No. 99651-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Marriage of:

TATYANA MASON,
Appellant in this Court and in the COA-II

and

JOHN MASON,
Respondent in this Court and in the COA-II.

Petition for Review

Tatyana Mason, *pro se*

P. O. Box 6441
Olympia, WA 98507
Tatyanam377@gmail.com

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B. Letter of Kelly Vamaka re: supersedeas bond.

C. Cost Order; and the 2021 Court of Appeals Opinion based on fabricated evidence and false facts.

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TABLE OF AUTHORITIES:

WASHINGTON STATUTES:

I. Identity of Petitioner:

Appellant *pro-se* Tatyana Mason is filing Petition for Review in this Court for the following reasons:

II. Court of Appeals Division II' Decision:

Tatyana seeks Review of the Court of Appeals Division II (COA-II) Unpublished Opinion filed on March 9, 2021 *See* **Appendix C**. Tatyana filed two Motions to Extend Time to file Petition for Review due to her medical emergency cancer situation timely dated (April 9 & April 30, 2021). These two motions have been granted by this Court. The due date to file this Petition for Review is June 1, 2021. *See* **Appendix A.**

III. Introduction:

The cases No. 50009-4; 52959-9 directly arrived from the 2016 tree day trial (case 07-3-00848-0 /COA - 49839-1). Tatyana as a pro-se prevailed the 2016 trial. In the court of appeals' poorly made opinions is a genuine issue of material fact concerning whether they caused a depravation of Tatyana's removing condition from her careen card, gainful employment and compelling these unreasonable orders to be free from the court of appeals' false holdings based on the fabricated evidence, multiple misstatement of facts, false credibility evaluation and false case analysis. All seven holdings of the court of appeals have been taking out of the blue — **none of the COA- holdings are matching any of Tatyana's claims**.

Because the court of appeals division II weighed the 2016 trial evidence of extraordinary circumstances, reasonable minds could reach different factual conclusions about an issue that is material to the disputed Tatyana's claim. **Hartley v. State**, 103 Wn.2d 768,775, 698 P.2d (1985)

Here, **(1)** Tatyana asked the court to **INCREASE** an amount of John's supersedeas bond-- **not** to **RELEASE** funds held in a supersedeas bond as the court of appeals falsely claimed; **(2)** Tatyana asked the court to enter the 2016 trial's **oral existing findings** into written order **not new findings** as the court of appeals grossly fabricated; **(3)** Contrary to the COA-II false analysis - res-judicata cannot be apply in these cases because previously the court of appeals or the opposite party **never mentioned or suggested** about the USCIS order and the 2016 trial court findings of extraordinary circumstances that "the 2013/2015 lower court orders and the 2015 COA-II' opinion directly deprived Tatyana from removing conditions from her green card, gainful employment and compelling the 2013 order & 2015 opinion. Now, it is tacitly conceded that **neither** of the 2016 USCIS order and the 2016 trial finding of extraordinary circumstances mentioned above are barred by res-judicata; **(4)** Contrary to the COA-II false statement, the 2016 trial **did consider** both parties financial circumstances that is why the 2013 lower court orders and 2015 opinion had been found unjust and vacated - but the court of appeals weighed this evidence, changed the 2016

trial findings on its own fabricated fanding by falsely claiming that "Tatyana's argument that the trial court failed to consider financial circumstances is barred by res judicata"; **(5)** The 2016 trial found several extraordinary circumstances-- vacated these unreasonable orders under CR 60(b)(11)-- but the COA-II grossly misstated the 2016 trial facts falsely stated that there were not extraordinary circumstances have been found by the 2016 trial. COA weighed the 2016 trial evidence, contradicted to the 2016 trial facts, credibility evaluation - directly violated the case laws - **State v. Davis,** 176 Wn. App.385, 396 n.10, 308 P.3d 807 (2013). Since the credibility of witnesses and findings of facts were a matter for the 2016 trial court's evaluation- the 2016 trial' findings upon this matter must be reinstated; **(6)** Genuine issue of material fact exists over whether John and his attorney's misconduct on appeals caused a violation of Tatyana's constitutional right; **(7)** The court may reappointed the superior retired judge as a pro-tempore in accordance with **RCW 2.08.180**. This court should dismiss the COA-II' grossly fabricated evidence, false case analysis entirely and review this matter as de-novo.

IV. Issues Presented for Review:

1. Whether a genuine issue of material fact exists when, after the court of appeals division II weighed the 2016 trial evidence, reasonable minds could reach different factual conclusions about an issue that is

material to the disputed Tatyana's claim. *See* **Hartley v. State**, 103 Wn.2d 768,775, 698 P.2d (1985)

2. Whether in reviewing the 2016 trial court's findings of extraordinary circumstances which were made on the basis of conflicting testimony, the Court of Appeals **may not** substitute its evaluation of witnesses' credibility for that of the 2016 trial court. *See* **State v. Davis,** 176 Wn. App.385, 396 n.10, 308 P.3d 807 (2013).

3. Whether the res-judicata doctrine bars the 2016 trial finding of several extraordinary circumstances and the 2016 USCIS order when the court of appeals nor the opposite party **never** mentioned or suggested about these findings and the USCIS order in any of their statements of fact, briefs, case analysis and opinions.

4. Whether enough evidence in the court of appeals records is establishes a genuine issue of material fact of the 2016 trial.

5. Whether the court of appeals made their opinions based on fabricated evidence presented by the opposite party knows or reasonably should know would cause Tatyana to inflict the constitutional injury.

6. Whether the delayed entry of the 2016 trial oral findings made without doubt do not require reversal on appeal.

7. Whether, the cases in the superior court of any county may be tried by a judge pro tempore in accordance with RCW 2.08.180.

8. Whether a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is **entitled** to hear the pending case as a judge pro tempore without any written agreement.

9. Whether in the Washington State previous cases a trial court's determination of the supersedeas bond amount is reviewed for an abuse of discretion. Here, a recusal judge Hirsch and the court of appeals division II abuse its discretion in refusing to increase the supersedeas bond from $15,000 to $40,000 on a pending appeal. *See* **IBEW Health & Welfare Trust of Sw. Wash. v. Rutherford**, 381 P.3d 1221(Wash. Ct. App. 2016).

V. Statement of the case

1. Background:

Tatyana arrived in the United States on June 11, 1999, as the fiancée of John Mason. She did not speak or understand English. John and Tatyana married on August 19, 1999, in the State of Washington. Tatyana's status in the U.S. was adjusted from fiancée to **conditional** lawful resident on October 28, 1999, due to her marriage to John and the Affidavit of Support Contract John signed to sponsor Tatyana. It was found by the 2016 trial that John refused to remove condition from Tatyana's temporary green card required him by law and refused to financial support her. RP 11/02/16 at 469-70. Though testimony and

compelling evidence, the 2016 trial found: John abused Tatyana by threatening her immigration status, strictly controlling her access to money, restricted her ability to go to school or obtain a job, and abusing her emotionally, verbally, and physically. RP 11/02/16 at 469-70.

The parties separated on July 18th, 2007". RP11/02/16 at 470. "The 2007 court placed a Domestic Violence Protection Order against John". Supp. CP __, sub 50; RP at 470. The 2007 Court found that "John committed act of abuse and control toward Tatyana", the court found that Tatyana is a disadvantage spouse; John has been dishonest with the 2007 Court trial, that John is secreting the children". Supp. CP _, sub 50.

Before divorced, Tatyana had to use school loan money to meet the minimum necessities of life. RP at 470-5 After divorced, Tatyana has struggled to provide for herself and was even required to declare bankruptcy. RP at 470-81. Right after final divorce, John and his unethical attorney Ms. Robertson started their long mission of harassment against Tatyana by using the court system in which it was not designed. RP 12/09/16 at 17-20. John and his attorney Ms. Robertson started to file thousands of motions in court - without serving Tatyana by taking advantage of Tatyana's financial, legal and language and cultural disadvantage. RP 11/02/16 at 469-82.

2. *The 2013 lower court one sided decision based on fabricated evidence:*

Without giving Tatyana an opportunity to defense herself at the English speaking court, a recusal judge Hirsch made her one sided decision based on fabricated evidence presented by John and his unethical attorney Ms. Robertson. The recusal judge Hirsch falsely stated:

(1) Tatyana is an English speaking woman who is voluntarily unemployed;

(2) Tatyana abused John and her children physically and emotionally;

(3) Children should stay with John, Tatyana has supervised visitation;

(4) Tatyana is responsible to pay $412,00 per month child support;

(5) Tatyana refused to pay $10,000 physiological evaluation ordered by judge Hirsch by her choice;

(6) Tatyana is obligated to pay $300, per hour twice a week for therapeutic evaluation with her children; Pay to Dr. Lucki his hourly fees until the child physiologist will decided that it is enough.

(7) John, Dr. Lucki, Therapeutically evaluator and court coordinator are in control of an abusive Tatyana.

3. *The 2015 court of appeals opinion:*

Since Tatyana did not speak or understand English, financially struggled, she was not able to retain an appellant attorney. Without legal knowledge and speaking English - she filed an appeal– which was immediately denied.

4. *Tatyana's immigration Status at Issue:*

In 2015 via USCIS letter Tatyana accidently learned that her conditions were not removed by John as it was required him by law and that she is in danger. Ex 36 (Jay Gairson report). She learned that the

USCIS several times reminded to John to do this—but he refused. Ex 36 (Gairson's testimony and report).

Tatyana also learned that the 2013 lower court order and 2015 opinion are preventing Tatyana from removing her conditions from green card and prevented Tatyana from gainful employment. Ex 36 (Gairson report) RP11/02/16 at 475-6;

In 2015, Tatyana filed her motions to vacate the 2013 order—but because the commissioners and judges of the superior court in Olympia are so uneducated in immigration filed—they refused to understand the issue—until the Judge Wickham who had a chance of previously handling these type of cases- took this case to the 2016 three day trial.

5. *The 2016 trial's findings of fact and credibility evaluation --- which the COA-II weighed, overlooked or substituted on its own fabricated findings and its evaluation:*

The 2016 three day trial in front of Judge Wickham via testimony and compelling evidence found that:

(1) The 2013 lower court in front of recusal judge Hirsch and the 2015 court of appeals opinion were one sided based on John and his attorney Ms. Robertson' fabricated evidence. CP123-5.

(2) The 2013 recusal judge Hirsch and the 2015 court of appeals opinion are **incorrectly treated** Tatyana as she was born in the US, has the US citizen, English is her native language. RP at 481-2

(3) Without giving Tatyana an opportunity to defense herself the 2013 lower court made unreasonable fundamentally wrong decisions which is impossible to compel. RP11/02/16 at 479-82;

(4) John and his expert witnesses Ms. Hurt, Ms. Seifert directly lied via testimony and declarations- had been sanctioned under CR11. RP 11/02/16 at 469-82; RP 12/09/16 at 16-20.

(5) Tatyana and her expert witnesses Jay Gairson and Ms. Pontorollo found credible. RP 11/02/16 at 474.

6. *The 2016 trial's Extraordinary Circumstances ---- the court of appeals weighed, overlooked and never mentioned or suggested in their findings of fact, analysis or opinions.*

(1) Tatyana is in extreme economical hardship for many years because abusive John refused to remove condition from her green card and the 2013, 2015 and 2015 court of appeals opinion-- deprives Tatyana from removing these conditions and gainful employment. RP 11/02/16 at 475-6.

(2) The compelling evidence (Ex 37) the USCIS order directing family court to vacate the 2013 and 2015 orders;

> THE 2016 USCIS ORDER "to be eligible for receiving permanent resident card and legal work authorization- Tatyana must submit the documents, and forms: Certified copy of dismissal of the 2013 child support order from appropriate state office and court.

(3) Expert Witness on immigration status Jay Gairson's testimony and his report (Ex 36) confirmed

> MR. GAIRSON's REPORT ("89. Tatyana entered the US on a K-1 visa, she would not have qualified to obtain her permanent resident status through any other normal means as **only through John removing the conditions** from her temporary permanent resident card" Ex 36 at 13 # 80 & 89.
>
> MR. GAIRISON REPORT: ("11. Tatyana's conditional permanent residence expired over a decade ago and she will have a difficult time acquiring a waiver to remove those conditions & gainful employment") Ex 36 at page 2; 17.

(4) John abused Tatyana and her children during their marriage and after divorce:

> Ms. PONTOROLO: We have the record that since 2001 it's very often a technique used by John to have control over Tatyana a victim of his abuse. There are a number of

> techniques that are used by perpetrators. Wherever control can be gained, it's utilized. RP 11/02/16 at 383; CP 971.

On January 9, 2017 Judge Wickham retired. On January 25, 2017 John filed his frivolous appeal full of misstatements. Because Judge Wickham issued a judgment against John and his attorney Ms Robertson in the amount of $12,800 – John filed $15,000 bond.

On January 25, 2017 Tatyana had a 30 minutes court hearing in front of the recusal judge Hirsch where she denied Tatyana's motion to vacate the 2013 unreasonable parenting plan. Tatyana filed an appeal.

On the same day January 25, 2017 court hearing Tatyana asked the lower court to increase the amount of bond from $15,000 to $40,000. Tatyana's motion was denied as well. Tatyana filed an appeal.

7. *Court of Appeals and Error—Review—Evaluation of Testimony:*

> The Washington Supreme Court hold that: "In reviewing a trial's findings of fact which were made on the basis of conflicting testimony, the court of appeals may not substitute its evaluation of witness credibility for that of the trial".

The court of appeals division II overlooked and weighed **ALL** the 2016 trial evidence, substitute the 2016 trial credibility evaluation on its own fabricated evaluation, grossly changed the 2016 trial's findings of fact on its own fabricated findings, made false analysis and holdings which none of them match any of Tatyana's claim.

