COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

IN RE THE RECALL OF KEITH CLARK,
IN RE THE RECALL OF CYNTHIA MCMULLEN
IN RE THE RECALL OF DEBRA LONG

On Appeal from the Superior Court
of the County of Spokane
No. 21-2-02888-32
No. 21-2-02890-32
No. 21-2-02891-32

Appellant's Opening Brief

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I. Introduction

"The people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all of the people's rights and obligations.'" *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (*quoting John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)).

This case tests that foundational principle; as a result of filing his first ever recall petition, Appellant Rob Linebarger ("Linebarger") was left responsible for $22,500 out of a total $30,000 amount of sanctions imposed against him and his former counsel. In spite of key factual differences, the Spokane County Superior Court relied upon three recall cases to support its imposition of these sanctions. Instead of simply finding that the recall petition was legally and factually insufficient, the superior court, without a strong evidentiary

analysis, found that it was under-researched and had been filed for an improper purpose, namely, to influence an election in which none of the three board members, Keith Clark, Debra Long, and Cynthia McMullen ("Board Members") were running.

In effect, the superior court ushered in a sea change to recall election case law; the three recall cases relied upon by the superior court to impose sanctions involved petitioners who had all previously filed numerous recall petitions against the same elected official, were all self-represented, and had engaged in conduct that evinced a disregard for the recall and court processes. A first-time recall petitioner who undertook efforts to research the recall criteria and process, hired legal counsel to assist with research and procedural requirements, and complied with all court orders and procedures is factually inapposite from the relied upon cases and should not be

subject to sanctions. The superior court erred in its reliance on these cases, presenting the basis for this appeal.

II. Assignments of Error

A. Assignments of Error

1. The superior court committed an error of law in finding no constitutional right to recall.
2. The superior court erred in finding bad faith when the recall petition was merely legally and factually insufficient.
3. The superior court erred in abusing its discretion by awarding sanctions.

B. Issues Pertaining to Assignments of Error

1. Is the chilling effect of sanctions in accordance with the constitutional rights implicated? (Assignments of Error #1 and 3)

2. Are sanctions appropriate when there is no procedural bad faith? (Assignments of Error #2)

III. Statement of the Case

In response to what he and other concerned parents saw as an abdication of the duty of the Central Valley School District Board to ensure the effective education of students and give them the opportunity to achieve personal and academic success, Linebarger researched recall petitions and the attendant process and engaged counsel to assist with the same. After his research, and after consulting with two attorneys, recall petitions were filed against the Board Members on October 8, 2021. The Board Members filed their opposition briefs on October 18, 2021. On October 19, 2021, the Board Members filed a Motion for CR 11 Sanctions and supporting declarations. CP 87.

A sufficiency hearing was scheduled for October 20, 2021, but minutes before the hearing, Linebarger's counsel submitted additional materials to the Court, including a purported Supplement to the Statement of Charges Supporting the Recall Election and supporting declarations. *Id.* The superior court continued the sufficiency hearing to October 25, 2021. Minutes before that hearing, Linebarger's counsel submitted a Statement of Additional Authorities. CP 88. The superior court determined all charges to be legally and factually insufficient. *Id.*

Six months later, Board Members filed an Amended Motion for CR 11 Sanctions. *Id.* A hearing on the motion was held on May 6, 2022. On June 9, 2022, the superior court granted the Motion for CR 11 Sanctions. CP 85. On October 4, 2022, Linebarger obtained separate counsel.

On December 16, 2022, the superior court issued an Order awarding $30,000 in favor of the Board Members as a joint and several obligation against Linebarger and his former counsel. CP 142. The superior court also issued a Memorandum Decision along with the Order. CP 139. Following the issuance of the Order, Linebarger moved for a vacation of the order on January 11, 2023. CP 144. The superior court denied that motion. CP 187.

On May 25, 2023, the Board Members moved for approval of a proposed settlement agreement between them and Linebarger's former counsel, in which each attorney who previously represented Linebarger would pay $1,000 toward the $30,000 amount. CP 190. The superior court partially granted that motion, finding that $1,000 was reasonable as to Mr. Rowland, one of Linebarger's former attorneys, but that $1,000 was not reasonable as to Mr. Wolf, the other former

attorney of Linebarger; Mr. Wolf was apportioned $6,500 of the total amount. CP 237. Linebarger was apportioned $22,500 of the sanctions. *Id.* Following the satisfaction of judgment filed by the Board Members, Linebarger filed this appeal.

