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64529-3

NO. 64529-3-I

COURT OF APPEALS, DIVISION 1,
OF THE STATE OF WASHINGTON

KAREN A. STEVENSON,

Appellant / Cross-Respondent,

v.

DAVID M. CANNING, PERSONAL REPRESENTATIVE OF THE
ESTATE OF MARY LOUISE CANNING,

Respondent / Cross-Appellant.

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COURT OF APPEALS
DIVISION 1
STATE OF WASHINGTON
FILED

On appeal from the Superior Court of King County,
the Honorable Chris Washington presiding

BRIEF OF RESPONDENT / CROSS-APPELLANT
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ORIGINAL

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I. INTRODUCTION

The length of Karen Stevenson's brief (with its 54 assignments of error) should not obscure the fact that this lawsuit is a simple case: Stevenson claimed that the Estate of Mary Canning owes her money; David Canning, as representative of the Estate, sought to take her deposition to discover the facts underlying her claim; and Stevenson refused to have her deposition taken. Throughout the twisted history of this litigation, with its 457 docket entries at the trial court, 113 docket entries in the current appeal before this Court, 73 docket entries in the companion appeal before this Court (Appeal No. 65121-8), and 59 docket entries in the prior appeal (Appeal No. 58341-7), Stevenson has never acknowledged Canning's right under the Civil Rules to take her deposition.

In this appeal, Stevenson now conjures up two new theories why Canning was not entitled to take her deposition: the mandate in her prior appeal did not permit Canning to engage in discovery, and the lack of a case schedule order divested the trial court from having any authority to act until the order was entered. These new theories lack any semblance of merit and are contradicted by the fact that Stevenson engaged in discovery and filed motions before the trial court during the relevant time period. Stevenson's appeal is nothing more than a continuation of her abusive

litigation tactics and this Court should affirm the trial court's dismissal of the lawsuit. The Court should further reverse the trial court's reduction of the award of attorneys' fees to Canning.

II. ASSIGNMENT OF ERROR ON CROSS-APPEAL

Error: The trial court erred in failing to award all of the fees and costs incurred by Canning that it found were reasonable and necessary.

Issue: Given the trial court's findings and conclusions in its October 27, 2009 order granting an award of fees and costs that Canning incurred fees and costs in the amount of \$29,026.50, and that those fees and costs were reasonable and necessary, did the court abuse its discretion by reducing the award of fees and costs to \$9,013.00?

Issue: Given the trial court's findings and conclusions in its January 22, 2010 order granting a supplemental award of fees and costs that Canning incurred fees and costs in the amount of \$10,899.07, and that those fees and costs were reasonable and necessary, did the court abuse its discretion by reducing the award of fees and costs to \$5,230.07?

III. STATEMENT OF THE CASE

- A. This case was dismissed because Stevenson repeatedly refused to appear for her deposition and to comply with the trial court's orders.**

The tortuous history of this case began on January 3, 2005, when Karen Stevenson filed a creditor's claim against the Estate of Mary Canning in Case No. 04-4-05181-6 SEA. CP 21-22. As personal representative, David Canning denied the claim and Stevenson filed the present lawsuit on May 20, 2005. CP 23. Stevenson then began a pattern of discovery abuse that ultimately led to two separate dismissals of her lawsuit.

Canning originally noted Stevenson's deposition for November 22, 2005. CP 176, 181-83. On November 8, prior to the deposition, Stevenson's then-counsel, Gayle A. Murray Brenchley, served a notice of intent to withdraw as counsel for Stevenson. CP 1165-66. Canning then continued the deposition to November 30, nine days after the proposed effective date of Brenchley's withdrawal. CP 176, 185-87. After Stevenson objected to the withdrawal of her attorney on November 18, CP 1167, Canning cancelled Stevenson's deposition scheduled for November 30. CP 238-40.

