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Docket No. 303314

IN THE MATTER OF THE ESTATE OF WENDELL K. MILES

RESPONDENT/CROSS-APPELLANT'S BRIEF

ORIGINAL

ADAM P. KARP, ESQ.
Attorney for Plaintiffs-Petitioners
114 W. Magnolia St., Ste. 425
Bellingham, WA 98225
(360) 738-7273
WSBA No. 28622

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I. CROSS-APPEAL ASSIGNMENTS OF ERROR

1. The trial court's granting Ms. Tasker's motion to strike portions of Colville Valley Animal Sanctuary's ("CVAS") declarations.

2. The trial court's granting Ms. Tasker's motion for sanctions against Nancy Rose, President of CVAS.

Issues Pertaining to Assignments of Error

1. Did the trial court err in sustaining most of Ms. Tasker's untimely objections to certain parts of declarations submitted by CVAS?

2. Did the trial court err in monetarily sanctioning Ms. Rose, a nonlawyer, when she signed a pleading on behalf of CVAS, a nonprofit corporation?

II. STATEMENT OF THE CASE

The decedent Wendell Miles's passion for animals translated into generous benefaction to animal welfare organizations. In addition to bequests, before his death on Apr. 22, 2010, he included a specific, non-residuary devise of realty to the "Colville human society." Nearly one year to the day of his death, the estate filed an *Amended Petition for Distribution,* asking the court's permission to authorize sale of the realty and to distribute proceeds to the Red Cross, the residuary beneficiary, claiming that as no precise entity named "Colville Humane Society" existed, the gift lapsed to the Red Cross.

On Sept. 19, 2011, the trial court made findings of fact and conclusions of law. The unchallenged findings and conclusions serve as verities on appeal, and are incorporated by reference here. **CP 244-50**. Five such findings and one unchallenged conclusion of law bear reprinting:

- On March 2, 2010, Wendell K. Miles executed his "Last Will of Wendell Kenneth Miles." He made specific bequests to seven individuals and two specific charities – "SPEA" or American Society for the Prevention of Cruelty to Animals, and "PETA," or People for the Ethical Treatment of Animals. A third charity was also specified – "Colville human Society my real estate" (doc. 2). He also designated that any "residual money to go to Red Cross" – American Red Cross (doc. 2). *Finding A.*

- At the time Mr. Miles executed his will, on March 2, 2010, Dog Patch Group, Inc. dba Dog Patch Humane dba Dog Patch, was no longer accepting animals from the general public – had not been broadly accepting animals since at least April, 2008. It had continued to accept and place dogs on a "personal level." It was located at 2307 Hickey Way, outside Colville city limits, but with a Colville mailing address. Dog Patch Humane, Inc., as of March 2010, was marketing a holistic methodology for treating humans and animals. The marketing was through a website. Local advertising using the word "humane" was mostly extant in the late 1990s's. Dog Patch Group, Inc. was listed in the yellow pages under humane societies and animal shelters in March, 2010, but the phone number was listed under Dog Patch Group, Inc. *Finding F.*

- In March, 2010, Colville Valley Animal Sanctuary, (Inc.) was located in Arden, south of Colville, with a Colville mailing address. It was formed in 2003. It used Colville Pet Refuge Humane Society, Inc., in business letters in late 2009. Since 2005, it had used the dba "The Refuge Humane Society" on business cards, thank you notes, promotional brochures, t-shirts and sweatshirts, and on parade banners. Its brochure defined "humane society" and its publication, "The Poochie Press," was put out

under the dba "Colville Pet Refuge Humane Society." In 2010, it sheltered 202 cats and 103 dogs and adopted out 114 cats and 102 dogs. It also trapped and spayed/neutered 21 cats. *Finding H.*

- The testator uses smaller case letters for some proper nouns – "debbi Odion" and "Colville human Society," and "Eric olsen." All designations are as to specific individuals, no designations are to a class. He has a clear intent to leave property to charitable organizations that protect and care for animals. This intention extends to all animals, not just dogs. And, the actual designation "Colville human Society" was singular (Doc. 2). *Finding I.*[1]

- The responding charitable organizations in the Colville vicinity that protect and care for animals are, of course, "in existence." There is ambiguity as to which organization the testator intended to designate. He knew the names of the organizations; he knew they were not located within Colville City limits, but that they had Colville mailing addresses; and he knew of the basis services each organization was providing in March, 2010 (Doc. 2.) *Finding J.*[2]

- ["The Refuge Humane Society" and "Colville Pet Refuge Humane Society"] were dba's of the Colville Valley Animal Sanctuary (inc.) in March, 2010. *Conclusion E.*

Despite granting Ms. Tasker's motion to strike portions of declarations (**CP 575-77**), the court nonetheless ruled that parol evidence illuminated Mr. Miles's intent to devise his realty to "The Refuge Humane Society" and the "Colville Pet Refuge Humane Society," fictitious business names of CVAS. **CP 250, Concl. E.**

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[1] Though Ms. Tasker nominally assigns error to Finding I, she does not specify what parts lack substantial evidence or even attempt to show error through the body of her brief.

[2] Ms. Tasker appears only to challenge that part of the finding that Mr. Miles knew the names of the charitable organizations in Colville that protect and care for animals. See *A.B.*, AE 2.

On Sept. 23, 2011, less than 24-hours after receiving CVAS's *Notice of Discharge of Counsel,* counsel for Ms. Tasker sent a letter to CVAS's President Nancy Rose, threatening to appeal unless CVAS consented to sharing proceeds. **CP 740-41**.

Based on that threat, the limited time remaining to file a CR 59 motion, and the contested withdrawal of CVAS's attorney, CVAS moved under CR 59(a)(1,9) and CR 59(g) for a new trial to reopen the record to admit additional evidence and to amend findings, a motion based on a serious procedural irregularity having the effect of depriving CVAS the chance to put on a good deal of its case and which resulted in an incomplete record to support the trial court's judgment on appeal. *See Motion to Reopen* (**CP 731-36**).

Ms. Rose, a nonlawyer and CVAS President, signed the pleadings, prompting Ms. Tasker's motion for sanctions. On Dec. 20, 2011, the trial court signed an amended order denying the motion to reopen, striking pleadings, and awarding CR 11 sanctions of $1100 to Ms. Tasker against Ms. Rose. **CP 824-26.** Ms. Rose timely cross-appealed that order.