IV. Argument

A. Standard of review.

Issues of statutory and constitutional interpretation are reviewed de novo. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 642, 647, 151 P.3d 990 (2007). "Court rules are construed using the rules of statutory construction." *Jones v. Stebbins*, 122 Wn.2d 471, 476, 860 P.2d 1009 (1993) (citing *In re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). "Where statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself." *Id.* (citing *Bellevue Fire Fighters Local 1604*

v. Bellevue, 100 Wn.2d 748, 750, 675 P.2d 592 (1984), *cert denied*, 471 U.S. 1015 (1985)).

Courts may, but are not required to, impose sanctions upon a finding of a violation of CR 11. CR 11(a)(4); *Biggs v. Vail*, 124 Wn.2d 193, 197 n.1, 876 P.2d 448 (1994) (noting 1993 amendment of CR 11 changing mandatory "shall impose" language to permissive "may impose" language); *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004) (whether to impose sanctions is within judge's discretion). Discretion "allows the trial court to operate within a 'range of acceptable choices.'" *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A "reviewing court will find error only when the trial court's decision (1) adopts a view that no reasonable person would take and is thus 'manifestly unreasonable,' (2) rests on facts

unsupported in the record and is thus based on 'untenable grounds,' or (3) was reached by applying the wrong legal standard and is thus made 'for untenable reasons.'" *Id.* (quoting *Rohrich*, 149 Wn.2d at 654).

B. The right to recall elective officers under Wash. Const. art. I, § 33-34, and the right to free speech under Wash. Const. art. I, § 5 and U.S. Const. amend I.

The superior court erred by stating that "this was not appropriate, in the Court's estimation. And I'm not referring to filing by the way of a recall petition. I think it's interesting we call that a constitutional right. Well, it's provided for in statute. But I guess we could argue about what that is. I realize the U.S. Constitution talks about the filing of petition for grievances. I don't know whether this falls within that. I'm not going to go there. That's for law school professors to argue about, I suppose." RP 65-66. However, the superior court failed to consider that the recall process is in fact a

constitutional right. The right to recall elective officers is included in the Declaration of Rights of the Washington Constitution. Wash. Const. art. I, §§ 33-34. The two sections pertaining to the recall process were added via Amendment 8, 1911 p.504 Section 1, and approved in 1912. Just a year later, the Supreme Court had occasion to hold that "[w]e conclude that the amendment was lawfully submitted to and adopted by the people of the state, and thereby became a part of our fundamental law." *Cudihee v. Phelps*, 76 Wash. 314, 329, 136 P. 367 (1913).

Linebarger was well within his rights to initiate a recall petition. He was also well within his rights to speak about the recall process, to write a blog post about the process, and to generally opine about the subject matter of the case. Our state Constitution is clear, on its face, that citizens' rights do not spring from our state's Constitution, but that it is simply a

memorialization of rights already possessed: "We the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution." *Malyon v. Pierce Cnty.*, 131 Wn.2d 779, 796 n.17, 935 P.2d 1272 (1997).

Washington's Constitution is to be interpreted with its common and ordinary meaning. *State ex rel. Albright v. City of Spokane*, 64 Wn.2d 767, 770, 394 P.2d 231 (1964). This is because it is the expression of the people's will, adopted by the people of Washington. *Id.* If the language is unambiguous, then it will be given its plain and ordinary meaning, and no construction or interpretation is permissible. *State ex rel. Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P.2d 229 (1975). Washington accords great weight to the contemporary facts and circumstances in effect at the time its Constitution

was created. *State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 146, 247 P.2d 787 (1952).