The trial court entered an order permitting Brenchley's withdrawal on December 9, 2005. CP 1168-69. Canning then re-noted Stevenson's deposition for January 12, 2006. CP 189-91. After Stevenson failed to appear, CP 177, Canning filed a motion to compel Stevenson to appear for

her deposition. CP 197-201.¹ Prior to the hearing, a new attorney, James Bittner, served a notice of appearance on behalf of Stevenson² and requested that the motion to compel be stricken. CP 193-95, 211, 1822. Canning's counsel agreed and to accommodate Bittner's request for time to prepare, rescheduled Stevenson's deposition for March 2, 2006. CP 177, 203-05, 211, 1822.

On February 23, 2006, Bittner filed a notice of intent to withdraw as counsel for Stevenson. CP 1188-90. The notice stated that the withdrawal would become effective on March 6, 2006 unless Stevenson objected. CP 1188-89.³ On March 2, 2006, while still representing Stevenson, Bittner appeared at the offices of Canning's counsel for Stevenson's deposition. Stevenson again failed to appear. CP 177, 207-09.

¹ The Motion to Compel was inadvertently filed under the probate case number, No. 04-4-05181-6 SEA, for the Estate of Mary Louise Canning. CP 197. The declaration of counsel in support of the motion was filed under the proper case number, No. 05-2-16751-3 SEA. CP 1170-84.

² Although the Notice of Appearance was not filed with the Court until February 14, 2006, CP 1185-87, it was mailed to defendant's counsel on February 2, 2006 and received on or before February 5, 2006. CP 193-95.

³ Stevenson filed an objection on March 6, CP 1191-92, and the trial court entered an order on March 28, 2006 permitting Bittner to withdraw. CP 218-19.

Canning filed a second motion to compel on March 16, 2006. CP 210-15. On or about March 24, 2006,⁴ the trial court entered an order directing Stevenson to appear for her deposition:

[I]t is hereby ordered that Karen Stevenson contact James E. Hurt and immediately provide available dates for her deposition which must be taken not later than April 17, 2006. In the event that she does not appear and have her deposition taken prior to that time, then pursuant to Civil Rule 37(b)(2)(C) her Complaint may be dismissed with prejudice upon proper motion filed with this Court.

CP 220-21.

After Stevenson failed to comply with the Court's order, Canning filed a motion to dismiss Stevenson's complaint. CP 222-27. The trial court granted the motion on May 4, 2006 and dismissed the lawsuit with prejudice. CP 231-32. Stevenson appealed and this Court reversed the decision because the trial court did not "make and affirmatively state on the record findings of a willful violation, the prejudice to the other party, and the court's consideration of lesser sanctions" as required under *Rivers*

⁴ The hearing for the motion to compel was noted for March 27, 2006, but the order was dated March 24 and was filed on March 28. Under KCLR 7(b)(3)(C), Stevenson's responsive pleadings were due on March 23, 2006, and she filed such pleadings on March 22. CP 216-17, 1193-96. Canning did not file a reply brief.

v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 41 P.3d 1175 (2002).⁵

After the mandate was issued on August 20, 2008, CP 241-43, Canning moved to reassign the case and establish a new case schedule. CP 244-57.⁶ Stevenson “join[ed] with Defendant Canning” in the motion and “ask[ed] th[e] court to enter a new case schedule order allowing fair trial of this case.” CP 1859-61. The court granted the motion on September 16, 2008, lifting the stay and ordering the court clerk to assign the case to a new judge and establish a new case schedule. CP 258-59. The case was assigned to Judge Chris Washington. CP 1197.⁷ On

⁵ The Court’s decision was based on Canning’s motion on the merits to reverse because Canning recognized that the order dismissing the complaint was not supported by adequate findings. *See Stevenson v. Canning*, No. 58341-7-I, 2007 Wash. App. LEXIS 1324 (May 29, 2007) (unpublished). Although the decision was in her favor, Stevenson inexplicably moved to reconsider and later filed a petition for review to the Supreme Court. This Court denied her motion for reconsideration and the Supreme Court denied her petition for review. *See Stevenson v. Canning*, 163 Wn.2d 1035, 187 P.3d 269, 2008 Wash. LEXIS 574 (June 3, 2008).