Thereafter, on Feb. 3, 2012, the trial court canceled Ms. Tasker's *lis pendens* and awarded $600 to CVAS against Ms. Tasker. **CP 857-58.** Ms. Tasker never appealed this order.

It cannot be understated that Dog Patch Group, Inc. ("DPG"), the corporation ostensibly seeking Mr. Miles's devise at the trial level, never appealed. Instead, an individual who has, by all recent accounts, focused her energies on practicing human and nonhuman medicine without a license in a field that many regard as charlatanry, and whose business has been run out of the State by the Washington State Department of Health, whose troubles with the Department followed several years of litigation involving a violent feud with her neighbors, resulting in six-figure indebtedness, claims of frostbite, and hyperbolic allegations of living off Prego – i.e., Ms. Tasker – is the appellant.

Seizing upon the above incongruity, on Mar. 2, 2012, CVAS moved to dismiss Ms. Tasker's appeal under RAP 3.1 and a motion on the merits. The clerk did not authorize consideration of the latter pursuant to the Apr. 8, 2010 *General Order In re the Matter of Court Administration Re: Restrictions on Motion on the Merits Practice,* (2). Comm. Wasson denied the RAP 3.1 motion, characterizing it as made pursuant to RAP 18.9(c). CVAS moved to modify, which this panel rejected without explanation on Sept. 28, 2012. As noted below, CVAS revives the motion here on the merits.

III. <u>ARGUMENT: RESPONSE BRIEF</u>

A. <u>Preliminary Matters</u>.

Ms. Tasker challenges *parts* of findings E, I, J, K, rendering those parts not challenged, as well as all of findings A-D and F-H, verities on appeal. *Moreman v. Butcher*, 126 Wn.2d 36 (1995). An appellate court may affirm a trial court where it reached the right result, but for the wrong reasons, *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113 (1993), even if the ground was not considered by the trial court, *J-U-B Engineers, Inc. v. Routsen*, 69 Wash.App. 148, 150-151 (1993).

B. Standing Argument Revived.

CVAS reasserts that Ms. Tasker lacks standing to appeal, as articulated in, and incorporated by reference from, its *RAP 3.1 Motion to Dismiss* (Mar. 2, 2012), *Reply on Motion to Dismiss* (Jun. 1, 2012), *Motion to Modify* (Jul. 12, 2012),[3] and Judge Nielsen's oral ruling on Feb. 3, 2012, where he explains why Ms. Tasker had no personal stake in the matter and is not the real party in interest, a ruling culminating in an order sanctioning her for filing a *lis pendens*, instead of DPG. **VRP 2/3/12** at 23.

C. Substantial Evidence Supports Findings E, I, J, and K.

The substantial evidence standard is sometimes characterized as the quantum of evidence required to meet the burden of *production* (but

[3] As this panel did not indicate the reason for denying the motion to modify, CVAS assumes it agreed with Comm. Wasson that a frivolity standard applied under RAP 18.9(c), and that Ms. Tasker's appeal was not frivolous. If so, that does not preclude rejection of Ms. Tasker's appeal on the merits, instead of under a pre-merits, RAP 18.9(c) standard.

not the higher burden of *persuasion*), i.e., enough to resist a CR 50 motion and warrant allowing the issue to go to the trier of fact for decision, a decision an appellate court lacks authority to disturb because it may not substitute its judgment. *See In re Dependency of C.B.,* 61 Wash.App. 280, 283 fn.2 (1991)(describing burden of production's function to determine if issue should go to factfinder; if so, issue is deferred for burden of persuasion calibrated to standard of proof), adding:

> FN2. Whether the burden of production has been met can be tested at various times during the litigation process. When it is to be tested on appeal, that is done by claiming that there was not "substantial evidence" to support the findings or verdict entered in the trial court. To say that there was not "substantial evidence" is to say that the burden of production was not met; to say that there was "substantial evidence" is to say that the burden of production was met.

Furthermore, reviewing courts defer to triers of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of evidence. *State v. Ainslie*, 103 Wash.App. 1 (I, 2000). Appellate substitution of judgment is prohibited. *Greene v. Greene,* 97 Wash.App. 708 (II, 1999). Thus, provided that CVAS met its burden of production, substantial evidence exists, and this court should not disturb any of the challenged findings. Having clarified the standard of review, CVAS addresses Ms. Tasker's challenges:

1. Finding of Fact E.

Ms. Tasker appears to challenge only that part of the finding that Mr. Miles had not visited DPG. ***A.B.*, AE 1**. Yet, there was never such a finding. Instead, the court found that, "As of April, 2011, the name 'Wendell Miles' was not familiar to Joyce Tasker." And this finding is supported by the record, at **CP 38** ("Although I never knew Wendell Miles by name, I knew him.") and **CP 138:18-19** ("Joyce Tasker has never claimed to be a friend per se of Wendell Miles.") The trial court also found, "He had been introduced to Jean E. Acorn with Colville Pet rescue, Inc. at Ms. Acorn's restaurant – date unknown."

Nonetheless, Ms. Tasker says at 10, "[DPG] was the only facility among the contenders for his gift that Mr. Miles actually visited," citing **CP 38**. But she does not indicate <u>when</u> he visited since the time DPG was "founded in 1991," nearly 20 years before Mr. Miles died. **CP 34:14**. Timing matters, since the trial court must ascertain the testator's intent at the time of executing the will, which, as described below, took place likely over a decade after any purported visit.

Ms. Tasker claims Mr. Miles said publicity and notoriety in the "courts" and "news" from what she describes as a "political firestorm" and the ensuing "8+ extremely brutal and expensive legal years at Dog Patch" that motivated his visit, and that he gave a cash donation at the time. **CP 141** (stating, "The local paper and other publicity was what provoked

Wendell Miles (as it did many others) to visit Dog Patch and see for themselves the alleged controversial facility."[4]) She does not indicate when he made this alleged, untraceable donation, but if it were in fact tendered, it had to have been between 1991-1999, per **CP 125-126** (compare creation of DPG in 1991 and eight years of litigation); **CP 145:25-26** (noting court order limiting DPG to six dogs, lifted later in 1999). As discussed below, putting aside whether DPG committed tax fraud, each of the five tax returns for 2004-2010 (no return filed for 2005 and 2006), all filed simultaneously following Mr. Miles's death, reveal no donation made by any person except Ms. Tasker herself and Kelly Bullock of Sunnyvale, Calif., who gave $5000 (not Mr. Miles). **CP 418-574** and **CP 419:13-16, 420:6-10, 421:22-26; 422:16-18; 423:6-10**.