While the Washington Constitution is analyzed separately, "Washington retains 'the sovereign right to adopt in its own Constitution individual liberties *more expansive* than those conferred by the Federal Constitution.'" *State v. Gunwall*, 106 Wn.2d 54, 59, 720 P.2d 808 (1986) (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 100 S. Ct. 2035 (1980)) (emphasis added). The Gunwall analysis provides criteria "relevant to determining whether, in a given situation, the constitution of the State of Washington should be considered as extending *broader* rights to its citizens than does the United States Constitution." *Id.* at 61 (emphasis added). The "Supreme Court application of the United States Constitution establishes a floor below which the state courts cannot go to protect individual rights. But states of course can

raise the ceiling to afford greater protections under their own constitutions." *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 995 (2010). There is no question that the concept of free speech is interpreted more broadly under the Washington Constitution than it is under the federal Constitution in certain contexts. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 115, 937 P.2d 154 (1997) (citing *State v. Reece*, 110 Wn.2d 766, 778, 757 P.2d 947 (1988), *cert. denied*, 493 U.S. 812, 110 S. Ct. 59 (1989)). Political speech is one such context, as "because of its broad language, [Wash.] Const. art. I, § 5 has been interpreted to offer greater protection than the First Amendment in the context of pure noncommercial speech in a traditional public forum." *Id.* at 118.

The resultant protections of political speech by the Washington Constitution are extremely robust, because

political speech is carefully guarded and protected by the U.S. Constitution:

> The First Amendment to the United States Constitution is more protective of speech criticizing public officials because such speech is essential to citizens' ability to thoughtfully engage in public debate and the democratic process. The public good that arises from sharp criticism and examination of public officials' records requires laws and policies that will not chill such speech.

Reykdal v. Espinoza, 196 Wn.2d 458, 465, 473 P.3d 1221 (2020). Freedom of speech is a preferred right under the Washington Constitution, and it furthers societal values such as (1) attainment of individual self-realization and fulfillment; (2) advancement of knowledge and discovery of truth; (3) practice of democratic self-government; and (4) retention of a stable community in a heterogenous and changing society. Justice Robert F. Utter, *The Right to Speak, Write, and Publish*

Freely: State Constitutional Protection Against Private Abridgement, 8 Seattle U. L. Rev. 157, 187-88 (1985).[1] The broad language used in the Washington Constitution evinces a recognition that speech is not merely a social tool, and when used on a matter of public interest, it is useful in ascertaining truth and is an exhibition of moral courage on the part of a citizen who is willing to speak out about what they believe is right, fair, just, and true.

The Washington Constitution is to be strictly interpreted to favor free speech rights, even if such speech would not be protected by the First Amendment. *Bering v. Share*, 106 Wn.2d 212, 242-43, 721 P.2d 918 (1986). Free speech is a preferred right in Washington, even when balanced against other constitutional rights. *State v. Coe*, 101 Wn.2d

[1] Justice Utter wrote the referenced article while a Washington Supreme Court Justice. This article preceded *Gunwall* by one year.

364, 375, 679 P.2d 353 (1984); *Alderwood Associates v. Wash. Environmental Council*, 96 Wn.2d 230, 242, 635 P.2d 108 (1981). These cases stand for the proposition that the government cannot intrude upon free speech rights of citizens absent an extremely compelling interest. Courts should not chill free speech rights absent an extremely compelling interest, which is not present here.

It is also important to note the context in which the instant recall petitions were filed; masks had been mandated for the first time in more than a century. While the superior court opined that "[i]t hardly seems that wearing them in present day is novel or controversial[,]" CP 93, that statement belies the proliferation of legal action, protests, and general discord that mask mandates faced throughout the state and

country. Further, academic performance had been suffering. Children and youth faced a "mental health crisis."[2]

The right to a fully funded education is "paramount" in Washington State. The Supreme Court has held that "Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education." *McCleary v. State*, 173 Wn.2d 477, 483, 269 P.3d 227 (2012). The State of Washington has an obligation to "make ample provision for the education of all children residing within the State's borders." *Seattle School District No. 1 v. State*, 90 Wn.2d 476, 512, 585 P.2d 71 (1978). This duty is described as follows:

> Careful examination of our constitution reveals that the framers declared only once in the entire document that a specified function was the State's paramount duty. That singular declaration is found in

[2] Wash. Off. of the Gov., Proclamation 21-05.1, *Children and Youth Mental Health Crisis* (March 26, 2021).

> Constitution art. 9, § 1. Undoubtedly, the imperative wording was intentional.... No other State has placed the common school on so high a pedestal.