⁶ The case could not go back to Judge Richard Jones, who had earlier granted Canning’s motion to dismiss, because Judge Jones was confirmed as a judge for the U.S. District Court, Western District of Washington in October 2007.

⁷ The clerk’s office did not issue a new case schedule as ordered, and on November 7, 2008, Stevenson moved for entry of a schedule:

KAREN STEVENSON . . . asks this Court to enter a new/amended case schedule order. DAVID CANNING

October 7, 2008, Stevenson filed a motion to disqualify Canning's counsel due to an alleged conflict of interest. CP 260-65. The trial court denied the motion by order filed on October 29, 2008. CP 276-77.

On October 13, 2008, Canning served a notice on Stevenson to appear for a deposition on Friday, October 24, 2008. CP 1198, 1203-05. Stevenson did not appear. CP 1198-99, 1207-11. After Canning's counsel complied with the requirements of CR 26(i), CP 1199, 1213-14, 1216-17, Canning filed a third motion to compel Stevenson to appear for her deposition on October 29, 2008, noting the hearing for November 12, 2008. CP 278-86. Stevenson responded by filing a motion to strike "portions of" the declaration of Canning's counsel,⁸ CP 287-92, which the trial court denied, CP 315-16, and by filing a response in opposition to the

through his attorney filed a motion for a new/amended case schedule order, and Stevenson joined in the motion, but no order apparently has been entered.

CP 2302. The order granting the motion and establishing the new case schedule was entered on November 26, 2008. CP 2315-16.

⁸ Stevenson based her motion to strike on her assertion that Canning's counsel falsely stated that (1) she did not provide any prior notification that she would not attend her deposition, and (2) she did not contact him on October 28, because she sent numerous letters and e-mails to Canning's counsel. CP 287-91, 295-96. Canning's counsel responded by providing copies of Stevenson's communications to him prior to the scheduled deposition, none of which stated that she would not attend, and clarified that Stevenson did not contact him to either participate in the CR 26(i) discovery conference or state that she was not available at the proposed time. CP 303-07, 1230, 2354-55, 2358-81.

motion to compel. CP 293-302. Her response did not identify any reason that she should not attend her deposition.

The court granted the motion to compel on November 17, 2008, but the order was not filed until November 21, CP 312-14, and Canning's counsel did not receive a copy until November 25. CP 651. The November 17 order required Stevenson to provide available dates for her deposition to be taken on or before November 26, 2008. Given the date the order was received, it was not possible for Stevenson to comply with its requirements. Accordingly, on November 26, Canning moved to amend the order to give Stevenson a reasonable opportunity to comply. CP 651-53. Although the hearing was noted for December 10, 2008, an order granting the motion to amend was not signed and filed until February 10, 2009. CP 1233-34. The February 10 order stated:

1. Karen Stevenson is directed to contact Kevin B. Hansen, defendant's counsel, within 14 calendar days from the date of this Order (defined as the date the Order is signed) and provide at least 5 possible dates (during normal business hours on days that the Clerk's Office is open) on which her deposition could be taken, provided that the deposition must occur within 35 calendar days from the date of this Order.

2. Karen Stevenson is ordered to appear for her deposition at the office of defendant's counsel on the date that is chosen by defendant's counsel (of the 5 or more dates referenced above).

3. In the event that Karen Stevenson does not appear and have her deposition taken prior to that time, then pursuant to CR 37(b)(2)(C) her complaint may be dismissed with prejudice upon proper motion filed with this Court.

CP 1233-34.

On February 10, 2009, Canning's counsel e-mailed Stevenson, informing her of the Court's order compelling her to appear for her deposition. CP 1250, 1256. Canning's counsel also mailed the order to Stevenson on February 10, by both first class and certified mail. CP 1240-50. Both prior to and after receiving the February 10 Order, Canning's counsel attempted to persuade Stevenson to provide possible dates for her deposition. CP 1251, 1258-60.