The court of appeals 2018 opinion solely relied on the 2015 opinion and 2013 lower court order. The 2016 trial findings of fact and credibility evaluation have been completely ignored, overlooked and weighed by the court of appeals. Out of the blue the court of appeals hold about the I-864 - which was never been at issue at the 2016 trial; The Court of appeals **never** mentioned or suggested regarding the USCIS order and the 2016 trial Extraordinary Circumstances which were the major issue at the 2016 trial and the reasons to vacate the 2013 and 2015 orders including the 2015 court of appeals opinion. *See* the 2018 opinion.

The 2021 court of appeals opinion made the same error by relying on their previously fundamentally wrong 2015 and 2018 opinions which has been specifically rejected by the 2016 trial. Now, again none of the seven holding of the court of appeals- matches any of Tatyana's claims.

VI. ARGUMENT:

1. **Material Facts --- Review--- Evaluation of Testimony at Issue**

Because the court of appeals division II weighed the 2016 trial evidence of extraordinary circumstances and changed the 2016 trial findings of fact on its own fabricated fact, reasonable minds could reach different factual conclusions about an issue that is material to the disputed Tatyana's claim. *See* the Supreme Court of Washington. En Banc. No. 44335. **Hartley v. State**, 103 Wn.2d 768,775, 698 P.2d (1985)

Here, in reviewing the 2016 trial court's findings of facts which were made on the basis of conflicting testimony and evidence, an appellate court unexpectedly weighed the 2016 trial evidence, substituted the 2016 trial credibility determination & findings for fabricated determination & findings and made false case analysis – contradicted to the 2016 trial findings, credibility evaluation and to the case law: ("Court of Appeals cannot weigh trial evidence, change facts or make new credibility determinations on appeal"). **State v. Davis,** 176 Wn. App.385, 396 n.10, 308 P.3d 807 (2013)(citing State v. Thomas, 150 Wn. 2d 821, 874-75, 83 P. 3d 970 (2004)). Additionally, the court of appeals or the opposite party **never mentioned or suggested** at any of their briefs, case analyses, statements or opinions, even in this action, about the 2016 USCIS order and the 2016 trial court findings that the state courts orders and COA-II opinion directly prevented Tatyana from removing conditions from her green card, preventing her from gainful employment and preventing her from compelling these unreasonable orders. It is tacitly conceded that **neither** of the 2016 USCIS order and the 2016 trial finding of extraordinary circumstances mentioned above are barred by res-judicata.

The USCIS order and the 2016 trial finding are controlling precedent in this action. Contrary to the COA-II false analysis - res-

judicata cannot be apply in these cases. This Court must reverse the court of appeals opinion and review this matter as de-novo.

2. **Supersedeas Bond at Issue.**

In the 2017 motion and briefs - Tatyana asked the court to **INCREASE** an amount of John's supersedeas bond from $15,000 to $40,000. She also supported her argument with **RAP 7.2 (h)** and with letter of Kelly Vamaka (appellant attorney) who would take the case **if** the bond would be increased. Tatyana also supported her argument with the case law **IBEW Health & Welfare Trust of Sw. Wash. v. Rutherford**, 381 P.3d 1221 (Wash. Ct. App. 2016) but the Court of Appeals **falsely claimed**: ("Tatyana asked **to RELEASE** funds held in a supersedeas bond John's appeal in case Mason and that Tatyana failed to support her argument"). The COA-II made long-false-ridicules case analysis- which are not matching with Tatyana's request, denied Tatyana's motion via fabricated holding in the opinion. *See* Opinion at p.1-2; 7-8.

Legal Analysis: In the **IBEW Health** case the trial court awarded a judgment of $57,141.69 against Rutherford in favor of IBEW. Rutherford filed a notice of appeal. At the hearing on the motion for stay, Rutherford proposed a bond in the amount of $58,643.18 and IBEW proposed a bond amount of $96,874.39. **IBEW** also suggested that the trial court round up

the bond to $100,000. The trial court granted the motion to stay, subject to Rutherford filing a bond or security in the amount of $100,000. **RAP 7.2(h)** To stay a money judgment, the trial court must set the bond in the amount of "the judgment, plus interest likely to accrue during the pendency of the appeal and attorney fees, costs, and expenses likely to be awarded on appeal." **RAP 8.1(c)(1)** (emphasis added). **Henry v. Bitar**, 102 Wash.App. 137, 140, 5 P.3d 1277 (2000), review denied, 142 Wash.2d 1029, 21 P.3d 1150 (2001). Determination of these other factors necessarily required the trial court to exercise its discretion in estimating not only the amount likely to accrue but to estimate the length of the appeal. A party may object to the supersedeas decision of the trial court by motion in this court. **RAP 8.1(h).** In the **IBEW** case the court of appeals hold that a trial court's determination of the supersedeas bond amount is reviewed for an abuse of discretion. They found that the trial court did not abuse its discretion in setting the supersedeas bond at $100,000.

Here, **in Tatyana's case,** the 2016 trial Judge Wickham awarded a judgment of $12,800 against John in favor of Tatyana in December 2016. On January 9, 2017 Judge Wickham retired. John filed a notice of appeal on January 25, 2017 and filed a bond in the amount of $15,000. Tatyana proposed a bond amount of $40,000. But the recusal lower court judge Hirsh denied Tatyana's motion to increase the bond without any

reasonable basis. Tatyana filed a motion to the court of appeals under RAP 8.1(h) but the court of appeals denied Tatyana's motion again without any reason or explanations. On March 9, 2021—the court of appeals issued their opinions full of fabricated facts, misstatements of the case, made false analysis, fabricated false holding, denied Tatyana's request.

To reach justice in this matter, this court must dismiss the court of appeals' opinion entirely and review this matter as de-novo.

3. **The 2018 successor Judge Wilson and the 2021 court of Appeals opinion abused its discretion in denying the 2016 delayed entry of facts and vacating CR 11 order -- because the Supreme Court hold- Delayed entry does not require reversal on appeal**.

In the case **State v. Portomene** 79 Wn. App. 863 (Wash. Ct. App. 1995). "The State court has the burden of presenting findings for entry, but did not prepare written findings until approximately **two months after the filing of Appellant's opening brief.** The court holds "Delayed entry does not require reversal on appeal". With regard to prejudice, the written findings ultimately entered here closely mirror the oral ruling. There is no indication that the findings were "tailored" to meet issues raised in this appeal. With regard to whether the delayed entry prevented effective appellate review, we note that the oral ruling demonstrates the court found all elements beyond a reasonable doubt. **Portomene's** counsel on appeal was able to present well-articulated arguments based on the oral ruling.

Thus, the delay did not prevent effective appellate review. We therefore decline to reverse, and will consider the findings despite their late entry".

Here, **in Tatyana's case:** Tatyana was acted as a pro-se litigant at the 2016 tree day trial. The trial Judge Wickham has the burden of presenting findings for entry; Judge Wickham issued a written CR 11(a) order but did not prepare written findings because he retired soon after this trial. John filed a notice of appeal and Tatyana filed her motion **two months after the filing of John's Opening Brief in 2018**. With regard to prejudice, **Tatyana asked the court to enter oral existed findings into a written order closely mirror the oral ruling**. She asked the lower court to supplement the evidence and oral ruling of Judge Wickham. She also supported her argument with the case law: **State v. Portomene** 79 Wn. App. 863 (Wash. Ct. App. 1995). But, the new successor judge Wilson denied Tatyana's motion based on fabricated false statements of the opposite attorney - who was specifically found in misconduct by the 2016 trial Judge. On March 9, 2021, the court of appeals fabricated evidence, made false case analysis and denied Tatyana's request via fake holding in its opinion by falsely stating that Tatyana asked to enter new findings. The court of appeals abused its discretion and violated the law.

The court of appeal inappropriately denied Tatyana's motion on delayed entry of the 2016 findings of facts and improperly vacated the CR

11(a) sanction order. This court should review this matter as de-novo; the court of appeals false holding must reverse. The CR 11(a) order must be reinstalled.

4. **Superior Pro-Tem Judge can be re-appointed by the Court Authority:**

Cases in the superior court of any county may be tried by a judge pro tempore in accordance with **RCW 2.08.180.** , If a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is **entitled** to hear the pending case as a judge pro tempore without any written agreement. **State v. Franks**, 7 Wn. App. 594, 596, 501 P.2d 622 (1972)-("On August 20, 1999, a duly-elected Pierce County superior court judge signed an order appointing a pro tem judge."). A judge pro tempore shall, before entering upon his duties in any cause, take and subscribe the following oath or affirmation:

> "I do solemnly swear (or affirm, as the case may be,) that I will support the Constitution of the United States and the Constitution of the State of Washington, and that I will faithfully discharge the duties of the office of judge pro tempore in the cause wherein . . . . . is plaintiff and . . . . . defendant, according to the best of my ability." **Green Mountain School Dist. v. Durkee**, 56 Wn.2d 154, 351 P.2d 525 (1960). Judge Pro Tempore Brown was appointed by written order.

See also case **Marriage of Barrett-Smith** 110 Wn. App. 87 (Wash. Ct. App. 2002). In this case ("Charles concedes that the trial judge erred in denying Cindy's request for a continuance and that a new trial is

warranted. We remand for a new trial… before a judge pro tem appointed in accordance with the requirements of **RCW 2.08.180**.").

Here, **in Tatyana's case**, Judge Wickham retired right after the 2016 trial, leaving a pending case in which the judge has made discretionary rulings; the judge Wickham is **entitled** to hear the pending case as a judge pro tempore without any written agreement. It is too expensive and unnecessary to start a new trial with a successor judge who does not know the case. The only issue is that the Judge Wickham would enter his oral findings into the written order. This court must reverse the court of appeals fake holdings and review this matter as de-novo.

5. Tatyana's Constitution Right at Issue:

("'[I]t often may be difficult to decide whether a right is clearly established without deciding precisely what the constitutional right happens to be.'"(alteration in original) (quoting **Lyons v. City of Xenia**, 417 F.3d 565, 581 (6th Cir. 2005) (**Sutton**, J., concurring))). The Fourteenth Amendment grants the right to due process of law to a person facing a depravation of her gainful employment by the state based on false evidence presented by the opposite party over time in their multiple briefs.

Fourteenth Amendment cannot tolerate when false evidence have been used in court. Here, the court of appeals falsely stated that no constitutional right is at issue. Because the court of appeals decision to

deprave Tatyana of her children and gainful employment rested with John and his attorney's briefs cannot be liable for any constitutional violation that occurred. This Court must disagree.

It is clear from the record before this Court that the 2013 recusal judge Hirsch and the court of appeals division II several opinions **never** mentioned or suggested any of the 2016 trial findings on extraordinary circumstances that these orders depriving Tatyana from removing conditions from her green card and gainful employment- placing Tatyana into extreme economical hardship. RP 11/02/16 at 475-6. The COA and recusal judge Hirsch never mentioned about the USCIS order requiring the state court vacate the 2013 and 2015 orders. In the 2018 and 2021 opinions, the court of appeals changed the 2016 trial credibility evaluation on its own fabricated credibility evaluation that John was credible and Tatyana was not; Never challenged John and his attorney's false fabricated statements; The court of appeals shockingly believes to abusive John false statements but not to Judge Wickham findings.

John and his attorney wrongfully fabricated the 2016 trial facts and they knew or reasonably should have known that this fabrication would cause Tatyana depravation of her gainful employment and her children through financial barrier. The question is whether enough evidence in record establishes a genuine issue of material fact. *See* **Bishop v. Miche**,

137 Wn.2d 518, 523, 973 P.2d 465 (1999). Since Tatyana is still facing depravation of her gainful employment and loss of children via financial barrier placed by the court of appeals based on John and his attorney fabricated facts, the court of appeals, John with his attorney caused a violation of Tatyana's constitutional right. This Court must reverse the court of appeals opinion and review it as de-novo.

VII. CONCLUSION:

Based on all of these serious reasons above, this court should grant this review, reverse the court of appeals opinions entirely and review this matter as de-novo.

Dated: May 31, 2021

RESPECTFULLY SUBMITED BY _____

Tatyana Mason, Appellant *pro-se*

THE SUPREME COURT
STATE OF WASHINGTON

SUSAN L. CARLSON
SUPREME COURT CLERK

ERIN L. LENNON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

May 3, 2021

LETTER SENT BY E-MAIL ONLY

Tatyana Ivanovna Mason
P.O. Box 6441
Olympia, WA 98507

Kenneth Wendell Masters
Masters Law Group PLLC
321 High School Road NE, D3-#362
Bainbridge Island, WA 98110-2648

Laurie Gail Robertson
WFLG, PLLC
16000 Christensen Road, Suite 304
Tukwila, WA 98188-2967

Re: Supreme Court No. 99651-2 - John Mason v Tatyana Mason
Court of Appeals No. 50009-4-II (consolidated with No. 52959-9-II)

Counsel and Ms. Mason:

On April 30, 2021, the Court received the Petitioner's "SECOND MOTION TO EXTEND TIME TO FILE A PETITION FOR REVIEW".

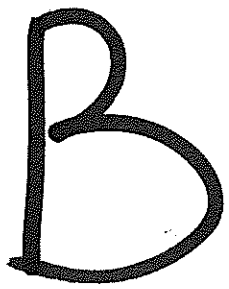
In regard to the motion for extension of time, the following ruling is entered:

Motion granted. The petition for review should be served and filed by June 1, 2021. (It is noted that the requested date of May 30 is a Sunday and this Court is closed.) The filing fee for a petition for review should also be paid by June 1, 2021.

