at 344. And the dead man's statute may be waived when the protected party introduces evidence

[5] RCW 5.60.030 provides,

> No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent, or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

concerning a transaction with the deceased. *Estate of Lennon*, 108 Wn. App. at 175. Once the protected party has opened the door, the interested party is entitled to rebuttal. *Bentzen*, 68 Wn. App. at 345 (citing *Johnston v. Medina Improvement Club*, 10 Wn.2d 44, 59-60, 116 P.2d 272 (1941)).

Here, Brian and his sister submitted declarations about conversations with Charles regarding the disposition of his property and the execution of a new will to revoke the 1988 will. These conversations were the foundation of Brian's lost will theory. But because Brian's case necessarily depends on *statements made to him* by his deceased father, the dead man's statute bars any attempt to testify regarding those statements. RCW 5.60.030. Consequently, whether Brian can demonstrate that genuine issues of material fact exist to preclude summary judgment depends on whether Diane has waived the statute's protection.

Brian relies in part on *Bentzen* in support of the proposition that Diane's responsive declaration effected a waiver of the dead man's statute's protections. There, Division One of this court held that the personal representative of a decedent's estate waived the protection of the dead man's statute by filing an affidavit in which he asserted that the decedent never told him of the existence of a disputed oral agreement. *Bentzen*, 68 Wn. App. at 345. The *Bentzen* court ruled that even the personal representative's negative assertions waived the statute's protections because they also denied the conversation between Bentzen and the decedent, a matter about which Bentzen was prepared to testify. 68 Wn. App. at 346.

Here, Brian argues that Diane has similarly waived the statute by filing declarations addressing the existence of a "lost will." Diane made the following statements:

> There is only one Will in existence and that is the Will of 1988. Frank Franciscovich did draft a Community Property Agreement for us, which we did in fact execute. There were no other Wills prepared.

1 Clerk's Papers (CP) at 199.

> This Will is the only Will to my knowledge that Charles ever executed. Under that Will, I inherit Charles [sic] entire estate.

2 CP at 283.

But importantly, Diane does not make any proclamation about what Charles *said or did not say* to her, which is precisely the kind of testimony barred by the dead man's statute, and *Bentzen* is therefore distinguishable. Nor does Diane make any statement that references any agreement (or lack thereof) between Charles and his children regarding the disposition of his estate. Diane's declarations merely state that, as far as she knows, the 1988 will is the only will in existence.

We hold that Diane did not waive the protection of the dead man's statute.[6] Accordingly, because Brian cannot testify to Charles's statements regarding the alleged lost will, he cannot establish that a genuine issue of material fact exists to preclude summary judgment. Therefore, Diane is entitled to summary judgment.

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[6] Brian makes additional arguments to attack the validity of the Agreement. But the validity of the Agreement is immaterial because Diane inherits all of the property under the will in the same way she would under the Agreement. Consequently, it is not necessary to reach the merits of the Agreement's validity. We also decline to reach the recusal issue because we reverse the superior court's discretionary decision to impose CR 11 sanctions, and we review the summary judgment issues anew, not relying on any superior court determinations. Thus, there is no additional remedy that we can give even if we determined that the superior court's failure to recuse itself was error.

III. SUPERIOR COURT COSTS, FEES, AND APPELLATE ATTORNEY FEES

First, Brian asserts, and Diane concedes, that the superior court erred by ordering him to pay the same fees twice. The amount of $1,365 should be deducted from the judgment. Second, as discussed above, the superior court improperly imposed CR 11 sanctions. We remand to the superior court to deduct the CR 11 sanctions from the judgment.[7]

Finally, Brian requests an award of appellate attorney fees. RAP 18.1(b) requires a party requesting attorney fees to devote a section of its opening brief to the request for fees or expenses. Because Brian dedicates only one sentence to the request and does not explain why he is entitled to such costs, he failed to comply with the mandatory requirements in RAP 18.1, and we deny his attorney fee request.

Affirm in part, reverse in part and remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Bjorgen, J.
BJORGEN, J.

Sutton, J.
SUTTON, J.

[7] We remand for another judge to recalculate the attorney fees award subtracting the $1,365 that the trial court imposed twice and to deduct any other amount awarded as CR 11 sanctions.