After Stevenson refused to comply with the Court's order, Canning's counsel sent another e-mail to Stevenson on February 26, 2009, asking her to either call him at 9:30 a.m. on Wednesday, March 4, 2009 in order to comply with KCLR 37(e) or provide another, more convenient time for the telephone conference. CP 1251, 1262. Stevenson received the February 26 e-mail, as evidenced by her e-mail dated February 27, 2009. CP 1251, 1264. Ms. Stevenson neither suggested an alternative date and time nor participated in the scheduled telephone conference. CP 1251.

On March 9, 2009, Canning filed and served a motion to dismiss Stevenson's lawsuit. CP 349-71. The motion was accompanied by a notice of hearing as required by KCLR 7(b)(5)(A), setting the hearing date as March 19, 2009, CP 1235-36, and a proposed order, as required by KCLR 7(b)(5)(C). Stevenson responded to the motion by (1) filing a motion on March 12 to continue the hearing, CP 690-93; (2) filing a response on March 16 in opposition to the motion to dismiss, with a proposed order, CP 386-92; and (3) filing a declaration on March 18 in opposition to the motion to dismiss, CP 1710-21. On April 6, 2009, the trial court granted Canning's motion and dismissed the lawsuit with prejudice. CP 424-33.

Canning subsequently filed a motion for award of attorneys' fees and costs on April 13, 2009, noting the hearing for April 23. CP 68-70. The motion was supported by a declaration of Canning's counsel. CP 30-67. Stevenson responded by (1) filing a motion on April 17 to continue the hearing, CP 76-93; and (2) filing a response on April 21 in opposition to the motion for fees and costs, CP 94-124. The trial court granted Canning's motion for fees and costs by an order that was signed on October 27 and filed on October 29, 2009. CP 133-135.

After the dismissal of this case on April 6, 2009, the trial court docket has ballooned as Stevenson bombarded the court with countless

motions for reconsideration, motions to strike, motions to revise, objections, and letters to Judge Washington. CP 76-93, 436-81, 551-69, 576-92, 628-37, 751-54, 766-86, 791-823, 828-53, 870-904, 939-1009, 1061-79, 1091-95, 1742-45, 1899-1905, 1909-15, 1937-41, 1963-64, 2000, 2007-22, 2044-54, 2067-69, 2135-49, 2221-28, 2234-45, 2246-72, 2280-92.

On December 21, 2009, Canning filed a motion for a supplemental award of attorneys' fees and costs, CP 142-49, supporting the motion with a declaration by his counsel. CP 150-60. The hearing on the motion was noted for January 8, 2010. CP 1740. Stevenson responded by: (1) filing a letter to Judge Washington on December 24, apparently arguing that Canning was equitably stopped from seeking additional fees, CP 1742-45; (2) filing "cross-motions" on December 28 to strike portions of counsel's declaration and to continue the hearing, CP 939-51; and (3) filing a reply on January 6, 2010 in support of her "cross-motions," CP 1746-67. Canning filed a reply in support of his motion on January 7. CP 161-70. The trial court granted the motion for fees and costs by an order that was signed on January 22 and filed on February 11, 2010. CP 171-173.

B. Stevenson is continuing a history of abusive litigation tactics.

This case is not the first time Stevenson has subjected the legal system to frivolous and harassing litigation that wastes the time and

resources of the court and her opponents. Stevenson has had a long-term relationship and cohabitates with James Canning, the brother of personal representative David Canning. CP 1237-38. In *Delany v. Canning*, 84 Wn. App. 498, 929 P.2d 475 (1997), Stevenson and James Canning filed an appeal characterized as “totally without merit” and “frivolous” by Division III of this Court. *See id.* at 510. James Canning, who was at that time a licensed attorney, represented both himself and Stevenson at the trial court level. *See id.* at 501. The trial court imposed various sanctions against Stevenson and James Canning for their “inexcusable discovery abuses,” described by the trial court as follows:

42. Mr. Canning’s acts not only resulted in information not being available to the other necessary parties in this case, his partners, but he kept the facts from the court and impeded the determination of this case.

43. Mr. Canning’s conduct, stone walling, foot dragging and obfuscation has occurred from beginning to end in this case with the result that equity requires attorneys fees be paid by Mr. Canning.