Sincerely,

Susan L. Carlson
Supreme Court Clerk

SLC:bw



LAW OFFICE OF KELLY VOMACKA
600 First Avenue, Suite 304
Seattle, WA 98104
206-856-2500
kelly@vomackalaw.com

April 25, 2017

To Whom It May Concern:

I am a Washington State attorney, WSBA #20090. I have met with Tatyana Mason and discussed Court of Appeals 49839-1-II with her at some length. She was the respondent in the trial court, where she represented herself. She is now the respondent on appeal, where she will need to represent herself unless she can secure counsel.

However, Ms. Mason is unable to pay for counsel. She is indigent and is forbidden from working due to her immigration status. The trial court denied her motion for attorney's fees in that court, because she was *pro se*, but it awarded her costs and CR 11 sanctions of nearly $13,000. Mr. Mason has posted a cash supersedeas of $15,000 against this amount while the case is on appeal. Mr. Mason has also hired Kenneth Masters as his appellate counsel, who is one of the premier appellate attorneys in the state.

I am quite willing to represent Ms. Mason, but I am not in a position to represent her *pro bono*. And she is not in a position to pay me. If the supersedeas amount is raised an additional $15,000, to cover my potential fee, I will represent her on this appeal. I understand that the Court of Appeals might ultimately deny her request for appellate attorney fees, and I will end up working *pro bono* after all, but I am willing to take that chance. If the bond is not raised, I will not be able to represent her at all, and I believe she will need to represent herself.

Sincerely,

KVomacka

Kelly Vomacka
Attorney at Law

Cost order April 8, 2021.
+

This is the March 9, 2021 COA-II Opinion based on fabricated evidence, false facts and false case analysis- **must be dismiss entirely.**

There is no point to read this Opinion as it is full of misstatements of fact with weighed the 2016 trial evidence, changed the 2016 trial findings on fabricated facts. NONE of the COA-II's 7 holdings are matching any of Tatyana's claims.

APPENDIX C

Filed
Washington State
Court of Appeals
Division Two

April 8, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of: JOHN ARTHUR MASON, Respondent, and TATYANA IVANOVNA MASON, Appellant.	Consol. Nos. 50009-4-II 52959-9-II RULING ON COSTS

On March 19, 2021, as the prevailing party, Respondent John Mason filed a cost bill for $858.24. Appellant Tatyana Mason objected to the attorney fees requested on grounds of indigency. Her objection is overruled. Accordingly, it is hereby

ORDERED that the Respondent John Mason is awarded $858.24 in costs against the Appellant Tatyana Mason.

Eric B. Schmidt
Court Commissioner

cc: Tatyana I. Mason, Pro Se
Laurie G. Robertson
Kenneth W. Masters

Filed
Washington State
Court of Appeals
Division Two

March 9, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of JOHN ARTHUR MASON, Respondent, and TATYANA IVANOVNA MASON, Appellant.	No. 50009-4-II
	Consolidated With
In the Matter of the Marriage of JOHN ARTHUR MASON, Respondent, and TATYANA IVANOVNA MASON, Appellant.	No. 52959-9-II
	UNPUBLISHED OPINION

WORSWICK, J. — In this consolidated case, Tatyana Mason appeals the trial court's denial of three different motions over two years, all relating to disputes with her husband John Mason over a 2013 parenting plan. She appeals the trial court's denial of her 2017 motion to compel payment of funds held in a supersedeas bond, her 2017 CR 60 motion to vacate a 2013 parenting plan, and a 2018 motion for the trial court to enter findings and conclusions from a prior trial that was pending appeal.

Tatyana[1] argues that (1) the trial court did not properly consider her motion to release funds in a supersedeas bond; (2) the trial court abused its discretion when it denied her motion to vacate the parenting plan; (3) the trial court's denial of her motion to vacate the parenting plan infringes on her constitutional liberty interest in raising her children; (4) the trial court's denial of her motion to vacate the parenting plan violated federal immigration regulations; (5) the trial court failed to consider the parties' financial circumstances when it denied her motion to vacate and during the 2013 trial that resulted in the parenting plan; (6) the trial court erred when it denied her 2018 motion to enter new findings on an issue that was pending appeal; and (7) the now-retired trial court judge who presided over her 2016 trial, the results of which we reviewed in a 2018 appeal, should be ordered to appear as a judge pro tempore to enter findings on remand from our 2018 decision. Tatyana requests sanctions and attorney fees under RAP 18.9. John also requests attorney fees and costs under RAP 18.1 and 18.9.

We hold the following: (1) Tatyana's argument that the trial court erred when it did not release funds in the supersedeas bond is moot because we vacated those fees in a prior appeal, (2) the trial court did not abuse its discretion when it denied Tatyana's 2017 motion to vacate the 2013 parenting plan under CR 60, (3) Tatyana's argument regarding her constitutional right to raise children is barred by RAP 2.5, (4) Tatyana's argument on federal immigration regulations is barred by res judicata, (5) Tatyana's argument that the trial court failed to consider financial circumstances is barred by res judicata, (6) the trial court did not err when it denied her 2018

[1] We refer to the Masons by their first names for clarity. No disrespect is intended.

motion to enter findings on an issue then pending appeal, (7) although a retired trial court judge is authorized to sit as a judge pro tempore by statute, we have no authority to order him to come out of retirement to preside over a case. We deny both parties' requests for attorney fees. Accordingly, we *affirm* the decisions of the trial court.

FACTS

This appeal is the fourth to arise from the dispute between Tatyana and John Mason following their marital dissolution in 2008.[2] Our two prior opinions provide necessary factual background for this appeal. The procedure of the second appeal is a central issue in this case.

I. PROCEDURAL HISTORY

Tatyana and John married in 1999 and had two children. *In re Marriage of Mason*, No. 45835-7-II, slip op. at 2 (Wash. Ct. App. July 7, 2015) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2045835-7-II%20%20Unpublished%20Opinion.pdf (*Mason* I). Tatyana came to the United States on "fiancée visa" sponsored by John. *In re Marriage of Mason*, No. 49839-1-II, slip op. at 2 (Wash. Ct. App. July 31, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2049839-1-II%20Unpublished%20Opinion.pdf, *review denied*, 192 Wn.2d 1024, (Mar. 6, 2019), *cert. denied*, 140 S. Ct. 296, 205 L. Ed. 2d 177 (Oct. 7, 2019) (*Mason* II). John filed for divorce in 2007. Tatyana filed a petition for a domestic violence protection order, and a superior court

[2] The third appeal was pending at the time this appeal was heard. *See Mason v. Mason*, No. 51642-0-II, (Wash. Ct. App. Mar. 21, 2018).

commissioner granted the petition. The trial court entered a dissolution decree and parenting plan in 2008.

In 2011 John filed a petition to modify the parenting plan alleging that Tatyana was abusing the children. John obtained an emergency order placing the children in his residential care. The trial court ordered Tatyana's visits be therapeutic in nature.

A. *2013 Trial*

In 2013, the parties proceeded to trial on John's modification petition. The trial court, with Judge Anne Hirsch presiding, entered findings of abuse by Tatyana and found that Tatyana was uncooperative in disclosing her finances and that she never arranged for any therapeutic visits. The trial court also found that there were no concerns about future domestic violence from John. The trial court entered a modified parenting plan and Tatyana appealed, but she did not contest the trial court's imputation of income or imposition of child support payments. In July 2015, we affirmed the 2013 parenting plan, holding that the trial court did not abuse its discretion when it entered the 2013 parenting plan. Neither Tatyana nor John appealed.

In September 2015, Tatyana filed a "motion to dismiss" the 2013 child support order (but not the parenting plan). Supplemental Clerk's Papers (Suppl. CP) at 333-39. A superior court commissioner denied her motion that same month. Tatyana did not appeal or seek revision of this decision. In late September or early October 2015, Tatyana filed a "motion for revision" of the 2013 parenting plan, which a superior court commissioner denied on October 9, 2015. *See* CP (49839-1-II) at 25. That same day, Tatyana filed a "Motion/Declaration to Modify/Dismissal of Full Amount of Child Support." Suppl. CP at 349. A superior court commissioner amended

the child support order and reduced Tatyana's support to the statutory minimum, but denied her motion to vacate the unpaid child support she had accrued. Neither party appealed this order.

B. *2016 Trial*

In October 2015, Tatyana filed a petition to modify the parenting plan and a motion to vacate the full amount of the child support order. *Mason* II opinion summarizes the relevant facts.

> The motion to vacate alleged various errors relating to the 2013 child support order. The motion also described Tatyana's precarious economic situation, including the allegation that she was unable to obtain employment because of her immigration status and unpaid child support. . . .
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> A superior court commissioner denied Tatyana's petition to modify the parenting plan and motion to vacate the child support order. Tatyana moved to revise the commissioner's order. . . .
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> . . . [T]he trial court stated that it would treat Tatyana's motion to vacate the 2013 child support order as a motion to vacate under CR 60(b). In a subsequent letter ruling, the court explained that because the parties had raised credibility issues, a trial was necessary to allow the parties to present testimony.

Mason II, slip op. at 4-5. Judge Christopher Wickham presided over the November 2016 trial.

> At trial, Tatyana represented herself. She offered the testimony of Jay Gairson, an immigration attorney, as an expert witness. The trial court ruled that it would allow Gairson's testimony on immigration law to assist in understanding the issues and law in that area.
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> . . . .
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> The trial court entered an order granting the motion to vacate and provided written findings of fact and conclusions of law. . . .
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> . . . .
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> . . . [T]he court vacated the 2013 child support order as well as any remaining unpaid child support. The court stated that John could seek entry of a

> new child support order, and that the court would consider a request for expert fees at a later hearing.
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> The court subsequently entered an order in December 2016 vacating the amended child support order the commissioner entered on October 13, 2015, which the court inadvertently failed to include in its previous order.
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> . . . .
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> The trial court held a hearing on the issue of expert witness fees. Tatyana requested the costs of Gairson's expert testimony, which he calculated to be $12,800, as well as sanctions under CR 11. The trial court awarded Tatyana costs equal to two-thirds of Gairson's fee based on the parties' relative financial positions.
>
> The trial court awarded to Tatyana the remaining one-third of Gairson's fee as CR 11 sanctions. . . .
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> . . . .
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> . . . However, the court did not enter any written findings regarding CR 11 and did not include the basis of its award in the CR 11 order.
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> Based on its rulings, the trial court entered an order awarding Tatyana $8,533 in costs . . . and $4,267 in sanctions under CR 11.
>
> John appeal[ed] the trial court's order vacating the 2013 child support order and the order awarding expert fees and imposing CR 11 sanctions.

Mason II, slip op. at 5-7.

Although the record on appeal does not contain direct documentation, it is clear from both parties' filings that John filed a supersedeas bond with the trial court pending this appeal.[3] John's appeal is *Mason* II, decided in 2018.

[3] Because the supersedeas bond was filed with the trial court in 2017, that filing does not appear in the record on appeal for either case here or the record for *Mason* II. However, based on Tatyana's motion and John's counsel's statements in the record, it is apparent the bond was filed.

II. 2017 MOTIONS (NO. 50009-4-II)

A. *Motion To Vacate Parenting Plan*

In January 2017, the same day that John filed his appeal, Tatyana filed another CR 60 "Motion to Vacate 2013 and 2008 Parenting Plan" under CR 60(b)(1), (3), (4), and (11). In it, she restated her grievances that were decided in the 2013 and 2016 trials or that were credibility issues before the court in 2012. She made claims of misrepresentation against John and his trial counsel and stated that the children were in an abusive environment with him.

B. *Motion To Release Supersedeas Bond Funds*

Later in January 2017, Tatyana filed a motion for the trial court to release funds from the supersedeas bond John filed pending his appeal. Tatyana's motion was entitled "Declaration to Order Petitioner to pay $20,000 for Removal of Condition from My Green Card . . . $12,800 judgment Placed against Petitioner for ongoing abuse of CR ll(A) should NOT be hold [sic] or depend on the Petitioner's Appeal." Suppl. CP at 785. She went on to request that the trial court order John to "release [the money] from the bond and pay to Respondent." Suppl. CP at 785.

C. *January 2017 Hearing on Both Motions and Resulting Trial Court Order*

In January 2017, the trial court held a single hearing on both motions. Judge Hirsch again presided. On the motion to vacate the parenting plan, Tatyana repeated allegations of fraud, misrepresentation, and misconduct that she raised in the November 2016 trial. The trial court stated that Tatyana's CR 60(b)(4) argument flowed from the November 2016 trial and that the court would not address findings that were on appeal. The trial court also stated Tatyana had

not shown the "extraordinary circumstances" necessary to vacate under CR 60(b)(11). Verbatim Report of Proceedings (VRP) (Jan. 25, 2017) at 31.

On the topic of supersedeas bonds, Tatyana argued, "I am asking to release from the bond Mrs. Robertson [John's attorney] placed against the appeal, $12,800." VRP (Jan. 25, 2017) at 10. The trial court explained to Tatyana that under RAP 8.1(h), the proper procedure to challenge the bonds was a motion to this court.

The trial court then denied Tatyana's motions in a January 25, 2017 order. In its order, the trial court found that RAP 8.1 controlled the trial court's ability to order payment. The trial court denied Tatyana's request to release the funds held by the clerk and directed Tatyana to this court to address that issue.

III. *MASON* II

In July 2018, we reversed the trial court's 2016 order vacating the 2013 child support order, and we also vacated the trial court's imposition of CR 11 sanctions. Although we vacated the sanctions, we affirmed the other fees. Tatyana appealed to our Supreme Court and also filed a motion for certiorari in the United States Supreme Court. Both courts denied review. *Mason* II, *review denied*, 192 Wn.2d 1024 (Mar. 6, 2019), *cert. denied*, 140 S. Ct. 296 (Oct. 7, 2019). Because of this lengthy appeal process, we did not issue mandate on our 2018 decision until October 2019.