Ms. Tasker's request that the trial court accept her infallibility in recalling a man's face from over a decade earlier, in the midst of tremendous stress, and in light of the obvious financial motive to

[4] Though she does not describe it, the controversy appears to have pertained not only to having too many animals, but clashes with law enforcement and a multi-year feud with her neighbor, resulting in shots being fired. *See Wright Decl.*, **CP 358:27—359:15, 361-369** (newspaper articles of Jul. 19, 1998; Nov. 23, 1999; Dec. 17, 1999, wherein Ms. Tasker is quoted as saying, "The sheriff is corrupt and the prosecutor is impotent," admitting she fired three shots from her .357 Magnum over a "long-simmering dispute over a private dog pound in a semirural subdivision"). Controversy did not leave Ms. Tasker alone, as in the years that followed the "Neighbors from Hell" coverage, her electrodermal business was shut down by the Washington State Department of Health and this court. Her alternative medicine business was the subject of a 2006 court order enjoining Ms. Tasker from continuing to operate, affirmed in *Tasker v. DOH,* 139 Wash.App. 1041 (2007), review denied, 163 Wn.2d 1027 (2008) (not cited as authority).

misremember, begs the court's naïveté. This is particularly so where DPG did not furnish evidence of one donation since 1993, except by Ms. Tasker and Kelly Bullock, thoroughly discrediting her claim that Mr. Miles must have intended his devise go to DPG. The trial court evidently saw through the allegation and found against DPG, as this court should under the deferential standard of review.

With respect to Finding E, sufficient evidence existed to meet the burden of *production*. DPG's failure to *persuade* the trial court to enter a contrary finding does not mean the court lacked substantial evidence to so find. It just means DPG did not meet its burden of persuasion.

2. Finding of Fact I.

It is unclear what part of this finding Ms. Tasker actually challenges, as the Will amply supports each of the five sentences and meets the substantial evidence standard of review.

3. Finding of Fact J.

Ms. Tasker appears only to challenge that part of the finding that Mr. Miles knew the names of the charitable organizations in Colville that protect and care for animals. ***A.B.,* AE 2**. Not challenged is the finding that, "There is ambiguity as to which organization the testator intended to designate," meaning which single entity, not multiple organizations. **CP 247: ¶ J, l.2-3.**

When the court, in *Finding I,* stated, "He has a clear intent to leave property to charitable organizations that protect and care for animals," it was referring to the other gifts in the Will, such as to the SPCA, PETA, and the Red Cross. Contrary to Ms. Tasker's insinuation (by emphasizing the letter "s" in "organizations," at 8), the court notes that "the actual designation 'Colville human Society' was singular," consistent with all his other designations to "specific individuals, no designations are to a class." *Finding I.*

Ms. Tasker also does not challenge that part of *Finding I* stating, "This intention extends to all animals, not just dogs," a finding that actually disfavors Dog Patch Group because its very name speaks to "just dogs." At 22, Ms. Tasker does not challenge this finding, but instead appears to interrogate the "court's distinction" as to whether DPG cares for both cats and dogs, instead of just dogs. However, the court never made a finding that DPG only cared for dogs, so Ms. Tasker is raising a straw man argument. Nonetheless, substantial evidence supports finding Mr. Miles intended the devise to an organization that did not prioritize dogs over cats, and even if DPG very intermittently and as a tiny fraction of its operations provided care to the occasional feline, the facts overwhelmingly support regarding CVAS as the intended beneficiary given its all-animal mission.

And Ms. Tasker does not dispute the court's finding in that respect, noting that for five years prior to Mr. Miles executing his will, CVAS used the dba "The Refuge Humane Society" on business cards, thank you notes, promotional brochures, t-shirts and sweatshirts, and on parade banners, that its brochure defined "humane society" and its publication was "put out under the dba 'Colville Pet Refuge Humane Society," a title used in business correspondence in late 2009, roughly half a year before Mr. Miles executed his will. Further, in 2010, CVASA sheltered 202 cats and 103 dogs and adopted out 114 cats and 102 dogs, also having a vibrant TNR program involving 21 cats. *Finding H.*

At best, Ms. Tasker offers undated photographs of a few cats,[5] a bird house, and a deer feeding station, which may have been taken over a decade before Mr. Miles executed his will. **CP 132**. But this proffer comes more as an afterthought, made after reciting DPG's nearly exclusive (and expected) dedication to canine-centric activities in the August 2011 *Tasker Decl.* (emphasis added below):

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[5] While Ms. Tasker does refer to an "upscale cat building," there is no evidence it is involved in housing cats for adoptions and she nowhere indicates the building's capacity or throughput. **CP 135.** At 22, she claims she makes colorful fleece blankets for cats, and has building materials for cat habitat on hand for people in need, citing **CP 150-151**, but there is no indication when this was done, except to say "over 23 years."

- In *History* at **CP 125-26** (spending $135,000 for a "new **dog** yard" and implementing a new business model to decrease sheltered "**dogs**" to 20-25 **dogs** per day);

- In *Examples of Dog Patch Services* at **CP 126-28** (**Chihuahua**, lost **dog**, **German Shepherd**, hardship case for **puppy** needing food – no mention of a cat);

- In *Overview* at **CP 128-31** ("thousands of **dogs** shelter and/or helped"; tax exemption "as a **dog** shelter"; and "licensing" programs to help **dogs**);

- In *Favorable Public Renown* at **CP 131-32** (referencing a video 11 years before Mr. Miles's will, involving a **dog** named Bosco; writing a **kennel** ordinance in 1999; flyers alerting to danger of leaving **dogs** in warm cars; helping homeless people feed their "**dogs**"; reference manual for adoptions on How to Housebreak Your **Dog** in 7 Days, including kennels, puppy pen, leash, ID tag, harness; giving classes);

- In *Legacy* at **CP 132** (referencing the Dog Patch Spay Neuter Trust to spay and neuter "**dogs** of low income residents");