Id. at 498 & 510-511. Context is important. Constitutional rights are important. Disregarding both resulted in an outcome that is not in accordance with the case law relied upon by the superior court.

C. The imposition of sanctions was manifestly unreasonable.

When determining whether a court's discretion was abused, error is found if the view taken by the court is one which no reasonable person would take, and it is therefore "manifestly unreasonable." The superior court, in its Memorandum Decision regarding CR 11 sanctions, relied primarily on three cases in determining that sanctions were appropriate, to wit: *In re Recall of Pearsall-Stipek*, 136

Wn.2d 255, 961 P.2d 343 (1998); *In re Recall Charges Against Lindquist*, 172 Wn.2d 120, 258 P.3d 9 (2011); and *In re Recall of Piper*, 184 Wn.2d 780, 364 P.3d 113 (2015).

The instant case is so drastically distinguishable from the three recall cases relied upon by the superior court in finding "bad faith" that the resulting imposition of sanctions was manifestly unreasonable. CP 139-40. Salient considerations include: (1) all of the petitioners in the three primary cases proceeded pro se. They did not obtain legal representation and counsel to assist with the factual and legal inquiry necessary to support a recall petition. And (2) all of the petitioners were serial petitioners or filed petitions substantially similar, if not identical to, previous recall petitions against the public official.

1. Recall of Pearsall-Stipek

In *Pearsall-Stipek*, the petitioner filed a recall petition that was *identical* to three previous recall petitions filed by a different petitioner; the petitioner also filed a second recall petition against the same public officer that was deemed legally and factually insufficient. The court there found that "[g]iven the repeated and wholly meritless efforts to recall Ms. Pearsall-Stipek, Mr. Bennett's persistence suggests that he may be motivated by spite rather than by a sincere belief in the sufficiency of the recall charges." *Pearsall-Stipek*, 136 Wn.2d at 267. Even then, the court merely found that the recall petition was frivolous and advanced without reasonable cause, and no sanctions were imposed; additionally, the award of attorney fees based on RCW 4.84.185 was reversed.

2. Recall of Lindquist

Similarly in *Lindquist*, petitioners had previously brought a recall petition against a different public official using many of the same documents in support. The petitioners were aware that the first recall petition had been dismissed for lack of legal and factual sufficiency, and had been told by numerous government officials, including the governor, the attorney general, the Pierce County sheriff, and the Tacoma police chief that the petition was meritless. *Lindquist*, 172 Wn.2d at 125. The decision to forge ahead in the face of such knowledge served as the basis for the imposition of sanctions. The timing of the filing of the recall petition also supported the court's finding of political harassment; the petitioners filed it a mere two weeks prior to the election, so that it would "be known before the election but too late for Lindquist to clear his name in a hearing on

the merits." *Id.* at 137. The petitioners admitted that Lindquist "would not appreciate the timing" of the petition, refused to comply with subpoenas, and refused to participate in two different hearings, including the sufficiency hearing. The last act merits discussion for two reasons; first, the sufficiency hearing is the hearing in which a determination of the validity of the recall petition is made, and second, the petitioners insisted it be held within the statutory deadline although they "knew Lindquist would be compelled to cut short his postelection family vacation to attend a hearing that petitioners had no intention of attending." *Id.* at 139.

Here, Linebarger duly responded to a subpoena duces tecum issued by the Board Members to the nonprofit organization for which he is a board member, and attended all hearings in the matter, even though he had the representation of counsel. There was no danger of

influencing the outcome of the election, as none of the Board Members were up for reelection. For these reasons, *Lindquist* is inapposite, and the superior court errantly relied on it in its analysis.

3. Recall of Piper

In *Piper*, the petitioners had previously filed an unsuccessful recall petition against Piper, displayed a "cavalier" and "reckless attitude" to *both* the recall and court processes, and "admitted that the purpose of the recall petition was not to successfully recall Piper." *Piper*, 184 Wn.2d at 791. The petitioners in *Piper* were "intentionally unprepared" for depositions and admitted that they "sought to force Piper to 'retire like he should.'" *Id.* The court continued that "[g]iven the repeated and wholly meritless efforts to recall Piper, Petitioners' persistence suggests that they were motivated by something other than a sincere belief

in the sufficiency of the recall charges." *Id.* Sanctions were predicated on the "repeated and wholly meritless efforts" to recall, not that the charges were ultimately determined to lack factual or legal sufficiency.