IV. 2018 MOTION (NO. 52959-9-II)

Judge Wickham retired in 2016. In December 2018, Tatyana filed a motion in the trial court entitled "Respondent's Motion Moves this Court for an Order Entering the Trial Court's

Findings and Conclusions; To Correct Clerical Mistake," requesting the court enter CR 11 findings and award her the sanction fees. CP at 1-4. She asked the trial court, then presided over by Judge Mary Sue Wilson, to enter what she had "cop[ied] and paste[d]" from Judge Wickham's oral ruling regarding sanctions from 2016. VRP (Dec. 14, 2018) at 5.

John's response to Tatyana's motion was late. John claimed the delay was due to an e-mail he received from the court administration that the hearing might be stricken, and requested the court accept the brief. John's response included a copy of our July 2018 decision (*Mason* II) that was still pending on appeal. Tatyana had not included that decision in her motion. The trial court accepted John's brief, finding the *Mason* II decision that he had included necessary to make its decision.

In its December 2018 written order, the trial court explained that it was premature to rule on Tatyana's request because an appeal was pending on the issue (*Mason* II) and that we had not yet issued a mandate. The trial court denied Tatyana's motion.

Tatyana appeals the trial courts' denial of all three motions.

ANALYSIS

Tatyana raises multiple arguments in two separate appeals. Throughout her briefs she argues multiple issues not raised below, re-alleges statements from prior trials, makes numerous credibility arguments, and blends arguments from different issues. From the first appeal (No. 50009-4-II), she argues the trial court erred when it denied her January 2017 motion to compel payment of funds held in a supersedeas bond. In the same appeal, she argues the trial court abused its discretion when it denied her January 2017 CR 60 motion to vacate the 2013 parenting

plan. In her second appeal (No. 52959-9-II), she argues the trial court erred when it denied her 2018 motion to enter findings on CR 11 sanctions that were pending appeal.

We vacated the trial court's 2016 sanctions in *Mason* II, slip op. at 18, and her argument related to the supersedeas bond is therefore moot. The trial court did not abuse its discretion when it denied Tatyana's CR 60 motion and the court properly acted within its authority when it denied her motion to enter findings on an issue pending appeal.

I. 2017 Motion To Compel Payment of Funds in Supersedeas Bonds

Tatyana argues that the trial court erred when it did not release to her funds held in a supersedeas bond pending John's appeal in case *Mason* II (No. 49839-1-II). She appears to argue that the trial court did not properly consider her motion to release the funds and did not modify the bond amount. We hold that this argument is moot.

"'A case is technically moot if the court can no longer provide effective relief.'" *Randy Reynolds & Assocs., Inc. v. Harmon*, 193 Wn.2d 143, 152, 437 P.3d 677 (2019) (internal quotation marks omitted) (quoting *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012)). However, even if a case is moot, we have discretion to decide the issue if the question is of continuing and substantial public interest. *Randy Reynolds*, 193 Wn.2d at 152. We consider the following nonexclusive factors to determine whether a case presents an issue of continuing and substantial public interest: (1) the public or private nature of issue, (2) the need for the future guidance on the issue, (3) the likelihood of the question's future recurrence, and (4) the level of adversity between the parties and the quality of their advocacy on the issue. *Randy Reynolds*, 193 Wn.2d at 152-53.

Tatyana seeks the release of funds in a supersedeas bond. A party may stay enforcement of a money judgment by filing a supersedeas bond with the trial court. RAP 8.1(b)(1). John filed the supersedeas bond to prevent payment of the CR 11 sanctions pending the results of *Mason* II. We vacated the sanctions for which the bond amount was held and awarded Tatyana the other fees. We issued mandate on that case in October 2019. Thus, the judgment secured by the supersedeas bond was vacated. Accordingly, we cannot provide Tatyana relief. Additionally, this is not an issue of continuing and substantial public interest. The dispute is private, requires no further guidance, and it is unlikely that the supersedeas issue will recur. Neither party advocates that this is an issue of public interest. Therefore, we do not address Tatyana's argument. Although the argument Tatyana makes on appeal is moot, the issue of whether she is entitled to such sanctions remains with the trial court.

II. 2017 Motion To Vacate Parenting Plan

Tatyana argues that the trial court erred when it denied her motion to vacate the "2013 and 2008" parenting plans under CR 60(b)(1), (3), (4), and (11). Suppl. CP at 1581. Tatyana also argues that the trial court's denial of her motion to vacate violated her constitutional right to raising children without state interference, violated federal immigration regulations, failed to consider her financial circumstances, and that we should assign a retired judge as a judge pro-tempore on remand. Tatyana raises no convincing arguments, and her arguments fail.

A. *Legal Principles*

CR 60(b) provides that a trial court may relieve a party from final judgment, order, or proceeding for eleven reasons. Tatyana's motion implicated four subsections:

CR 60(b)(1):	"Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;"
CR 60(b)(3):	"Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);"
CR 60(b)(4):	"Fraud . . . , misrepresentation, or other misconduct of an adverse party;" and
CR 60(b)(11):	"Any other reason justifying relief from the operation of the judgment."

See Suppl. CP at 1590.

A CR 60 motion "shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken." CR 60(b). CR 60(b)(11) is "intended to serve the ends of justice in extreme, unexpected situations and when no other subsection of CR 60(b) applies." *Shandola v. Henry*, 198 Wn. App. 889, 895, 396 P.3d 395 (2017). This subsection applies where there are "extraordinary circumstances involving irregularities extraneous to the proceeding." *Shandola*, 198 Wn. App. at 895. An unfair result even when caused by poor representation is insufficient grounds to vacate. *See In re Marriage of Burkey*, 36 Wn. App. 487, 488-90, 675 P.2d 619 (1984). A reduction in income does not generally qualify as an extraordinary circumstance. *See In re Marriage of Yearout*, 41 Wn. App. 897, 898, 902, 707 P.2d 1367 (1985).

We review CR 60(b) orders for abuse of discretion. *Shandola*, 198 Wn. App. at 896. A trial court abuses its discretion when it bases its decision on untenable grounds for untenable reasons. *Shandola*, 198 Wn. App. at 896. We do not weigh evidence or make credibility determinations on appeal. *State v. Davis*, 176 Wn. App. 385, 396 n.10, 308 P.3d 807 (2013) (citing *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004)).

B. *Abuse of Discretion*

Tatyana argues that the trial court abused its discretion when it denied her 2017 motion to vacate the parenting plan. Tatyana makes no legal argument that the trial court abused its discretion or based its decision on untenable grounds for untenable reasons. Instead, she lays out grievances and allegations arising out of her disputes with John, her immigration status, and her financial situation since the divorce, arguing that the 2013 trial, and not the trial court's decision on her 2017 motion to vacate, was flawed. Her arguments raise issues of credibility and evidentiary weight that we may not review.

Tatyana also appears to argue that we erred in vacating sanctions against John in *Mason* II. Tatyana's attempts to have our decision reversed failed. Ruling on Reconsideration, *In re Marriage of Mason*, No. 52959-9-II (Wash. Ct. App. Dec. 16, 2019) (*Mason* II). Moreover, to the extent that her brief alleges an abuse of discretion at all, her arguments are not apt.

1. *CR 60(b)(1) and (3)*

We affirmed the 2013 parenting plan in July 2015. Tatyana filed this CR 60 motion in January 2017. Thus, her claims under CR 60(b)(1) and (3) are barred as untimely because they were filed more than one year after the 2013 parenting plan was final. CR 60(b). Accordingly, the trial court properly denied her motion on these claims.

2. *CR 60(b)(4): Fraud, Misrepresentation, or Misconduct*

Tatyana's argument that the trial court abused its discretion when it denied her motion to vacate the 2013 parenting plan based on CR 60(b)(4) also fails.

To find fraud, the trial court must make findings of fact and conclusions of law on the nine elements of common law fraud. *In re Marriage of Maddix*, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985).[4] The moving party must prove misconduct by clear and convincing evidence. *Mitchell v. Wash. Inst. Pub. Policy*, 153 Wn. App. 803, 825, 255 P.3d 280 (2009). To vacate for misrepresentation, the moving party must have relied on or been misled by the representation. *See Smith v. Dewar*, 185 Wn. App. 544, 562, 328 P.3d 328 (2015). The moving party must also "show misconduct that prevented a full and fair presentation of its case." *Dalton v. State*, 130 Wn. App. 653, 665, 124 P.3d 305 (2005).

The only allegations of fraud, misrepresentation, or misconduct that Tatyana raised in the trial court were those arising out of arguments made in the November 2016 trial conducted by Judge Wickham. At that trial, the court considered Tatyana's motion to vacate the 2013 child support order and any unpaid child support. The 2013 parenting plan was not at issue in that trial. The 2016 trial court issued sanctions against John that were pending appeal at the time Tatyana's 2017 motion was filed and heard. At the November 2016 trial, Tatyana raised no new evidence and made no arguments based on the 2013 parenting plan, or our mandate affirming

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[4] "In Washington, common law fraud has 9 essential elements, all of which must be established by clear, cogent, and convincing evidence:

> (1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage."

N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc., 29 Wn. App. 228, 232, 628 P.2d 482 (1981).

that plan in 2015. She did not show any of the nine elements of fraud in the trial court, nor did she show how any misconduct on John's part prevented a presentation of her 2013 case. Thus, the trial court properly determined that Tatyana's CR 60(b)(4) argument flowed from the November 2016 trial and that it could not address those findings that were on appeal.

Tatyana's argument on appeal is similarly flawed. Instead of pointing to the trial court's error, she appears to accuse the attorney who represented her in 2013 of misrepresentation. The only case she cites to is *Liu v. Mund*, 686 F.3d 418, 419-20 (7th Cir. 2012). That case involves spousal support under immigration law and has nothing to do with fraud, misrepresentation, or CR 60. *Liu*, 686 F.3d at 419-20. Because Tatyana did not show fraud, misconduct, or misrepresentation, and because the issue of the propriety of the statements she relied on were pending appeal, the trial court properly denied her motion to vacate under CR 60(b)(4).[5]

3. *CR 60(b)(11): Extraordinary Circumstances*

Tatyana argues that the trial court abused its discretion when it denied her motion to vacate under CR 60(b)(11). We disagree.

CR 60(b)(11) is "intended to serve the ends of justice in extreme, unexpected situations and when no other subsection of CR 60(b) applies." *Shandola v. Henry*, 198 Wn. App. at 895.

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[5] In a footnote, John argues that Tatyana's CR 60(b)(4) and (11) claims are also time barred. He appears to argue that because the trial on the parenting plan was in 2013, the January 2017 CR 60 motion was not filed within a reasonable time. However, Tatyana bases many of her arguments on incidents that occurred during the November 2016 trial that was pending appeal. "The critical period is the period between when the moving party became aware of the reason to vacate the judgment and when the moving party filed its motion." *Dalton*, 130 Wn. App. at 663 (2005). Because of this timing irregularity, we resolve the CR 60(b)(4) and (11) issues on the merits.

This applies where there are "extraordinary circumstances involving irregularities extraneous to the proceeding." *Shandola*, 198 Wn. App. at 895.

The trial court determined there were no extraordinary circumstances. Tatyana's motion merely restated her grievances that were decided in the 2013 trial or were credibility issues before the court in 2012. Her claims of extraordinary circumstances were that John and his trial counsel lied to the court that the children were in an abusive environment with John. However, in the 2013 parenting plan, the trial court (which had the same judge presiding for both the trial resulting in *Mason* I and the 2017 motion) found that Tatyana was abusive toward the children. The court had no concerns about future domestic violence from John. Tatyana presented no new evidence to the trial court related to abuse allegations in her CR 60(b)(11) motion.[6]

On appeal, Tatyana cites *In re Marriage of Jennings*, 138 Wn.2d 612, 625-26, 980 P.2d 1248 (1999) without analysis. *Jennings* is factually distinguishable. Although *Jennings* was a decision on a CR 60(b)(11) motion, it had nothing to do with a parenting plan. In *Jennings*, our Supreme Court held that a decrease in military retirement benefits in the wake of a dissolution decree was an exceptional circumstance warranting vacation or modification of the divorce decree. 138 Wn.2d at 628-29. Accordingly, it is not apt.

Tatyana also relies on *State v. Keller*, 32 Wn. App. 135, 647 P.2d 35 (1982), without analysis. *Keller* is also distinguishable because it was a criminal case involving dismissal of a

[6] The trial court explained: "There were things that happened during the [2013] trial before me that were troublesome, and one of the things that was troublesome was the findings by CPS that Ms. Mason had physically abused the children, and those findings haven't been changed. Those findings were one of the reasons the court ordered what it ordered." VRP (Jan. 25, 2017) at 34.

juvenile prosecution. *Keller*, 32 Wn. App. at 136. At issue was a dispute over the proper method for the State to reinstate charges after a trial court vacated them. *Keller*, 32 Wn. App. at 140-41. To the extent it applies at all, the *Keller* court's analysis works against Tatyana; the court noted that "[t]he 'any other reason' language of CR 60(b)(11) is thus not a blanket provision authorizing reconsideration for all conceivable reasons." *Keller*, 32 Wn. App. at 141.

The trial court did not abuse its discretion when it determined that Tatyana did not show extraordinary circumstances. The trial court's decision was based on the record before it, and was reasonable. Thus, the trial court did not abuse its discretion when it dismissed Tatyana's motion to vacate under CR 60(b)(11).