- In *Philosophy and Policy* at **CP 133-34** ("We understand and respect a **dog's** point of view ... We place our **dogs** needs ... We try to understand how each **dog** .... We try to really know our **dogs** ...");

- In *Adoptions* at **CP 134-35** (adoptions that all appear to be only of dogs, not one cat; even the adoption efforts for the poor speak of the criteria being "always the same: the **dog** and the family must be well matched...");

- In *"No-Kill" Facility* at **CP 136** (noting that "if space allows, Dog Patch will accept **the dog** into Dog Patch if the adoption fails and the previous parent cannot take **the dog** back);

- In *Special Cases* at **CP 136-37** (letter carrier finding frozen **dog**; noting admission space based on "number of **dogs** Dog Patch can shelter"; and giving helpful advice to those "in keeping their **dog** in their home as well as instruction to dog parents, with example of Cocker spaniel);

- In reference to Nancy Rose's declaration at **CP 145**, stating "**Dogs** at Dog Patch are kept like middle class kids not caged like animals."

Substantial evidence clearly endorses the view that Mr. Miles intended that the entity receiving the realty would not cater exclusively to dogs. Ms. Tasker admits this. And the substantial evidence confirms CVAS's ministry to cats and dogs more or less equally, while the eponymous DPG's *raison d'etre* is to focus on dogs. The claim at 23 that "The bulk of the work at CVAS is directed towards dogs and cats as is that of Dog Patch" is, therefore, simply untrue. And whatever work DPG did for dogs ended many years before Mr. Miles executed his will.

4. Finding of Fact K.

Ms. Tasker restricts her challenge to whether (a) Mr. Miles knew DPG scaled down its operation since the late 1990s and would have used the name "Dog Patch" if that was his intent; (b) that Mr. Miles knew of the Refuge Humane Society or Colville Pet Refuge Humane Society; and (c) that Mr. Miles intended to designate CVAS by using reference "Colville human society" in this will. ***A.B.,* AE 3-5**.

a. Mr. Miles's knowledge of CVAS and intent to devise.

To begin with, at 25 (emphasis added), Ms. Tasker concedes, "It could **equally** be said that Mr. Miles' intent was to gift his property to

Dog Patch[.]" This statement alone admits the existence of substantial evidence to find Mr. Miles intended to devise his realty to CVAS.

Next, the court could reasonably infer that Mr. Miles knew of CVAS per Ms. Rose's declaration explaining that:

> during the years immediately preceding the making of Mr. Miles' will, the Sanctuary was involved in numerous public events and fundraising efforts in which it held itself out to the public as Colville's "humane society," and that we received numerous donations from members of the community in that name.

CP 384:6-9. That CVAS was the only organization in Colville "with a dedicated shelter facility and that offers the full range of services typical of a county-supported humane society" aids in generating the inference to find as the trial court did. **CP 384:10-12**. Furthermore, Ms. Tasker's protest that CVAS not being known as a humane society is belied by the unchallenged *Finding H*. The evidence established that CVAS was not only a highly visible organization that served as the *de facto* humane society for Colville, but it was the only organization in Colville operating an actual shelter facility, that took in and adopted out animals, and provided an array of services typical of a county-supported humane society. **CP 73:20-24; 74:4-11** and **76- 96** (exhibits) [Nancy Rose]; **370-417, 291-94**. The evidence further established that during Mr. Miles's lifetime, CVAS had already been known to the public by the trade name

"Colville Pet Refuge Humane Society" – a close approximation of the designation "Colville Humane Society" as used in Mr. Miles's will. **CP 371-72, 390-403.** Other evidence supports the court's conclusion that CVAS was tantamount to the "Colville human society":

- Routinized juxtaposition of the word "Colville" with "Humane Society": **CP 277-285; 371:12—372:5; 390-401; 403;**
- Large-scale sheltering and humane society-type activities: **CP 372:6—374:23; 378:4-12, 380:1-6; 386-388;**
- Fostering networks and spay/neuter services: **CP 376:1-17;**
- Partnership with Spokane Humane Society: **CP 375:9-18;**
- A vibrant TNR program: **CP 376:17-26;**
- CVAS was the only organization in Stevens County that shelters cats: **CP 292:19** (see **291-294** generally for discussion of cat side of CVAS)

b. Mr. Miles's knowledge of DPG's defunct status.

Substantial evidence confirmed that DPG scaled down its operations. 31-year veterinarian Dr. Lennox Ryland stated in late 2010 that Ms. Tasker told her "the name 'Wendell Miles' was not familiar to her and she also stated that her organization was inactive and was no longer adopting or placing homeless animals." **CP 32.** Dr. Ryland elaborates on her lengthy conversations in fall and early winter 2010, totaling seven to eight hours, including numerous emails exchanged, stating that "she rarely left her house," that she "was occupied full-time

caring for her own animals," and that "all of her remaining time was spent running a business which she described as involving 'bioenergies' work and which, she stated, was generating approximately $100,000 per year." **CP 296:6-19**. During the first conversation, Ms. Tasker "made clear that she had not been actively involved in the rescue effort for many years, and that she was no longer taking in animals. This was not an isolated, or merely incidental, statement." **CP 296:20-22**. After chronicling her transition into rescue, Ms. Tasker explained that she decided "to retire from the rescue business and keep only those animals that she had come to regard as her own." **CP 296:24—297:2.**

Upon reviewing Ms. Tasker's first declaration to the court, Dr. Ryland added that her statements, "to the effect that she remains actively involved in animal rescue and that she knew Mr. Miles, are diametrically at odds with the statements she made to me during the fall of 2010." **CP 297:19-22.** Others echo the remarks made by Dr. Ryland as to the interactions with Ms. Tasker. ***See Gilbert Decl.,*** **312:11-24;** ***Emmett Decl.,*** **CP 354:1-2** (in Apr. 2008, DPG was "no longer taking in animals").

The surfeit of evidence was more than substantial to persuade a fair-minded person of the truth of the finding that DPG had stopped operating by the end of the 1990s and was not functioning as a viable dog

shelter several years prior to Mr. Miles's making of a will. **CP 311, 383-84.** The evidence established she was no longer taking in or adopting out animals, and that the 20-or-so animals who continued to permanently reside in her home were, for all practical purposes, her own animal companions. **CP 31-32; 121-23; 295-300; 311; 354; 383-84**. There was substantial evidence of Ms. Tasker's admission that the animals she purports to "shelter" sleep in her bed. **CP 383, 308**.