D. The Imposition of Sanctions was Reached by Applying the Wrong Legal Standard

The Board Members sought sanctions because Linebarger "filed the recall petition for an improper purpose and on baseless grounds." CP 42. While the Board Members ostensibly brought their motion under CR 11, essentially, they made the same argument as the public official in *Pearsall-Stipek*, who moved for attorney fees under RCW 4.84.185. This is evidenced by the fact that Board Members sought attorney fees in the amount of $167,671.00, dating back to September 22, 2021, two and a half weeks *before* the recall petition was even filed. CP 140. The time entries included

both the CR 11 motion drafting and research, as well as the time spent on the recall petition response. CP 140-141.

1. The sufficiency of recall petitions is to be determined at no cost to either party.

In *Pearsall-Stipek*, the Supreme Court held that attorney fees are not available under RCW 4.84.185, due to the provision of a sufficiency hearing under RCW 29A.56.140, which is "without cost to any party[.]" While the legislative history is silent as to whether the Legislature intended to insulate recall petitioners from sanctions for frivolous recall petitions, the

> special dispensation indicates that the Legislature intended to broaden citizen access to the courts in the recall context. The threat of sanctions for filing a frivolous recall petition may discourage citizens from exercising their recall rights. This potential chilling effect could undermine the Legislature's intent that citizens be able to freely initiate recall efforts.

Pearsall-Stipek, 136 Wn.2d at 349. Merely frivolous recall petitions are not enough to warrant sanctions. Bad faith is required. Here, Linebarger filed the petition in good faith and it was not frivolous.

2. Legal and factual insufficiency does not necessarily mean the petition was filed in bad faith.

Bad faith, in the context of recall petitions, is harassment of the public official, an attempt to influence the election concerning that official, or procedural bad faith such as refusing to participate in court hearings or discovery. *See, e.g.*, *Lindquist*, 172 Wn.2d at 138-39 ("These examples of petitioners' *procedural* bad faith are sufficient to uphold the trial court's discretion in awarding attorney fees.") (emphasis added).

As briefed above, harassment is found when a petitioner files numerous recall petitions against the same public official or has knowledge that such a petition has no likelihood of success. To wit:

- In *Pearsall-Stipek*, the petitioner filed two separate recall petitions against an elected official, one of which was identical to three earlier recall petitions filed by a different petitioner.
- In *Lindquist*, the petitioners "present recall action against Lindquist contains many of the same documents included in the recall against Madsen." *Lindquist*, 172 Wn.2d at 124. The recall against Madsen had previously been deemed legally and factually insufficient. *Id.*

- In *Piper*, one of the petitioners had "previously filed an unsuccessful recall petition against Piper." *Piper*, 184 Wn.2d at 791. Additionally, the petitioners "admitted that the purpose of the recall petition was not to successfully recall Piper." *Id.*

The Supreme Court in *Pearsall-Stipek* held that the first recall petition was barred by *res judicata*, and the second was filed because the petitioner "may be motivated by spite rather than by a sincere belief in the sufficiency of the recall charges." *Pearsall-Stipek*, 136 Wn.2d at 267. Even still, the award of attorney fees was reversed.

In *Lindquist*, the Supreme Court noted that petitioners had also "been told by government officials, including the governor, attorney general, Pierce County sheriff, and Tacoma police chief," that the discretion to prosecute rests with the

prosecuting attorney, namely Lindquist. *Lindquist*, 172 Wn.2d. at 137. Yet, "[d]espite this knowledge, petitioners' recall petition charged Lindquist with failing to investigate and prosecute Madsen." *Id.* Coupled with the petitioners' failure to attend hearings, including the sufficiency hearing, refusal to respond to subpoenas or prepare for deposition, and refusal to agree to a continuance so that Lindquist was forced to cut short a family vacation, prompted the Supreme Court to hold that "[t]hese examples of petitioners' procedural bad faith are sufficient to uphold the trial court's discretion in awarding attorney fees." *Id.* at 139.