C. *Right To Raise Children Without State Interference*

Tatyana argues for the first time on appeal that the trial court's denial of her motion to vacate the parenting plan prevents her from seeing her children and therefore violates her right to raise her children without State interference. We do not consider this argument.

We generally will not review error not raised in the trial court. RAP 2.5; *Sprute v. Bradley*, 186 Wn. App. 342, 358, 344 P.3d 730 (2015). However, a party may raise for the first time on appeal (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a). "An error is manifest when the appellant shows actual prejudice." *In re Adoption of K.M.T.*, 195 Wn. App. 548, 567, 381 P.3d 1210 (2016). To establish prejudice, a party must show the error had practical and identifiable consequences in the trial. *Adoption of K.M.T.*, 195 Wn. App. at 567.

Where a party claims constitutional error, we preview the merits of the claim to determine whether the argument is likely to succeed. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

"Parents have a fundamental liberty interest in the care, custody, and management of their children" as protected by the Fourteenth Amendment. *Adoption of K.M.T.*, 195 Wn. App. at 559; *In re Welfare of H.Q.*, 182 Wn. App. 541, 550, 330 P.3d 195 (2014). Therefore, Tatyana makes a colorable claim of constitutional magnitude. However, Tatyana must still show a manifest error that involved actual prejudice.

Tatyana makes no showing of error. She does not credibly explain how the trial court unconstitutionally interfered with her parental rights. She merely restates claims regarding John's credibility from the 2013 trial. She ignores the trial court's 2013 findings of Tatyana's physical abuse against the children. She cites to no other case nor makes any argument that a constitutional error affected the 2016 trial or the motion to vacate below. Accordingly, we do not consider this issue. RAP 2.5.

D. *Violations of Federal Immigration Regulations*

Tatyana argues that the trial court's denial of her 2017 motion to vacate the parenting plan violated federal immigration regulations. She appears to argue that the denial tangentially impacted her immigration status, which prevents her from gaining employment. To support this argument, she recites portions of the record from the 2013 and 2016 trials. Crucially, she challenges the 2013 trial court's income imputation and how that created a barrier to her ability to have therapeutic visits with the children. Thus, she argues again that the 2013 parenting plan is invalid. This argument is barred by res judicata.

Res judicata is a question of law we review de novo. *In re Marriage of Shortway*, 4 Wn. App. 2d 409, 423, 423 P.3d 270 (2018). Res judicata bars a party from relitigating actions a court has already determined. *Shortway*, 4 Wn. App. 2d at 422. Res judicata also bars litigation by collateral attack, which generally includes a motion filed in a different action. *Shortway*, 4 Wn. App. 2d at 422. "The doctrine of res judicata applies 'where a prior final judgment is identical to the challenged action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.'" *Shortway*, 4 Wn. App. 2d at 423 (internal quotation marks omitted) (quoting *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 836, 125 P.3d 202 (2005)).

The parenting plan issues Tatyana raises here were settled in the 2013 trial and affirmed by this court in *Mason* I. The 2013 trial court found, and we explained in our affirming opinion, that Tatyana was uncooperative in disclosing her finances and that she never organized any therapeutic visits. Accordingly, we held that the 2013 trial court did not abuse its discretion when it implemented the 2013 parenting plan.

Tatyana's argument meets all four elements of res judicata. (1) Subject matter: The challenged action is the 2013 parenting plan, which is identical in subject matter to the 2013 trial and 2015 appeal. (2) Cause of action: Tatyana challenges the implementation of the 2013 parenting plan via collateral attack on her motion to vacate. (3) Persons and parties: John and Tatyana are parties throughout this dispute. (4) Quality of the persons against whom claim is made: John and Tatyana remain the parents in a dispute over a parenting plan. Thus, Tatyana's argument is barred by res judicata.

E. *Consideration of Financial Circumstances*

Tatyana argues that the trial court failed to consider the parties' financial circumstances, especially as related to her immigration status, when it denied her 2017 motion to vacate the parenting plan. This argument is also barred by res judicata.

Tatyana does not argue that the trial court was required to consider financial circumstances in her CR 60 motion and she again recites portions of the record from the 2013 and 2016 trials. Tatyana re-alleges the same arguments regarding immigration and income from her argument above on immigration regulations that were settled in *Mason* I and *Mason* II. Thus, for the reasons explained above, her argument is barred by res judicata.

F. *Remand to Judge Wickham*

Tatyana argues that we should remand to the trial court for "re-trial" in front of Judge Wickham as a judge pro tempore. Tatyana makes an identical argument in her second brief. This issue is tied to Tatyana's 2018 motion to enter the 2016 trial court's CR 11 findings, not to her motion to vacate. Accordingly, it is discussed below.

III. 2018 MOTION TO ENTER TRIAL COURT'S FINDINGS AND CONCLUSIONS AND CORRECT MISTAKES

Tatyana argues that the trial court erred when it denied her 2018 motion to have the trial court enter findings and conclusions arising from the 2016 trial. Tatyana makes multiple arguments based on the credibility and character of John and his counsel, and restates facts from her prior brief and earlier trials. Tatyana appears to assign error to the trial court's denial of her December 2018 motion to enter CR 11 findings from the 2016 trial, despite that the case was pending appeal and we had not yet entered a mandate. Tatyana also requests that we order

retired Judge Christopher Wickham to be installed as a judge pro tempore so that he may enter factual findings on whether or not CR 11 sanctions are appropriate after we vacated those sanctions in 2018, and remanded for the trial court to enter findings or reconsider the imposition of sanctions.

The trial court correctly denied Tatyana's motion because the issue was pending appeal and had not been mandated at the time of the motion. Additionally, the trial court had no authority to enter findings for a trial heard by a predecessor judge. Although retired Judge Wickham is *authorized* to act as a judge pro tempore by statute, we have no authority to *require* him to hear the CR 11 issue on remand.

A. *Legal Principles*

The Clerk of the Court of Appeals issues the mandate for our decisions when review is terminated. RAP 12.5(b). "If a petition for review has been timely filed and denied by the Supreme Court," termination occurs "upon denial of the petition for review." RAP 12.5(b)(3). Our decision is effective only "[u]pon issuance of the mandate of the appellate court as provided in rule 12.5." RAP 12.2; *see also* RAP 12.7(a). Under RAP 7.2(e), a trial court has the authority to hear and determine postjudgment motions, but "[i]f the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision." RAP 7.2(e)(2). Where a trial court does not seek permission from us before entering findings in a decision on review, it lacks authority to enter those findings. *State v. Friedlund*, 182 Wn.2d 388, 395-96, 341 P.3d 280 (2015).

In Washington, a successor judge generally may not enter findings of fact based on testimony heard by her predecessor. *Tacoma Recycling, Inc. v. Capital Material Handling Co.*, 42 Wn. App. 439, 441-42, 711 P.2d 388 (1985); *In re Marriage of Crosetto*, 101 Wn. App. 89, 95, 1 P.3d 1180 (2000). This rule applies even where the prior judge entered an oral decision or memorandum. *State v. Bryant*, 65 Wn. App. 547, 549, 829 P.2d 209 (1992). A judge "*shall not act* . . . [w]hen he or she was not present and sitting as a member of the court at the hearing of a matter submitted for its decision." RCW 2.28.030 (emphasis added). However, CR 63(b) provides a limited exception to this rule:

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; *but if a new judge cannot perform those duties*, the new judge has the discretion to grant a new trial.

(Emphasis added).

When read together, case law and civil rules "set forth the rule that a successor judge only has the authority to do acts which do not require finding facts. Only the judge who has heard evidence has the authority to find facts." *Crosetto*, 101 Wn. App. at 96 (quoting *Bryant*, 65 Wn. App. at 550). Thus, a successor judge has the power to enter conclusions of law only; any finding of fact must be made in a new trial. *Tacoma Recycling*, 42 Wn. App. at 442; *In re Welfare of Woods*, 20 Wn. App. 515, 517, 581 P.2d 587 (1978) (holding that in a case where termination of parental rights was remanded for entry of additional findings a new trial was required where the trial judge had left the bench); *Wold v. Wold*, 7 Wn. App. 872, 877, 503 P.2d 118 (1972) (holding that a new trial is required in a dissolution action where the appellate court

concluded there were inadequate findings of fact and the trial judge who entered the deficient findings had died).

A successor judge may make findings of fact based on evidence from an earlier trial only where the parties agree to allow it. *Crosetto*, 101 Wn. App. at 96-97.

If an elected superior court judge retires leaving a pending case in which the judge has made discretionary rulings, "the judge is entitled to hear the pending case as a judge pro tempore without any written agreement." RCW 2.08.180. But we have no authority to assign trial court judges to a given case. Indeed, "[t]rial courts have inherent authority to control and manage their calendars, proceedings, and parties." *State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113 (2012) (citing *Cowles Publ'g Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981)).

B. *Judge's Authority To Enter Findings on Issue Pending Appeal*

Tatyana makes multiple arguments to support her contention that the trial court erred when it denied her motion to enter findings. None are convincing. We first address Tatyana's arguments that directly apply to whether a judge has authority to enter findings regarding an issue on appeal before turning to her supporting arguments.

1. *Entering Findings on an Issue Pending Appeal*

Tatyana argues that the trial court erred when it ruled her motion was premature and that the trial court was barred from entering findings regarding an issue pending appeal. We disagree.

Under RAP 7.2(e), the trial court has the authority to hear and determine postjudgment motions. However, "[i]f the trial court determination will change a decision then being reviewed

by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision." RAP 7.2(e)(2). Our decisions are effective only "[u]pon issuance of the mandate of the appellate court as provided in rule 12.5." RAP 12.2, *see also* RAP 12.7(a).

Tatyana filed her motion in December 2018. We did not issue our mandate in *Mason* II until October 2019. *Mason* II included the issue of whether to affirm or vacate the CR 11 sanctions against John. Thus, Tatyana was seeking to have the trial court change the decision then being reviewed by the appellate court. RAP 7.2(e). To make such a decision, the trial court would have had to seek permission from this court, which it did not. Accordingly, the trial court did not err when it denied Tatyana's motion to enter findings.

Tatyana argues that the 2016 trial court's error in not entering findings on the CR 11 sanctions was merely a "clerical error" and that RAP 7.2(e) allows a trial court to correct clerical errors at any time during an appeal. 2 Br. of Appellant (52959-9-II) at 44. She cites *State v. Vailencour*, 81 Wn. App. 372, 378, 914 P.2d 767 (1996), for the statement that Division One of this court has "previously held, in the civil context, that the trial court's failure to enter findings and conclusions is a clerical error which may be corrected any time during the appeal process under CR 60(a) and RAP 7.2(e)." *Vailencour*, 81 Wn. App. at 378 (citing *In re Marriage of Stern*, 68 Wn. App. 922, 927-28, 846 P.2d 1387 (1993)). She also cites to *Stern*.[7]

[7] Tatyana's remaining citation is to *State v. Portomene*, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995), but that case was also a criminal case that regarded clerical errors that neither prejudiced the defendant nor were substantive errors.

But Tatyana's reliance on *Stern* is misplaced. In *Stern*, the court held that the failure to enter findings was an inadvertent oversight and not a substantive error. 68 Wn. App. at 927-28. Moreover, even assuming, *arguendo*, that the 2016 trial court's failure to enter proper findings on CR 11 was a clerical error, it still has to meet the standard of CR 60(a). CR 60(a) requires that clerical errors "may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e)." The trial court would still be barred under RAP 7.2(e) from entering findings on an issue before the court without first obtaining permission from this court. Thus, the trial court was correct when it ruled Tatyana's motion was premature.

2. *John's Untimely Response to Tatyana's Motion*

Tatyana argues that John's response brief to the trial court was late and should have been stricken. She argues that the trial court erred when it considered John's response. We disagree.

The discretion whether to accept untimely documents rests with the trial court. *O'Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 521, 125 P.3d (2004). We review a motion to strike a pleading for an abuse of discretion. *King County Dep't of Adult & Juv. Det. v. Parmelee*, 162 Wn. App. 337, 360, 254 P.3d 927 (2011). A trial court abuses its discretion when it bases its decision on untenable grounds for untenable reasons. *Shandola*, 198 Wn. App. at 896. When a deadline for a filing has passed, a court may accept a late filing if the party files a motion explaining excusable neglect. CR 6(b)(2).

Tatyana cites *Pioneer Inv. Sers. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 385, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), for eight factors a federal court may consider

when determining excusable neglect. But these factors do not apply to a state court procedure. *See Pioneer Inv. Servs.*, 507 U.S. at 395 (citing Fed. Bankr. R. 9006(b)(1)).

To the extent these factors are applicable, they favor John, and not Tatyana. Tatyana shows no prejudice, there was no delay to judicial proceedings, and John explained to the trial court that his delay was due to confusion over whether the court might strike the December 2018 hearing. Moreover, John included the *Mason* II opinion in his response and the trial court found the opinion necessary in making its decision. Thus, the trial court did not abuse its discretion when it considered John's response to Tatyana's motion.

3. *Citations to Our Prior Opinion*

Tatyana argues that the trial court should have entered findings on the CR 11 sanctions because we ordered it to do so on remand in *Mason* II, slip op. at 18. She is mistaken.

We vacated the 2016 award of sanctions, and gave the trial court options as to how it might proceed. We stated, "[W]e vacate the trial court's order imposing CR 11 sanctions on John and remand either for entry of specific findings supporting the award of CR 11 sanctions that are included or incorporated in the court's CR 11 order or a determination that CR 11 sanctions are not warranted." *Mason* II, slip op. at 18. Accordingly, the trial court was not required to enter new findings on remand, but could have determined that no sanctions were warranted.