CVAS President Nancy Rose corroborated this admission, stating:

> In the spring of 2007, Ms. Tasker ... told me that the kennel facility was no longer being used, that she was no longer taking in or adopting out animals, and that it was quite enough for her to take care of the animals she already had—which at the time consisted of about 10 dogs and five or six cats. These animals ... were clearly Ms. Tasker's own animals.

CP 383:13-19. Having been "integrally involved" in the Colville rescue community since 2005, Ms. Rose would know if DPG were operating a "humane society." Local owner of Paws and Claws Pet Lodge Velna Veit also echoed DPG's defunct status, describing her interaction with Matt Bouchard and the Cocker Spaniel named Buddy, overhearing a conversation he had with Ms. Tasker on Jan. 29, 2011, where he asked her for help. Ms. Tasker responded "she was no longer taking in animals, and that these days she was simply taking care of a few older animals that she

had come to regard as her own." **CP 299:9-14.** Mr. Bouchard confirms the accuracy of the representation by Ms. Veit. **CP 290.**

Later, confronted by evidence she no longer operates a shelter, she responded with a lengthy and transparent affidavit arguing that a "humane society" need not actually shelter or adopt out animals. **CP 125-27**. The affidavit begins, tellingly, "Some humane societies shelter and adopt. Others do not." **CP 125**.

The evidence also revealed that as early as 1994, Ms. Tasker ceased filing tax returns for DPG and allowed its nonprofit status to lapse. **CP 143, 159, 419, 470**. The evidence indicates Ms. Tasker only began filing tax returns after becoming aware of the bequest that is the subject of this action, at which point she scrambled to regain her nonexempt status by filing seven years' worth of returns in one fell swoop. **CP 419, ¶ 3**. It further revealed that in recent years the name "Dog Patch Humane" was used by Ms. Tasker as a dba for the animal side of her "electrodermal testing" business. **CP 313-46.** An internet advertisement for "Dog Patch Humane" proclaims that "Dog Patch is a center for Computerized Electro Dermal testing for pets." **CP 314, 338**. It was only after Ms. Tasker learned of the bequest at issue that, on or about Jul. 30, 2011, less than two months before the trial court's decision to award the realty to CVAS, Dog Patch's "new website was devoid of any mention of the [Computerized

Electro Dermal Screening ("CEDS")] business and instead featured a lavish humane society-type operation." **CP 314:7-15**.

As to Mr. Miles's intent to give anything to Ms. Tasker, consider that the personal representative Rita Garrison, with whom Mr. Miles had a "close personal relationship ... for more than 14 years," and who visited Mr. Miles during the last three months of his life (including seven weeks before, when he drafted his will), noted that Ms. Tasker was "not one of" the "many friends and family members" who visited him. Nor had Ms. Garrison ever met Ms. Tasker or communicated with her. Nor did she ever have a "conversation with Wendell relating to Joyce Tasker or her organization Dog Patch Group." **CP 29**. The obituary describes Ms. Garrison as Mr. Miles's "long-time special friend." **CP 886**.

Ms. Tasker attempts to marshal counterevidence through Lew Wilson, but it pales in comparison to that offered by CVAS. Besides, under the substantial evidence standard, merely creating a fact issue does not warrant reversal as the trial court is not obligated to accept her rendition of facts.

D. Lapsing Not Challenged on Appeal.

As the Red Cross did not cross-appeal, the conclusion that the gift did not lapse remains the law of the case.

E. *Cy Pres* Not Required Nor Authorized Here.

The court need not invoke *cy pres* where parol evidence can clarify an ambiguous testamentary provision. To begin with, the court presumes the testator's familiarity with the surrounding circumstances that could affect the construction of an ambiguous will term. *In re Estate of Bergau,* 103 Wn.2d 431, 436 (1985)(en banc). Additionally, the "testator's intentions ... are determined as of the time of the execution of the will." *Id.* In clarifying uncertainty as to testator's true intention, it is "well accepted that extrinsic facts and circumstances may be admitted for the purpose of explaining the language of the will," with respect to all three species of ambiguities – latent, patent, and equivocation. *Id.,* at 436-37. The trial court correctly determined that Mr. Miles's will contained a latent ambiguity relative to which charitable organization he intended to gift his land. A latent ambiguity is described in *Bergau* as "not apparent upon the face of the instrument alone but which becomes apparent when applying the instrument to the facts as they exist." *Id.,* at 436.

In *Sigley v. Simpson,* 73 Wash. 69, 71-73 (1913), the Supreme Court addressed the latent ambiguity in the will of M.J. Heney, where he left "unto my friend Richard H. Simpson the sum of six thousand dollars," resulting in a will contest between Richard H. Simpson and Hamilton Ross Simpson. The trial court sided with the latter, and the former appealed, arguing that parol evidence could not be admitted to prove that Heney

meant "Hamilton Ross" when he wrote "Richard H." In affirming, the Supreme Court allowed parol evidence to cure the latent ambiguity resulting from the use of the words "my friend," given that the former was his employee and not a friend, while the latter was intimate with Heney, was his personal associate, had been the subject of discussions with third parties about leaving a legacy, and that Heney did not know the latter's given name or order of his initials and always addressed him as "Mr. Simpson." *Id.,* at 73. Concurring justices found "friend" to be "a word of weight and meaning," which fit the latter contester, not the former, and permitted the use of parol evidence. Had Heney not prefaced the bequest by the word "friend," so they said, "there might be no room for construction." *Id.,* at 74.

In reaching this conclusion, the Supreme Court approvingly cited to *Acton v. Lloyd,* 37 N.J.Eq. 5 (1883), which used parol evidence as to devisee identity, holding the bequest to "Dickey Lloyd" intended for "David S. Lloyd"; to *Camoys v. Blundell,* 1 H.L.C. 77, 9 Eng. Rep. 969, in using extrinsic evidence to deem Thomas Weld Blundell entitled to the legacy naming Edward Weld, though Edward was his brother, by noting that the court must construe the will "with reference to the evidence of the state of the family as known to the testator," and letting the "description prevail over the name"; to *Woman's Foreign Missionary Society v.*

Mitchell, 93 Md. 199 (1901), quoted as saying, "It is the identity of the individual, natural or artificial, that is material, and not the name.... The identity being established, the name is of no importance"; and *Reformed Presbyterian Church of N.A. v. McMillan,* 31 Wash. 643 (1903), reversing the trial court's conclusion that the legacy to a nonexistent board of disabled ministers lapsed to the heirs at law, using parol evidence.