In *Piper*, throughout the proceedings, the petitioners exhibited "a 'cavalier' and 'reckless attitude' to the recall and the court process." *Piper*, 184 Wn.2d at 791.

The superior court conflated bad faith with legal and factual insufficiency. Specifically, the superior court stated

that "if you're just going to file things without that reasonable inquiry, without some factual and legal basis, it is purely harassment. That's what it boils down to. And that's not what a recall petition is designed for." RP 67. Moreover, that is not what occurred, as here, Linebarger conducted his own factual and legal research and hired two attorneys to do the same and to represent him. That is not what the Supreme Court held *Pearsall-Stipek*, *Lindquist*, and *Piper*; those cases involved repeat petitioners, who all proceeded pro se, and exhibited a disdain for the recall and court processes.

If the superior court decision is upheld, any first-time recall petitioner who files a recall petition found to be legally and factually insufficient may be sanctioned. That would contravene the "special dispensation" of RCW 29A.56.140 which provides that the sufficiency hearing is to be held at no cost to either party. It is after all, "the Legislature's intent that

citizens be able to freely initiate recall efforts." *Pearsall-Stipek*, 136 Wn.2d at 266.

In short, there must be more than legal or factual insufficiency for sanctions or attorney fees to be levied against a recall petitioner. This is a logical conclusion, as the right to recall elected officials is enshrined in the Washington Constitution.

3. Media coverage is of no moment in the recall process.

The superior court applied the wrong legal standard in determining that Linebarger's contact with the media was evidence of bad faith. CP 97. The superior court provided that "at least one Washington appellate court has upheld the use of CR 11 sanctions when a party seeks media coverage in order to garner 'attention, inflame the public, and materially

prejudice' the proceedings." CP 97 (quoting *Watness v. City of Seattle*, 11 Wn. App. 2d 722, 746, 457 P.3d 1177 (2019).

However, there is no possibility that Linebarger's contacts with the media could "materially prejudice" the proceedings by "inflaming the public;" a recall petition is determined to be legally and factually sufficient by a judge, not a jury. RCW 29A.56.140. Not only that, but the context of the media contacts between the instant matter and the *counsel* for the estate of Watness is important to note. In *Watness*, the sanctioned party filed a motion on the one-year anniversary of the alleged wrongful death in order to capitalize on media coverage and to inflame interest while also distributing the motion to the media in violation of a stipulated protective order. The filing of the motion was also accompanied by social media postings aimed at generating

more media coverage, and the motion itself was based on a "novel use of the statute." *Watness*, 11 Wn. App. 2d at 746.

Again, the case relied upon by the superior court regarding media contact concerned sanctions against the attorneys of a represented party for their actions during the pendency of the respective matter. And, there were additional considerations distinguishing the cited authority, namely a protective order and novel legal theory of the motion in question.

E. The apportionment of sanctions is not supported by the record and was made for untenable reasons.

Throughout this case, counsel for the Board Members detailed the shortcomings of Linebarger's former counsel, alleging that they "fail[ed] to provide this Court with any legal authority in the petition, and attend[ed] hearings without any apparent preparation." CP 53. Counsel for

Board Members also noted that despite Linebarger "seemingly spoon-feeding his attorney the statutory authority and a draft of the recall petition, Petitioner's counsel failed to include any statutory authority in the recall petition." CP 55. Further, counsel for Board Members lamented that Linebarger's former counsel "have repeatedly proven to be dilatory (at best) and completely unresponsive (at worst)." *Id.* In fact, in responding to the Motion for CR 11 Sanctions, Linebarger's former counsel incredibly missed the response deadline.

Also according to counsel for the Board Members, the discovery process was abused by Linebarger's former counsel, who failed to produce any communications after dismissal of the recall petition, and who demonstrated "a cavalier attitude toward the recall process that warrants sanctions." CP 55. By way of example, counsel for the

Board Members detailed that although "Board Members' counsel requested final subpoena production by the end of the day on Monday, February 28, 2022[, o]n Friday, February 25 at 5:48 PM, Petitioner's counsel emailed Board Members' counsel raising 'First Amendment concerns,' even though counsel had already settled these concerns months earlier." CP 53-54. Counsel for the Board Members lamented the "unprofessional excuses [of Mr. Wolf], blaming delay on his struggle to manage 'heavy caseloads.'" CP 53. Ultimately, counsel for the Board Members stated that "had counsel for Petitioner engaged in the most cursory of research – research that a first-year law student can conduct – he would have learned that this matter should never have been filed. Of course, he did no such research." CP 55-56.