4. *Tatyana Re-alleges Settled Issues*

Tatyana argues that the trial court in 2016 approved the CR 11 sanctions and that those sanctions should be maintained. She argues that the trial court's ruling was correct under an

abuse of discretion standard—in other words, she argues that the 2016 trial court did not abuse its discretion when it imposed CR 11 sanctions. This argument is barred by res judicata.

As discussed above, res judicata applies "where a prior final judgment is identical to the challenged action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made." *Shortway*, 4 Wn. App. 2d at 422-23 (internal quotation marks omitted) (quoting *Lynn*, 130 Wn. App. at 836).

Tatyana's argument is based on the same subject matter (the trial court's CR 11 sanctions) that arose out of the same cause of action, (the 2016 trial) between the same parties (Tatyana and John) and involving the same parties in interest. We vacated the CR 11 sanctions in *Mason* II, slip op. at 18. The issue of sanctions was argued in the 2016 trial and we mandated our decision to vacate. Res judicata bars this argument.

Moreover, Tatyana bases her argument on the false premise that we *approved* the CR 11 sanctions. To be clear, our decision did not address the issue of the sanctions on their merits; we merely held that the trial court failed to make sufficient findings to support them. Tatyana's argument in this appeal that the trial court did not abuse its discretion in awarding sanctions again suffers the same fate; without sufficient findings of fact, we are unable to consider the appropriateness of the sanctions. Although the argument Tatyana makes on appeal is barred by res judicata, the issue of whether she is entitled to such sanctions remains with the trial court.

C. *Successor Judges and Judges Pro Tempore*

1. *Findings of Fact by a Successor Judge*

Tatyana argues that the trial court should have entered the findings of fact because the case that the court relied on in making its decision, *Tacoma Recycling*, 42 Wn. App. at 441-42, is not apt. We disagree.

In *Tacoma Recycling*, Tacoma Recycling obtained a money judgement against the defendant, CMH. 42 Wn. App. at 439. Division One of this court held that there were no findings of fact and conclusions of law and vacated the trial court's decision. *Tacoma Recycling*, 42 Wn. App. at 440. The trial court judge then retired. *Tacoma Recycling*, 42 Wn. App. at 440. His replacement denied CMH's motion for a new trial, adopted the original judge's findings and conclusions in toto, and entered judgment for Tacoma Recycling. *Tacoma Recycling*, 42 Wn. App. at 440. On the second appeal, we held that the successor judge had no authority to enter findings of fact. *Tacoma Recycling*, 42 Wn. App. at 442. The "vacation of those findings rendered them completely nugatory; they must be treated as if they never had been entered." *Tacoma Recycling*, 42 Wn. App. at 442.

Tatyana argues that *Tacoma Recycling* is distinguishable because, she states, the judge there died and because here, unlike in *Tacoma Recycling*, the prior appeal did not vacate the trial court's findings. Both of her arguments are factually inaccurate. The prior judge in *Tacoma Recycling* retired. *Tacoma Recycling*, 42 Wn. App. at 440. And we vacated the CR 11 sanctions. Thus, *Tacoma Recycling* is on point and applies here.

Tacoma Recycling is part of well settled law that a successor judge has the power to enter conclusions of law only; any finding of fact must be made in a new trial. *Tacoma Recycling*, 42 Wn. App. at 442; *Welfare of Woods*, 20 Wn. App. at 517 (holding that in a case where termination of parental rights was remanded for entry of additional findings a new trial was required where the trial judge had left the bench); *Wold*, 7 Wn. App. at 877 (holding that a new trial is required in a dissolution action where the appellate court concluded there were inadequate findings of fact and the trial judge who entered the deficient findings had died). Accordingly, the trial court properly relied on *Tacoma Recycling* when it denied Tatyana's motion.

2. *Assignment of a Judge Pro Tempore*

Tatyana argues that Judge Wickham has authority to preside over the case on remand as a judge pro tempore, despite his retirement. In this she is correct. However, she goes further and argues that we should *appoint* Judge Wickham as the judge pro tempore to enter CR 11 findings. Her requested relief is beyond our authority.

A previously elected superior court judge who retires is entitled to hear a pending case as a judge pro tempore. RCW 2.08.180. But the authority to assign or appoint a judge to a given case is beyond our authority. Authority over trial court calendars and proceedings rests almost entirely with the trial court. *State v. Gassman*, 175 Wn.2d at 211 (citing *Cowles Publ'g Co.*, 96 Wn.2d at 588). And there is no guarantee that the trial court would ask Judge Wickham to come out of retirement or that he would agree to do so.

Tatyana cites to no authority to support her argument that we may assign a trial court judge to a case, let alone require a retired judge to return to the bench to hear a matter on remand.

Because she does not provide a citation to authority, we assume none exists. *State v. K.A.B.*, 14 Wn. App. 2d 677, 703, 475 P.3d 216 (2020). Thus, it is outside our authority to assign a retired judge as a judge pro tempore to hear an issue on remand.[8]

John argues that even if Tatyana could request that Judge Wickham preside, he would have filed an affidavit of prejudice to ask the judge to recuse or be removed. John appears to argue that he would be able to compel Judge Wickham to be removed for prejudice simply because he entered findings adverse to John in a prior hearing. This is plainly wrong. Judge Wickham has already made rulings on this case, so John is unable to file an affidavit of prejudice. RCW 4.12.050(1)(a).

John also argues that he would file a successful motion requiring Judge Wickham to recuse. We do not address this argument other than to say that on this record, we see no behavior on the part of Judge Wickham that would warrant his removal. Judge Wickham's credibility determinations, sanctions, and rulings in a case do not result in the appearance of "personal bias or prejudice" under the Code of Judicial Conduct as John contends. CJCR 2.11(A)(1); 2 Br. of Resp't (52959-9) at 29. Instead, reviewing and revising cases on remand is the day-to-day business of the trial court. John's argument is deeply flawed.

[8] Tatyana also cites to *Zachman v. Whirlpool Fin. Corp.*, 123 Wn.2d 667, 869 P.2d 1078 (1994). There the trial court appointed a retired judge to come back and hear a remanded case on its own motion. *Zachman*, 123 Wn.2d at 669. Therefore *Zachman* supports the argument that Judge Wickham may be appointed, but does not support that it is within our authority to do so. Tatyana's remaining arguments concern interpretation of ballot measures and are inapposite.

Because the trial court was correct to deny Tatyana's motion to enter the CR 11 findings and because we cannot compel Judge Wickham to return from retirement as a judge pro tempore, the trial court is left with choices on how to resolve the CR 11 findings issue from *Mason* II on remand. Among those choices are to recall Judge Wickham, if he is willing, to serve as judge pro tempore to determine if sanctions are appropriate in the wake of *Mason* II and, if so, to enter CR 11 findings. RCW 2.08.180. Or the trial court may hold a new trial or evidentiary hearing. *Tacoma Recycling*, 42 Wn. App. at 442; *Welfare of Woods*, 20 Wn. App. at 517; *Wold*, 7 Wn. App. at 877.

IV. CONCLUSION

The trial court properly denied Tatyana's motion to release funds in a supersedeas bond. Because the issue for which those funds were held has been vacated, her arguments to the contrary are moot. The trial court did not abuse its discretion when it denied her motion to vacate the 2013 parenting plan under CR 60. She raises only credibility arguments from the prior trials. Her argument that her constitutional right to raise children was violated by the parenting plan was raised for the first time on appeal and we do not consider it. Tatyana's argument on federal immigration regulations is barred by res judicata as is her argument that the trial court failed to consider the parties' financial circumstances. The trial court did not err when it denied her 2018 motion to enter findings on an issue then pending appeal because her motion was premature. Finally, although a retired trial court judge is authorized to sit as a judge pro tempore by statute, we have no authority to order him to come out of retirement to preside over a case. Thus, the trial court made no error, and we affirm.

ATTORNEY FEES

Tatyana argues that we should re-enter CR 11 sanctions against John. That decision is left to the trial court, and is pending the remand of *Mason* II.

Tatyana argues that we should impose sanctions against John and his trial counsel under RAP 18.9 for "multiple frivolous pleadings and misstatements of fact." 2 Br. of Appellant (52959-9-II) at 48. We disagree.

RAP 18.9 authorizes us to "award sanctions against a party who uses the Rules of Appellate Procedure for the purposes of delay, files a frivolous appeal, or fails to comply with the Rules of Appellate Procedure." *Schorno v. Kannada*, 167 Wn. App. 895, 904, 276 P.3d 319 (2012).

> "In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal."

Lee v. Kennard, 176 Wn. App. 678, 692, 310 P.3d 845 (2013) (quoting *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005).

Here, although John makes some improper arguments, there is nothing in the record on appeal to suggest he filed any frivolous pleading or misstatement to us. The allegations of misstatements that Tatyana raises against John concern his pleadings and performance at the court below, not before us. Accordingly, we deny Tatyana's request for sanctions against John.

John also argues that we should impose sanctions against Tatyana under RAP 18.9 for Tatyana's "scurrilous, impertinent, vexatious, intransigent, and frivolous appeal arguments." 2 Br. of Resp't (52959-9-II) at 32. Although Tatyana has filed multiple motions and this dispute has gone on for years, this particular appeal does not meet the definition of frivolous as described above. Viewing Tatyana's appeal as a whole, there are issues she raises that are not totally devoid of merit. Thus, we deny John's request for sanctions under RAP 18.9.

We deny both parties' requests for attorney fees. We affirm the decisions of the trial court.

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.

Worswick, J.

We concur:

Lee, C.J.

Veljacic, J.

The 2016 Trail Transcript Ruling of Judge Wickham

Appendix D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON
FAMILY AND JUVENILE COURT

In re the Matter of:	
JOHN MASON, Petitioner,	COURT OF APPEALS NO. 49839-1-II
vs.	THURSTON COUNTY NO. 07-3-00848-0
TATYANA MASON, Respondent.	

VERBATIM REPORT OF PROCEEDINGS
(Trial & Ruling - Volume III)

BE IT REMEMBERED that on November 2, 2016, the above-entitled matter came on for trial before the HONORABLE CHRIS WICKHAM, Judge of Thurston County Superior Court.

Reported by: Aurora Shackell, RMR CRR
Official Court Reporter, CCR# 2439
2000 Lakeridge Drive SW, Bldg No. 2
Olympia, WA 98502
(360) 786-5570
shackea@co.thurston.wa.us

APPEARANCES

For the Petitioner:	LAURIE ROBERTSON Washington Family Law Group 10700 Meridian Ave N, Ste. 107 Seattle, WA 98133-9008
For the Respondent:	TATYANA MASON (Appearing Pro Se)
Also Present:	DIANA NOMAN MARINA DELAHUNT ALMIRA SAFAROVA-DOWNEY Russian Interpreters

I N D E X

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E X H I B I T S

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Mr. Gairson would not testify on behalf of me with all those documents if it's something would be wrong.

THE COURT: You've got one minute left.

MS. MASON: Yes. I would say I believe -- so I believe what the court noticed many legal and serious fact errors presented by Mrs. Robertson and Seifert and everything what Ms. Robertson right now is arguing is undermined her argument in this case.

THE COURT: Thank you. In a perfect world, I'd spend a couple days, I'd write up a very complete and detailed analysis of this case, and I'd send it out to everybody. But I don't live in a perfect world, and so I'm going to do the best I can right now to summarize what I have heard and seen over the last few days of trial. And if I misstate something, I apologize. I think there's value in my communicating this while it's relatively fresh in my mind. Granted, it's been a couple weeks here since we started, but it's reasonably fresh in my mind.

So the record shows that John and Tatyana -- I'm going to call you by your first names, I hope that's okay -- were married on August 19th, 1999. That Tatyana was brought over here on a fiancee visa, that she received a conditional residency status upon the application of John. And upon his signing of an

I-864 in 1999, which is an affidavit in which the sponsoring individual promises to the U.S. government to support the person who is being brought into this country, there was a two-year period during which the conditions attached to that conditional permanent residence status could be removed.

I've heard testimony and seen evidence that, fairly early on in the relationship, there was conflict ultimately resulting in a protection order being filed, resulting in Ms. Mason going to SafePlace to get advice as to how to proceed and so on.

So it's not surprising that the couple did not file the necessary form to remove the conditions on the conditional residence status within the two-year period. How well either one of them understood what their obligation was, I'm not sure. I'm not persuaded that they were clearly aware of it. However, it's also apparent from what I've heard and seen that John had no real incentive to continue to work with Ms. Mason to maintain her permanent status in the United States early on in the marriage.

The parties separated on July 18th, 2007. The divorce was final June 24th, 2008. There was a modification proceeding which ultimately resulted in

a child support order being entered November 25th, 2013. Now, I indicated that the conditions on the conditional permanent residence were not removed within the two years as required under the law. However, I heard testimony that it is possible to file a Form I-751 to remove the conditions even after the two years have passed.

Ms. Mason, through her own testimony and through the testimony of her expert, however, has presented compelling evidence that she is now in a disfavored status as someone who has significant unpaid child support and that the immigration authorities have the discretion to deny her permanent residency at this point, so she is in the awkward position of being in this country but having no ability to obtain permanent status. And with the focus on legal status that currently exists in this country, it's not hard to believe that most employers will not hire her, because she is not able to show proof of legal status. And were she to go back to immigration, she would most likely be denied because of the child support order.

Now, it's true this matter got to my courtroom through a very circuitous path, as Ms. Robertson pointed out through John's testimony and through the

entry of various exhibits along the way. However, based on my review of the record, I'm persuaded that no court in the lengthy proceedings involving John and Tatyana has ever considered the impact of the I-864 on the obligations of John and Tatyana to each other. Certainly, if a court was entering a child support order, it would take into account whether or not the person receiving child support was also paying spousal maintenance to the person paying it. I mean, I think that goes without saying that that would be considered both in the calculation of the child support and as to offsets.