Cy pres only applies where it is evident the testator did not intend to gift to a specific person or entity, but instead a class of beneficiaries. *Puget Sound National Bank of Tacoma v. Easterday,* 56 Wn.2d 937, 948-49 (1960) makes this point clearly:

> In *Horton v. Board of Education of Methodist Protestant Church*, 1948, 32 Wash.2d 99, 201 P.2d 163, 171, we quoted from Scott on Trusts as follows:
>
> "Where it clearly appears that the testator intended that the property should be applied only to the *particular purpose which failed*, or for the benefit of a *particular association or corporation which was dissolved*, it has been held that the doctrine of *cy pres* is not applicable and that the property reverts to the heirs or next of kin of the settlor." (Italics ours.) 3 Scott on Trusts 2112.
>
> Later, in the same opinion, we quoted from *Duncan v. Higgins*, 129 Conn. 136, 26 A.2d 849, as follows:
>
> "The doctrine [*cy pres*] applies in situations where a testator has evidenced a dominant intent to devote his property to some charitable use but the circumstances are such that it becomes impossible to follow the *particular method* he directs, and the courts then sanction its use in

some other way which will, as nearly as may be, approximate his general intent. * * * [Italics ours.]

"Ordinarily where an organization to which a charitable gift or devise is made is incapable of taking it, the question whether its payment to another organization will be permitted is determined upon the basis of the applicability of the *cy pres* doctrine or doctrine of approximation; and that doctrine will be applied only where the court finds in the terms of the will, read in the light of surrounding circumstances, a *general intent* to devote the property to a charitable use, to which the intent that it go to the particular organization named is secondary. * * *"

Again, in *Townsend v. Charles Schalkenbach Home for Boys, Inc.*, 1949, 33 Wash.2d 255, 205 P.2d 345, 350, we said:

'* * * The doctrine does not mean that some kind of a charitable trust will be enforced every time the testator expresses a charitable intent. The settlor must have had a *broad, general* intent to aid charity as a whole, *or some particular class of charitable objects. His intent must not be narrow and particular*. * * *' (Italics ours.)

Easterday, at 948-49.

Ms. Tasker failed to assign error to:

- *Finding of Fact A*, stating that Mr. Miles made a "specific bequests to seven individuals and two **specific** charities ... [and a] third **charity** was also **specified** – 'Colville human Society my real estate'" (emphasis added);
- *Finding of Fact I*, stating that the "designation 'Colville human Society' was **singular**," consistent with Mr. Miles's using "smaller case letters for some **proper nouns** – 'debbi Odion' and 'Colville human Society;' and 'Eric olsen," where "**All** designations are as to **specific** individuals, no designations are to a class" (emphasis added);

- *Finding of Fact J,* stating that, "There is ambiguity as to **which organization** the testator intended to designate" (emphasis added); and

- *Conclusion of Law D,* stating, "[M]ore than one charitable organization could be said to meet that description – parole evidence is admissible to show the intended **organization**" (emphasis added),

compelling the conclusion, per *Easterday*, that *cy pres* does not apply. Out of state cases on similar facts reach the same conclusion. For instance, *Phipps v. Barbera,* 23 Mass.App.Ct. 1, 498 N.E.2d 411 (1986) involved a testatrix who named a particular museum, rather than museums in general or the public at large, leading the court to conclude that the will lacked general charitable intent and rendered *cy pres* inapplicable. Instead, the court resolved the latent ambiguity through parol evidence:

> a. *Application of cy pres doctrine.* The MFA argues that the judge committed error when he declined to apply the doctrine of cy pres to reform the bequest of the Paxton paintings. There was no error.
>
> The cy pres doctrine has been stated as follows: "It is now a settled rule in equity that a liberal construction is to be given to charitable donations, with a view to promote and accomplish the general charitable intent of the donor, and that such intent ought to be observed, and when this cannot be strictly and literally done, [a] court will cause it to be fulfilled, as nearly in conformity with the intent of the donor as practicable." *Rogers v. Attorney Gen.,* 347 Mass. 126, 131, 196 N.E.2d 855 (1964), quoting from *American Academy of Arts & Sciences v. President & Fellows of Harvard College,* 78 Mass. (12 Gray) 582, 596 (1832). "[I]f the charitable purpose is limited to a particular object

> or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object ... the doctrine of [cy pres] does not apply, and, in the absence of any limitation over or other provision, the legacy lapses."*Selectmen of Provincetown v. Attorney Gen.*, 15 Mass.App.Ct. 639, 646, 447 N.E.2d 677 (1983), quoting from *Teele v. Bishop of Derry*, 168 Mass. 341, 343, 47 N.E. 422 (1897).
>
> We think that the cy pres doctrine does not apply here. The testatrix clearly intended to benefit a "particular," although nonexistent, institution, rather than museums in general or the public at large.*Selectmen of Provincetown v. Attorney Gen., supra*, 15 Mass.App.Ct. at 646-647, 447 N.E.2d 677. In addition, the presence in the clause that disposes of the paintings of a specific gift over to Barbera if the paintings should not be accepted points to the conclusion that there was no general charitable intent.*Rogers v. Attorney Gen.*, 347 Mass. at 134, 196 N.E.2d 855. We see nothing in this result that is contrary to G.L. c. 12, § 8K.

Id., at 6-7.

In the case at bar, the trial court correctly concluded that *cy pres* did not apply because Mr. Miles intended to devise his realty to a specific entity, refusing to let the gift lapse due to imprecision in naming the beneficiary, and using parol evidence to ascertain his intent and eliminate latent ambiguity, citing *Sigley. Conclusions of Law C and D.*

In identifying CVAS as the object of Mr. Miles's bounty, the trial court relied on findings based on substantial evidence. Under any doctrine, Ms. Tasker was never a contender and the evidence does not remotely support her partaking in any part of the devise. Nor, without waiving its

objection to DPG's standing in this appeal (having never appealed), would the evidence favor DPG over CVAS.