Similarly, the Court placed the sanctionable conduct at the feet of Linebarger's former counsel. The superior court,

in its Order granting the motion for sanctions, found that "the actions of Petitioner's counsel reveal this recall petition was thrown together, is baseless, and lacked even a modicum of due diligence." CP 89. In recounting the posture of the case, the superior court noted that "[m]inutes before the [sufficiency] hearing began, Petitioner submitted additional materials to the Court," but failed to actually file such with the Court Clerk's Office. CP 87. In response to receiving voluminous supplemental materials, the superior court continued the hearing, but again, "[s]hortly before the October 25 hearing, Petitioner submitted" additional authorities, which were likewise not properly filed with the Court Clerk's Office. CP 88. The superior court made numerous findings that "Petitioner's charges were not well-grounded in the law. Petitioner failed to identify a single case or statutory authority to support this charge." CP 91. Or

that the [residency] charges were not well-grounded in the law… Petitioner did not cite any specific legal authority that would make it unlawful." CP 98.

The superior court succinctly stated that:

> While courts act as gatekeepers in preventing improper recall petitions from going through, there is also an expectation that lawyers, too, act as gatekeepers in preventing frivolous actions from making their way in front of the court. In this instance, Petitioner's counsel did not engage in the necessary good faith inquiry to act as a gatekeeper.

CP 96. This clearly evinces that both the superior court and counsel for the Board Members determined that the sanctionable conduct was committed by Linebarger's former counsel, and not Linebarger himself.

Accordingly, as the record demonstrates that both Board Members and the superior court laid the basis for the

imposition of sanctions at the feet of Linebarger's former counsel, the apportionment of the sanctions with Linebarger being responsible for 75 percent of the total amount is untenable.

F. Attorney fees should not be awarded to either party.

In accordance with RCW 29A.56.140, which provides that sufficiency hearings are to be "without cost to any party," attorney fees should not be awarded to either party here. This is the inverse of the statement of the rule "[w]here a statute authorizes fees to the prevailing party, they are available on appeal." *Kyle v. Williams*, 139 Wn. App. 348, 358, 161 P.3d 1036 (2007) (citing *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 716, 9 P.3d 898 (2000)). As the Board Members were not awarded their

attorney fees by the superior court, and the statute does not allow for attorney fees, they are not available.

Under CR 11, attorney fees are not available, as "CR 11 is not a fee shifting mechanism but, rather, is a deterrent to frivolous pleadings." *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 418, 157 P.3d 431 (2007) (citing *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992)). Even under the alternative theory of frivolity contained in RCW 4.84.185, under which Board Members essentially moved for attorney fees before the superior court, attorney fees are not available as they were not pleaded properly in the response to the recall petition but were instead made by motion following the responsive pleading. Attorney fees, when based on contract, are "special damages that must be pleaded when the right to recover the fees arises from a contractual provision." *Kathryn Learner Family Trust*

v. Wilson, 183 Wn. App. 494, 499, 333 P.3d 552 (2014). Conversely, general damages "are the natural and necessary result of the wrongful act or omission asserted as the basis for liability. They are presumed by or implied in law to have resulted from the injury." *Id.* (quoting *Jensen v. Torr*, 44 Wn. App. 207, 214, 721 P.2d 992 (1986)).

Given the explicit provision that sufficiency hearings are to be held at no cost to any party, attorney fees are special damages that must be pleaded. They were not. Therefore, they are not available on appeal either.

V. Conclusion

For the foregoing reasons, the Court should reverse the superior court's Order granting CR 11 sanctions and remand this matter for an Order vacating the same.

This document contains 5,456 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 2nd day of November, 2023,

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2023, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Courts' Secure Portal, which sends a copy of uploaded files and a generated transmittal letter to active parties on the case. The generated transmittal letter specifically identifies recipients of electronic notice.

DATED this 2nd day of November, 2023, at Spokane, Washington.

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November 02, 2023 - 11:37 AM

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