I understand the *Khan* case. I've reread it, and I understand that it stands for the proposition that a family law court is not required to enforce the I-864 obligation. The court was very clear to say that because the family court does not have to enforce the affidavit, that preserves the remedy to the beneficiary of the I-864 affidavit to pursue relief separately. But I don't read the *Khan* case as saying that the I-864 affidavit is not relevant. They did not reverse Judge Hogan for even considering it. And so I don't believe that the *Khan* case directs this court or any other court to disregard it.

In my mind, it is the elephant in the room in this

case. I indicated to Ms. Mason that my understanding of Civil Rule 60(b)(1), (2) and (3) is that a motion under those paragraphs has to be brought within a year of the entry of the order. And she raised the point, well, the year doesn't begin until the Court of Appeals speaks. That may be true. I've never seen that raised before, but there is some support for the idea that an order is not final until the last appeal has been completed.

But I think rather than rely on (1), (2) and (3), I think the court has to go to subsection (b)(11), which is, "any other reason justifying relief from the operation of the judgment." And in doing that, I will say that I do not believe, in 25 years of being a court commissioner and a trial judge, that I have ever found a basis to vacate a court order under (b)(11). My understanding of the case law is that (b)(11) is disfavored; that the appellate decisions encourage for us to use (1) through (10), and, if they are not available, to deny the motion.

However, (b)(11) does exist, and, as I say, in this case, it seems to me the I-864 affidavit is the elephant in the room. And for an order to stand that involves the financial relationship of the parties, without considering the obligation of one to support

the other makes no sense to me, and so I think it has to be considered.

Now, there was some question raised by Ms. Seifert and by John that the I-864 affidavit was no longer operable. And as we heard, it terminates on the death of the sponsor, which is not applicable here; if the sponsor becomes a U.S. citizen, which has not happened here; or if the sponsored immigrant is credited with 40 quarters of gainful employment in excess of 125 percent of the poverty level.

The *Davis vs. Davis* case stands for the proposition that a spouse's quarters are credited to the quarters of the person being sponsored during the marriage, even after a decree of separation. In this case, however, we don't have a decree of separation. We have a decree of divorce, and the section that speaks to crediting spousal quarters requires the parties to be married at the time the determination of 40 quarters is made.

In this case, according to my calculation, I have to believe it comes to 29 quarters, and the social security record of Tatyana shows essentially she had one quarter earnings during the marriage. She's had a number of quarters of earnings since, but, during the marriage, she had one. Even crediting John's

quarters to her during the marriage, she does not reach 40 quarters by the end of the marriage, and so that provision does not apply.

Another basis for termination of the support obligation is if she departs the United States permanently. As we heard from her testimony, she did depart, but it was for two weeks for her mother's funeral. It certainly wasn't permanent. And, finally, if the sponsored immigrant dies, and that hasn't happened either.

So the various provisions that allow for the termination of the I-864 support obligation, none of those have come to pass, so the obligation is still alive.

I also note with regards to credited quarters that I find credible Tatyana's testimony that, during the majority of the marriage, she was not supported by John. Granted, she lived in the house with him that he was paying the mortgage on in order for her to survive. She was taking out loans and probably not doing much of anything.

So based on all of this, I am prepared to vacate the child support order, which I believe will have the effect of allowing Tatyana to apply for her green card and remove the conditions that were placed on

her conditional permanent residence status, which I think in the long run is going to be beneficial to both parties, because it will ultimately allow her to obtain citizenship, which will terminate the I-864 obligation. That's one of the grounds to do that. It also will allow her to obtain employment, which is another basis for terminating the obligation. Otherwise, I see no way for either party to get out of this box that you are both in.

We've talked about setting a new support amount. I'm going to leave it to John and his attorney as to whether or not they wish to do that. I have heard testimony from Ms. Gairson that John owed Tatyana a certain amount of money under the I-864 affidavit. I fully expected to hear an argument for that today. I would not have granted that relief, because, again, I'm only looking at the child support order, but I would expect a court setting support to consider that obligation and net out any child support. And I'm assuming the I-864 obligation would probably surpass any amount of support based upon Tatyana's difficulty in obtaining substantial gainful employment.

So I don't know that it's going to be beneficial to either side to enter that order, but I leave it up to John. He has a right to request it, and so that

would be his choice.

For Tatyana, I would say that, from what I've seen, you have a right to seek support under the I-864 affidavit. You can file a claim for that in state court or in federal court. My guess is if it were filed in Thurston County Superior Court, we would join it with this case, because the issues are related. But, currently, it's not part of the case, so unless and until that's filed, this court is not going to be enforcing that obligation separate and apart from an offset on child support.

I recognize that everyone here is operating at a disadvantage. I should say I've had a chance to observe Ms. Mason in court for three separate days with two interpreters. And although she has a reasonable ability to use English, her English is not good, and her statements were more clear through the interpreters than in her English. I know she is more comfortable, perhaps, speaking in an English-speaking situation with English than in Russian, and that's understandable. But it's not hard for me to understand why she might not have done well with an English-speaking attorney or with an English-speaking court prior to this proceeding.

I am aware of no proceedings prior to the last

three days in which interpretive services were provided for her. I know that in the motion hearings I had leading up to this, she did not have interpreter services, and so I believe she's been operating at a disadvantage. And although she has had the benefit of communication with immigration and more recently with Mr. Gairson, this is a complicated field, even for people who work in it, and so it's not hard for me to understand why she would not have understood it fully.

As to John, I think, in some ways, the same thing holds true. It's not surprising to me that he would not have fully understood all of the obligations he was undertaking and the requirements of the law. As I say, I've been doing this work for 25 years, and yet I've only had maybe four of these cases. And the only reason why this issue appeared to me is because I was educated by a self-represented party, a spouse, roughly three years ago in a trial. State court judges do not get training on these affidavits or their impact, and, as counsel has pointed out, there's very little case law on it.

And so everyone is doing the best they can without a lot of guidance, but, as I say, it's hard for me to understand why a court setting child support, if it

knew about the existence of the affidavit, would not take that into account. I think it's a significant issue.

Now, I agree with the *Khan* court that it's not controlling, but it is such a big issue that I don't think it can be ignored, and that's why I believe it's the elephant in the room and why it is a basis to vacate the prior child support order.

I'm going to set this matter on for my motion calendar on November 21st at 1:30. It's a special calendar, because we have some days that we won't have calendars coming up. And, at that point, Ms. Mason can present an order vacating the order of child support. You're the prevailing party here, so it's your responsibility to prepare the order. The best way to do that is for you to prepare an order, send a copy to Ms. Robertson, ask her if she agrees with it, listen to her suggestions as to how it could be better stated and, if you like, incorporate those suggestions, redo the order, get her to sign off on it, bring me an order with her signature. If that doesn't work, then both of you can be here, and I'll hear from you both as to what's right or what's wrong with the order that Ms. Mason prepares.

All we're doing is vacating the child support

order. I anticipate a request for fees in this case. I'm going to want a separate motion from each side telling me exactly what you want, how much you're asking for, what it's based on. You can refer to exhibits in the trial record if you want, or you can submit additional affidavits if you want. And I will need some information as to the financial status of both parties, so I'm going to ask that you both submit a new financial declaration as of November 2016, a court form which shows what your financial situation is, and I will consider that to determine financial situation. If you want to submit more than that, you're welcome to, but you don't have to. I'm fully prepared to determine an award of fees on financial declarations alone.

And then, Mr. Mason, should you choose to seek a new child support order retroactive to the date of the one that's being vacated, you can schedule that for another hearing. I only ask that you do that in the month of December, so that I can be the one to hear it. Because this case is so complicated, I don't want to have to pass it off to someone else.

MS. MASON: Will we put that on your regular motions calendar?

THE COURT: I have a special motion calendar

Monday the 21st at 1:30.

MS. MASON: I mean, if you want us to do the other motion for December.

THE COURT: Oh, for support, yes. I have, I believe, two calendars in the month of December. One is December 9th, and one is December 23rd. Any questions? Ms. Mason?

MS. MASON: So, basically, I understood with the affidavit of support, I have to file in federal court, right? That's what I understand.

THE COURT: If you are looking to receive money as a result of that affidavit, you can file it in state court or federal court, as far as I can tell. And what I'm saying is, if you file it in Thurston County Superior Court, it will get joined with this case. I'm not saying you have to do that or you should do that. I'm just explaining that that's a separate claim, separate from what's going on right now.

MS. MASON: Okay. And another question, it's in December 9 or 23, Mr. Mason will propose new child support order, right, motion?

THE COURT: He hasn't decided to do that. His attorney asked when he could do that. I told her those were the two calendars I have in December, so

I'm inviting him to schedule it for one of those days. You'll get notice of this if he files.

MS. ROBERTSON: Okay.

THE COURT: Any other questions?

MS. ROBERTSON: No, that's fine.

THE COURT: Ms. Robertson? Thank you. Court will be in recess.

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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, AURORA J. SHACKELL, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

1. I reported the proceedings stenographically;

2. This transcript is a true and correct record of the proceedings to the best of my ability, except for any changes made by the trial judge reviewing the transcript;

3. I am in no way related to or employed by any party in this matter, nor any counsel in the matter; and

4. I have no financial interest in the litigation.

Dated this 20th day of April, 2017.

_____
AURORA J. SHACKELL, RMR CRR
Official Court Reporter
CCR No. 2439

The 2016 trial's ruling on CR 11(A) sanction.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON
FAMILY AND JUVENILE COURT

In re the Matter of:	
JOHN MASON,	COURT OF APPEALS NO. **49839-1-II**
Petitioner,	
vs.	THURSTON COUNTY NO. 07-3-00848-0
TATYANA MASON,	
Respondent.	

TRANSCRIPTION OF AUDIO RECORDING

BE IT REMEMBERED that on December 9, 2016, the above-entitled matter came on for hearing before the HONORABLE CHRIS WICKHAM, Judge of Thurston County Superior Court.

Reported by: Aurora Shackell, RMR CRR
Official Court Reporter, CCR# 2439
2000 Lakeridge Drive SW, Bldg No. 2
Olympia, WA 98502
(360) 786-5570
shackea@co.thurston.wa.us

APPEARANCES

For the Petitioner: LAURIE GAIL ROBERTSON
Law Offices of Jason S. Newcombe
10700 Meridian Ave. N, Ste. 107
Seattle, WA 98133-9008

For the Respondent: TATYANA MASON
(Appearing Pro Se)

(After hearing trial, the court ruled as follows)

--oOo--

THE COURT: We're next going to go to the motion calendar, and the first matter is Mason and Mason. This seems to be a day for electronic challenges. I'm waiting for the record to be called up here. I have my notes, so maybe I'll just begin.

I noted -- as you know, I issued a written decision, an actual order, and when I was looking at it the other day, I noticed it was on Ms. Robertson's pleading paper, because she sent me the -- her associate sent me the electronic order, and that's what I worked from. And so I apologize, it looks like the order that you created. I know that it wasn't the order you created, just so it's clear that that was an order that the court created on your pleading paper.

And that order was entered on November 23rd, and it set another hearing, which is today, to take up the issue of attorney's fees and costs. And I have -- the motion is, I believe, from Ms. Mason. I don't believe that Mr. Mason has a similar motion, does he?

MS. ROBERTSON: Correct. No.

THE COURT: Okay. So, Ms. Mason, this is your

motion. Go ahead.

MS. MASON: Yes. Thank you. Your Honor, I am requesting to grant me fees under CR 11, $82,000, including 45,000 for my own time preparing for this trial. I am requesting -- as you know, Your Honor, CR 11(b) covered my conduct as a pro se, and I have done my best to do this job, and I have prevailed due to my diligent work and passion.

In contrast, Mrs. Robinson had ignored her duties under CR 11(a) as an attorney. Under CR 11(a)(1), Mrs. Robinson has made many misrepresentations that were not grounded in facts. On July 7, 2016, Mrs. Robertson filed Ms. Seifert's declaration, who failed to acknowledge the existence of Department of Justice before Department of Homeland Security. Ms. Seifert, who claimed herself as an immigrational expert for 27 years does not know immigrational law and does not know what's the year I-864 was enforced.

So single trip to my mother's funeral in 2004, they said, terminated obligation under I-864, Mr. Mason, but, however, she refused to mentioned, if I depart permanently. And other issues there. Is this because Ms. Robertson instructed Ms. Seifert to falsely testify in every aspect of law in this case?

John has consistently prejudiced himself by

stating in several of his declarations signed under oath that he never signed affidavit of support. Even the physical fact was presented at the trial. John still denied it. On April 29th, 2016, this court directed both parties to request I-864 from FOIA, Freedom of Information Act, and John decide to trick this case -- this court again. Instead of I-864, he request I-129, which is fiancee visa, and which was valid only for 90 days, and so it was expired before August 1999. So, of course, FOIA denied his request.

Next, Ms. Robertson helped John to continue his control, continue his abuse and prejudice in this court so many times by writing for him and on his behalf -- on his behalf submitted to the court all information what is just manipulating declarations signed under oath -- under oath with, "John does not sign affidavit of support."

Under CR 11(a)(2), Ms. Robertson made many unwarranted and bad faith arguments. Ms. Robinson shows a lack of competence before this trial. Ms. Robertson misled this court on several cases during the trial, as *Davis v. Davis* case, which -- she's supporting her argument with *Davis v. Davis* case, where couple were just separated, but they're still married. In our case, we're divorced. This case

does not apply to our case.