IV. ARGUMENT: CROSS-APPEAL OPENING BRIEF

A. Motion to Strike.

CVAS is satisfied that even without considering the stricken portions of declarations, substantial evidence supports all the trial court's findings and warrants affirmance.

That said, procedurally, Ms. Tasker filed her motion to strike on Aug. 25, 2011, four days (two court days) before the hearing on the personal representative's petition for distribution of Mr. Miles's realty. **Cf. CP 243 and 575.** The motion was therefore untimely under LCR 6 (requiring six court days) and no order shortening time was obtained. On that basis alone, it should be disregarded and the trial court's ruling reversed.

Further, as to the hearsay objection to the *Supplemental Declaration of Nancy Rose* (**CP 380:17-23** and **CP 380:26—381:2**), the part where she merely explains in general terms that many calls received by CVAS came from members of the public referred to it by Joyce Tasker is nonhearsay. The inferred statement to which Ms. Tasker objects consists of words to the effect of a command or recommendation, such as "Contact CVAS." This is not a statement offered to prove the truth of the matter

asserted. The objection to Ms. Rose restating what Ms. Veit and Ms. Emmett related concerning Ms. Tasker, while hearsay, is mooted by the separately submitted declarations of Ms. Veit (**CP 298-306**) and Ms. Emmett (**CP 352-57**).

As to Mr. Wright's declaration (**CP 358-69**), the challenge to **CP 358:27—359:2, 359:6-8,** and **359:15-17**, as well as **361-69**, concerns a conversation on May 17, 2011 with Chuck Brandt, expressing reservations about dealing with CVAS due to concern that DPG was somehow associated with CVAS; Mr. Wright's attaching three articles from the *Spokesman-Review* documenting the turbulent litigation history of Ms. Tasker and her feud with the Hickeys; and remarking that Ms. Tasker's "unfortunate legacy" made it difficult for reputable welfare organizations like CVAS "to gain credibility and support in the Colville community," clearly referencing the wary Mr. Brandt and others with whom he "encountered apprehension, and even overt hostility" as a result of Ms. Tasker's "reputation."

ER 803(a)(21) expressly creates an exception to hearsay for "[r]eputation of a person's character among his associates or in the community" and serves to override Ms. Tasker's objection under ER 801. ER 608 does not apply since Mr. Wright's declaration does not seek to attack *Ms. Tasker's* credibility in the form of reputation evidence, but

instead seeks to explain the adverse impact Ms. Tasker's general reputation has had on *CVAS* gaining credibility within the community. The relevance objections are mooted by Ms. Tasker's furnishing her own evidence on the subject of the Hickey feud, through Lew Wilson (**CP 117-20**) and Ann Berger (**CP 121-23**). And the ER 901 authentication objection fails by the plain language of ER 902(f), self-authenticating newspapers or periodicals.

B. <u>Sanctioning Nancy Rose</u>.

For numerous reasons, the trial court erred monetarily sanctioning Ms. Rose by concluding that her "pleadings are violative of CR 11 in that she is not an attorney and she signed and dated pleadings for CVAS, an interested party." **CP 826**. Note that this order "corrected and replaced" the prior order's finding CVAS's CR 59 motion to have been filed in "bad faith." **CP 263**. The trial court amended its prior order that was signed about an hour after hearing oral argument with Mr. Karp and Mr. Simeone, when Mr. Simeone appeared before Judge Nielsen *ex parte* and answered in the affirmative when the court asked if he had "reworked [the order] consistent with what [Judge Nielsen] had ruled." Mr. Simeone had not done as requested, by inserting a finding of bad faith when the court explicitly ruled that the language of bad faith be eliminated from Mr.

Simeone's proposed order dated Nov. 14, 2011. The clerk's minutes confirm as much:

> Mr. Karp confirms with the Court if the Court makes specific findings CR 11 was violated beyond having the attorney sign the pleadings and the Court says he wouldn't go that far.

CP 280. In amending, the court only found that "Nancy Rose is not an attorney licensed to practice law in the State of Washington." **CP 825:13-14.** Ms. Rose does not challenge this finding. Instead, she contends that such finding is insufficient as a matter of law to impose monetary sanctions.

First, Ms. Tasker's CR 11 motion was untimely in having waited nearly two weeks after receipt of CVAS's motion to reopen, undermining the purpose of CR 11 to avoid waste and delay. As the Supreme Court indicated:

> [Deterrence] is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions. ...

Biggs v. Vail, 124 Wn.2d 193, 198 (1994). "[T]he better practice is to inform counsel specifically of the nature of his or her misconduct and the possibility of CR 11 sanctions[.]" *Id.* Ms. Tasker gave no such notice.

Second, the actual request for CR 11 fees lacked specificity. Ms. Tasker claimed the pleading is "unjustified unnecessary … in violation of the civil rules and in contradiction to the rules of evidence." She did not clarify under which prong she sought fees – i.e., CR 11(a)(1)(factual basis), CR 11(a)(2)(legal basis), CR 11(a)(3)(improper purpose), or CR 11(a)(4)(denials of factual contentions). It was her burden to demonstrate that particular arguments or allegations lack foundation. *Biggs v. Vail,* 124 Wn.2d 193, 202 (1994)(burden on movant). Although CR 11 was enacted to deter baseless filings, it was never intended to chill advocacy. *Bryant v. Joseph Tree, Inc.,* 119 Wn.2d 210, 219 (1992)(citing *Townsend v. Holman Consulting Corp.,* 929 F.2d 1358 (9th,1990). "Rule 11 is an extraordinary remedy, one to be exercised with extreme caution." *In re Keegan Management Co., Securities Litigation,* 78 F.3d 431, 437 (9th Cir.1996)(internal citations omitted).

Third, the trial court's award of $1100 directly contradicted binding case law directing the trial court to impose the least burdensome sanction for a *pro se* party filing a pleading on behalf of a corporation ostensibly in violation of CR 11 – viz., allow the pleading to be withdrawn or cured by attorney signature. However, the court opted to strike the motion, not allow cure, and then authorized a fee award, contending that CVAS could have asked for a continuance of the 10-day reconsideration

window.[6] *See Finn Hill Masonry, Inc. v. DLI,* 128 Wash.App. 543, 545 (2005); *Biomed Comm., Inc. v. State of Washington*, 146 Wash.App. 929, 931 (2008)(citing CR 11(a), providing that "if a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant"); *Dutch Village Mall v. Pelletti,* 162 Wash.App. 531, 539 (2011)(noting trial court correctly gave LLC thirty days to have attorney sign pro se pleading before striking). These holdings are consistent with the Washington Supreme Court's longstanding view that whenever possible, the civil rules should be applied to allow substance to prevail over form. *See Griffith v. City of Bellevue*, 130 Wn.2d 189, 192 (1996).

In the present case, CVAS lacked legal representation for a period of only twenty days before the undersigned counsel entered an appearance on its behalf. During that time, CVAS did nothing more than was absolutely necessary to preserve its rights given the strict 10-day period for filing a post-judgment motion. CVAS specifically requested the Court's permission to proceed *pro se*, and in doing so represented to the Court that it was actively and diligently seeking to procure substitute counsel. The fact that undersigned counsel appeared in this action, and

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[6] This was actually not possible per CR 6(b), which states the court "may not extend the time for taking any action under rules … 59(b), 59(d)…."

without so much as the need for continuance, attests to the genuineness of CVAS's efforts.

In *Dutch Village Mall v. Pelletti,* 162 Wash.App. 531 (2011), Division I found the trial court abused its discretion in awarding $750 in CR 11 sanctions to a tenant when the sole owner of a limited liability company, not a licensed attorney, filed an action against the tenant for unpaid rent. While finding that the trial court "correctly granted the motion to strike the pleadings of Dutch Village Mall unless, within 30 days, they were either withdrawn or signed by an attorney," something the trial court did not offer CVAS, it reversed the $750 sanction award because at the time of the trial court hearing on Pelletti's motion to strike the pleadings, it was not "patently clear that [Dutch Village Mall's] claim ha[d] absolutely no chance of success. The fact that a complaint does not prevail on its merits is not enough." *Id.,* at 539 (quoting *Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.,* 151 Wash.App. 195, 208 (2009)).

The trial court having rejected CVAS's CR 59 motion on the merits, yet specifically rejecting that it was frivolous or filed in bad faith, made it not "patently clear" that CVAS had "absolutely no chance of success." Hence, it was error to award any monetary sanctions.

Fourth, even if this court upholds a monetary award, the amount constitutes an abuse of discretion. The burden is on the movant to justify

the request for sanctions. *Biggs v. Vail,* 124 Wn.2d 193, 202 (1994). Washington courts may look to federal decisions interpreting FRCP 11 in construing CR 11. *Bryant v. Joseph Tree, Inc.,* 119 Wn.2d 210, 218 (1992). Attorneys may not recover fees at the customary hourly rate for work that is clerical in nature. *North Coast Elec. Co. v. Selig,* 136 Wash.App. 636, 643-44 (I, 2007)(secretarial and similar clerical expenses are part of office overhead and not recoverable as part of attorney fees); *Absher Const. Co. v. Kent Sch. Dist.,* 79 Wash.App. 841, 845 (1995)(preparing pleadings for duplication, preparing and delivering copies, requesting copies, obtaining and delivering docket sheet are tasks not within the realm of "reasonable attorney fees"). Some of Ms. Tasker's fee requests were clerical in nature yet billed at the full attorney rate.

The court should also consider that fees are not properly awarded for nonpersuasive arguments. Ms. Tasker devoted nearly her entire *Motion to Strike* and part of her *Motion for CR 11 Sanctions* to raising an objection under ER 408 – which the trial court rejected. The court should also not award fees for pleadings not timely served or filed and thus not reasonably before the court.

Lastly, the court should consider the impact of a monetary sanction on an impoverished party. Ms. Rose's inability to pay demands consideration not because it affects the egregiousness of a violation but

because the purpose of monetary sanctions is to deter litigant misconduct. The deterrent purpose of CR 11 is analogous to punitive damages. *See, e.g., Johnson v. Baker,* 84 Md.App. 521, 541-42 (1990)(noting Fourth Circuit's outline of four factors, which Tenth Circuit enumerated, that district court should consider in formulating amount of sanction: (1) reasonableness of opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the Rule 11 violation); *Oliveri v. Thompson,* 803 F.2d 1265 (2nd Cir.1986), *cert. den'd,* 107 S.Ct. 1373 (district court has discretion to temper sum by balancing consideration of ability to pay); *Gaskell v. Weir,* 10 F.3d 626, 629 (9th Cir.1993)(ability to pay is one factor court should consider when imposing sanctions). Ms. Rose is indigent, as explained in her declaration. **CP 806-10**. The likelihood of her ever signing a pleading on behalf of a corporation is virtually guaranteed without any monetary reprimand.

V. RAP 18.1 FEE REQUEST

CVAS seeks fees pursuant to RAP 18.1 and RCW 11.96A.150, which provides that "any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party ... [f]rom any party to the proceedings," as well as "in such manner as the court determines to be equitable." Though this court did not find Ms. Tasker's appeal frivolous, RCW 11.96A.150 authorizes the award of fees

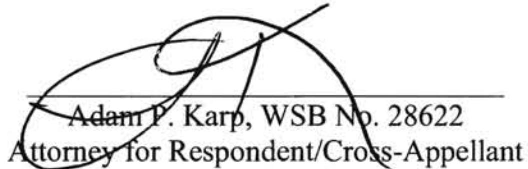
to any party on any reasonable basis. For all the reasons stated above, Ms. Tasker should pay CVAS for the additional burden she has imposed on a charitable nonprofit organization simply trying to honor Mr. Miles's wishes.

VI. CONCLUSION

This court should affirm the trial court's award of Mr. Miles's realty to CVAS and reverse the $1100 sanction against Ms. Rose, while allowing CVAS to recoup its fees and costs on appeal.

Dated this Nov. 8, 2012

ANIMAL LAW OFFICES



Adam P. Karp, WSB No. 28622
Attorney for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Nov. 8, 2012, I caused a true and correct copy of the foregoing, to be served upon the following person(s) in the following manner:

[x] First-Class Mail

Robert A. Simeone
PO Box 522
Colville, WA 99114

Adam P. Karp, WSBA No. 28622