So another one, she misquoted case *Liu vs. Mund* where it's basically sponsor. A sponsor cannot mitigate I-864, but Ms. Robertson stated everything around backward. Ms. Robertson was wrong on the *Shumye vs. Felleke* case again during the trial and tried to enforce the income, which does not apply to both for me.

So is Ms. Robinson doing this because -- on purpose or is it because of the lack of competence of the law?

Ms. Robertson failed to understand and follow the law in this case and it's done in bad faith or it's through the gross incompetence as shown by use of the argument that is not warranted by the existing law CR 11 A(3). Many of Ms. Robertson's tactics in this case were done to increase my costs and put me even more in deeper economic hardship, to unnecessarily delay justice, to purposefully harass me for -- and for other inappropriate purposes.

So Ms. Robinson is not for the first time actually ambushed me at this court since 2007. For example, before the trial, it's five minutes before trial, she actually served me with the trial brief. When I served her -- which she knows was on October 13th, it

was exchanged the documents between parties. So she didn't do that. I filed in the court my paperwork, and on Friday, I submit to her, but she refused to give it to me. So it's okay for Ms. Robertson to serve her legal documents through e-mail when she wanted them, but she does not accept from me any legal documents through the e-mail. She wants priority mail, which costs 6.45 for each time.

THE COURT: You have three minutes left. Do you want to save some time to respond to her?

MS. MASON: Sure.

THE COURT: Your request, as I understand it, is for --

MS. MASON: Attorney's fees and several --

THE COURT: I have $81,751 for your costs.

MS. MASON: Right. This is including --

THE COURT: And that includes the CR 11.

MS. MASON: Well, this is basically, I present the information about my covering my time, because I believe why my time has less value than Ms. Robertson's time. And this because I didn't want to go the trial. Ms. Robertson presented her declaration which basically falsely represent the facts of the laws.

THE COURT: I have a document that you

submitted that shows a total of $81,751. Is that the number?

MS. MASON: Yes. Correct.

THE COURT: All right. Ms. Robertson, go ahead.

MS. ROBERTSON: First of all, we provided this per my client's declaration as well as a memoranda of law that clearly outlines the law on the request that has been made by the respondent. First and foremost, under the law, a pro se litigant cannot be awarded attorney's fees. They are not an attorney. They have not incurred attorney's fees. And multiple cases have ruled on that. We have those cases outlined in our brief, including *In re Marriage of Brown*, *West vs. Thurston County*, *Mitchell vs. Washington State Department of Corrections*. All of those are in our briefs. In fact, to award a pro se litigant attorney's fees would be contributing to them practicing without a license, which violates the law.

So Ms. Mason coming in here and requesting $45,000 in attorney's fees for herself, as well as an additional $15,000 to allegedly correct her immigration, are not proper for this motion. When the court set this motion at the end of the hearing,

it was set specifically to address expert fees. Those fees had been testified and addressed to you at the trial with regards to Mr. Gairson. That's what this court set the motion for. That's what was anticipated what would be argued. For Ms. Mason to come before this court and request attorney's fees for herself, a non-attorney, is completely improper. For her to request $15,000, as she says, to have her immigration corrected, is completely outside the scope of this matter.

So what the court needs to look at, really, are Mr. Gairson's fees versus Ms. Seifert's fees, and we've argued that, again, in the memo as well as in my client's declaration.

Under the law, this court needs to really look at the reasonableness of Mr. Gairson's fees. Even he testified at trial that his fees were unreasonable, that they were excessive, that he had spent over 20 hours just meeting with Ms. Mason. Really, he came into this court allegedly as an expert. He was admitted as an expert in immigrational law to explain parts of immigration al law to this court. He testified -- excuse me -- he testified that he did not know the history of this case. He testified that he was not representing Ms. Mason. He testified that

he didn't even know the nature of the motion before the court, that his role was to come in and talk about immigration law where he said he was an expert in. And yet, he charged 41 hours of his time and is seeking roughly $15,000 in fees.

Those fees don't apply to this case. If the court wants to make a reasonable comparison, we provided Ms. Seifert's bill. Ms. Seifert's bill is roughly $2,500 for doing exactly the same thing, for coming to this court and providing expert opinion on immigration law.

Now, those were the experts on immigration law, and if the court recalls, when the trial started, the court itself said that this was not an area the court had a lot of knowledge in, that this was not an area of law that comes before the family court, and that's why this court was looking at those two people to come in and offer their testimony and offer their information. There was never any bad faith. There was never any finding of bad faith by this court or that anything was manipulated.

My client provided responsive materials because we got Mr. Gairson's report the day before trial, something that we never even anticipated, because this was a motion to vacate a 2013 order. This

wasn't a motion for this court to decide what my client owed under the affidavit. And if the court looks back at the report that was provided by Mr. Gairson, a large part of that report, that's what that's all about. It was at that point that my client was required to provide responsive materials and to bring in Ms. Seifert. Prior to that, it was never his intention to do that, because that's not what the motion was about.

On the day of trial, we provided full copies to the court, to opposing party, of our exhibits. Our exhibits consisted of orders that had previously been entered before this court. There was nothing surprising about it. There was nothing new about it. We never got copies of Ms. Mason's exhibits, and the court can recall as we went through the trial, every time she presented an exhibit, we had to look at it because, previously, we had never received a copy of it.

So for her to make claims that there was any bad faith in this action, which my client wasn't the one who filed three years after the order was entered, is completely unreasonable. And, again, the case law is clear, she doesn't get attorney fees. So, really, what the court is looking at are the expert fees that

should be awarded to either party for their experts. Mr. Mason's position is that they both brought in experts, they should both be responsible for the experts that they provided to this court without an award of fees to either party.

Also, under 26.09.140, the court does have to look at ability to pay. My client solely supports the two children of these parties and now has lost a judgment for child support, support that should have gone to these children. He has incurred debt because of that. He gets nothing. He gets zero from Ms. Mason to support their children, and that needs to be a consideration. This court said it was requesting financial declarations from the party. We provided financial declarations. We provided bank statements. We provided pay records. We provided tax returns. All we got from Ms. Mason was a financial declaration.

So the court should look at the evidence before it and make a determination that each party should be responsible for their own expert fees, and there should be no additional award of fees to either party. Thank you.

THE COURT: All right. Ms. Mason, you have three minutes.

MS. MASON: Yes. As you see, Your Honor, Mr. Mason already contradicts himself by saying that he has very little income. However, he still was able to buy overly-aggressive attorney, and he still was able to pay a second attorney, Ms. Seifert. So two attorneys have been fighting me on the issues of law and interpretation of facts, so I had no other choice as to hire expert because I know the unethical behavior of Ms. Robertson since 2007.

So they compare Lisa Seifert and Jay Gairson, but it's absolutely incomparable because you can see -- you did see how Lisa Seifert's report. She does not know the law or she was instructed by Ms. Robertson to misrepresent every fact in this case and lost. Mr. Gairson actually, he took time. He actually looked at my old immigrational case. He had to view all those documents, and he takes time to make sure everything lies was not changed. So he did a very good job. Instead of Lisa, who spent for two hours and testified on every aspect of law is wrong. And Mr. Gairson, who actually prepared the report and spent time to explain everything, and in result, it sounds like what Ms. Robertson completely or she is incompetent in the law, or she did this on purpose in the bad faith to mislead, misquote, misinterpret the

law. And I am really asking what Ms. Robertson has to discipline by abuse of CR 11(a) as an attorney. Because I was following the duty my conduct under CR 11(b) as a pro se, but Ms. Robertson decide to not follow and ignore this conduct under CR 11(a) as an attorney.

So, also, I submitted --

THE COURT: You've got 30 seconds left.

MS. MASON: Yes. I submitted my paperwork, and based on equal justice, the litigant pro se can actually have -- based on federal statutes, can actually award at least attorney fees. And that's an established in law, and I provided this declaration. And, also, I complete -- I was basically calculated how I got this 45,000 is basically from July 8th to November 2nd is 15 weeks, multiply by five days a week and six hours per day, is 450 hours. And I multiplied by a hundred, because based on mean --

THE COURT: You're out of time.

MS. MASON: Yes.

THE COURT: I want to start by saying that I know you have spent a great deal of time on this case, and you ultimately prevailed in the hearing that we had, and that was in no small part due to the effort that you put into it. I've already

acknowledged the language barriers that you face, and you were still able to marshal the information together to present a strong case. However, this is a request for fees, and Washington law does not award -- does not compensate parties for the time that they spend preparing their case. You're not an attorney, as Ms. Robertson has said, and so your fees cannot be awarded by this court. And so all of the work that you did clearly was valuable, but I do not have the authority to compensate -- to require Mr. Mason to compensate you for it. That's the first piece.

So if I go through your summary here, I believe the only -- well, I can probably cover mail costs. There is such a thing as statutory attorney's fees which I can probably add on here. But I don't know that I can cover any of these other costs, other than Mr. Gairson. Mr. Gairson was a professional expert that you retained for the purpose of proving your case. He clearly presented good evidence for you, and so he was competent at what he did. I understand Ms. Robertson's point that even by his own admission, he spent more time with you than he thought was normal or customary under the circumstances, but I believe that that time probably was necessary because

of, again, your language barriers and also the complicated nature of this case. It's not as if he was consulting with another attorney; he was consulting with someone who he essentially had to educate as to the law so that you could bring the information yourself to the court.

And when I look at all of that, I look at his total fee of $12,800, in the scope of this case, with the degree of adversity presented in this case, I think that's a reasonable figure. So I will adopt that figure as reasonable. So I will allow that as a cost of litigation, along with your priority mail costs, which you've listed as $71, and I will add something called statutory attorney's fees.

And Ms. Robertson, help me out here with the number. It's a standard number in the statute. I haven't looked at it for some time.

MS. ROBERTSON: She's -- she's not entitled to that.

THE COURT: I think any party is.

MS. ROBERTSON: She's not an attorney.

THE COURT: I recognize that, but I think it goes with judgment.

MS. ROBERTSON: I mean, if you're talking about a contempt judgment, there's a $100 addition.

THE COURT: No, I'm talking about -- that's okay. I'm not going to order something that I don't have the authority in front of me. If you want to find the authority for this, Ms. Mason, I'll add it on to what I'm going to award. I will award you two-thirds of Mr. Gairson's costs on the financial -- relative financial positions of each of you. You are essentially unemployed and homeless. Mr. Mason earns roughly $4,500 a month net. And so it's reasonable to me that he pay two-thirds of that cost and you pay one-third.

As to the remaining one-third, I will impose the additional one-third under Civil Rule 11, and I'm doing that based on a declaration that was filed by Ms. Robertson July 6th. It's a statement of Mr. Mason, and I'm going to read in pertinent part. This is from the first page of that declaration, "She claimed in part that I have filed an I-864 support affidavit when she came to this country, and, therefore, I should have been supporting her, and she never should have been required to pay child support. Nothing could be further from the truth." That's his statement.

Then on the second page, "I believe the I-864 was a document I may have started to complete, but it was

not what I was required to file and so I did not complete or file the document." And then later on that page, "Respondent claims that I would have had to complete I-864 as part of the fiancee visa application, but that is not true." And then on page three, "Respondent's representation that I had to have filed the I-864 form is simply not true."

Those statements raise the issue of the existence of the I-864, which is what required this court to have a three-day trial over whether or not that document existed. Now, clearly clients are entitled to aggressive advocacy, but I believe the advocacy in this case presented an untrue presentation to the court which created unnecessary litigation. And I believe that that is a violation of the portion of CR 11 which says that the signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion or legal memorandum and that, to the best of the party's or attorney's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, (1), it is well grounded in fact; (2), it is warranted by existing law or a good faith argument; (3), it is not interposed for any improper purpose such as to harass

or to cause unnecessary delay or needless increase in the cost of litigation." I believe those statements were made for that purpose, and, therefore, I believe CR 11 does apply here.

The remaining one-third of Mr. Gairson's fee, I will assess to Mr. Mason because of CR 11 violations. So I will grant a judgment for the entire cost of Mr. Gairson's services.

MS. ROBERTSON: And there's no consideration that she forged U.S. documents? And we provided proof that she forged --

THE COURT: Ms. Robertson, be careful here. You have already pushed this issue farther than you ever should have. Your client and, by extension, you should have known there was an I-864 regardless of what you were looking at, and you put this court and Ms. Mason through three days of trial on that issue.

MS. ROBERTSON: For the record, my client was never going to ask for the trial, and when this court asked us at the beginning of the trial why we couldn't submit this on affidavits, my client agreed it should have been something that was submitted on affidavits, and it was Ms. Mason who requested that the court go forward with trial --

THE COURT: This court set the trial itself,

if you'll recall, because I was concerned about the issues that you and your client had raised, and I felt there was no way that I could resolve those issues without a trial with witnesses in person. That trial was unnecessary, and it was raised solely because of the allegations that were made that were baseless.

This is the end of this hearing. Ms. Mason, if you have an order to present, I will sign it this morning after Ms. Robertson takes a look at it.

MS. MASON: Yes, I do.

THE COURT: You need to show it to Ms. Robertson first.

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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, AURORA J. SHACKELL, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

1. I received the electronic recording from the trial court conducting the hearing;

2. This transcript is a true and correct record of the proceedings to the best of my ability, except for any changes made by the trial judge reviewing the transcript;

3. I am in no way related to or employed by any party in this matter, nor any counsel in the matter; and

4. I have no financial interest in the litigation.

Dated this 18th day of March, 2017.

AURORA J. SHACKELL, RMR CRR
Official Court Reporter
CCR No. 2439

PRO-SE

May 31, 2021 - 5:45 PM

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Appellate Court Case Title:	John Mason v Tatyana Mason
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Address:
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