44. Mr. Canning’s acts have been done in bad faith and with an element of wantonness.

Id. at 504. Following the Court of Appeals decision, Stevenson and James Canning filed “numerous motions” as well as petitions for review to the Supreme Court. The Supreme Court, in *Delany v. Canning*, 131 Wn.2d 1026, 937 P.2d 1101 (1997), denied the petitions for review, denied the

various motions, and imposed further sanctions on both Stevenson and James Canning for their frivolous pleadings.

Although James Canning is not officially a party in this lawsuit, it is clear that he and Stevenson are again conjoined in vexatious litigation. Between April 21, 2005 and January 26, 2008, James Canning sent a total of 175 e-mails and letters to the law firm of David Canning's counsel on behalf of Stevenson regarding her creditor's claim and this lawsuit. CP 1266-1442. Although David Canning's counsel asked James Canning to provide a single, coherent statement of his concerns, he refused to do so. CP 1444-47. Stevenson has also sent voluminous correspondence not only to the law firm of David Canning's counsel, CP 1472-1578, but to the trial court as well. CP 738, 751, 759, 765-86, 791-823, 844-50, 870-78, 887, 925, 964, 997-1001, 1005-1007, 1621-1709, 2000, 2007-19, 2226-28, 2246.

Despite her refusal to appear for her deposition, Stevenson made full use of the discovery process for her own benefit. She served two sets of requests for admissions on Canning and raised concerns with Canning's responses to her first set of discovery requests. CP 1252-53, 1580-87, 1601-03. Canning timely responded to her discovery and her concerns about earlier discovery responses. CP 1252-53, 1589-99, 1605-10, 1612-19.

C. In both orders awarding attorneys' fees and costs to Canning, the trial made specific findings that hourly rates of Canning's counsel were reasonable and that the amount of time spent providing legal services were reasonable and necessary.

In its October 27, 2009 order, the trial court reviewed the detailed billing records submitted by Canning's counsel, CP 134, ¶¶ 2-4, and made the following findings and conclusions:

- “[T]he hourly rates charged by Mr. Canning’s counsel are comparable to or less than rates charged by other King County firms for lawyers for similar experience and background, and are thus reasonable.” CP 134, ¶ 5.
- “Based on the Court’s review of the description of the services performed, the Court finds that no hours for which fees are sought include duplicative efforts, unproductive time, or time on issues unrelated to the lawsuit.” CP 134, ¶ 6.
- “The Court further finds that Mr. Canning has incurred a total of \$1,013.00 in recoverable costs in this litigation.” CP 134, ¶ 6.
- “The Court concludes that the total hours expended by [Canning’s counsel] in this lawsuit were reasonable and necessary and that the total amount of fees requested by Mr. Canning for the legal services, \$28,013.50, and that the total amount of costs requested by Mr. Canning, \$1,013.00, are reasonable.” CP 135, ¶ 7.

Despite these findings and conclusions, the trial court only awarded a total of \$9,013.00 in fees and costs. CP 135.

In its January 22, 2010 order, the trial court reviewed the detailed billing records submitted by Canning's counsel for the time period after April 22, 2009, CP 172, ¶¶ 2-4, and made the following findings and conclusions:

- “[T]he hourly rate charged by Mr. Canning’s counsel is comparable to or less than rates charged by other King County firms for lawyers for similar experience and background, and is thus reasonable.” CP 172, ¶ 5.
- “Based on the Court’s review of the description of the services performed, the Court finds that no hours for which fees are sought include duplicative efforts, unproductive time, or time on issues unrelated to the lawsuit.” CP 172, ¶ 6.
- “The Court further finds that Mr. Canning has incurred a total of \$230.07 in recoverable costs since April 21, 2009 in this litigation.” CP 172, ¶ 6.
- “[T]he total hours expended by [Canning’s counsel] in this lawsuit were reasonable and necessary” CP 172, ¶ 7.

Despite these findings and conclusions, the trial court struck language in the proposed order about supplemental fees in the amount of \$10,669.00 and handwrote in the Order that “the award of \$5,000 as attorneys fees in this case is reasonable.” CP 172, ¶ 7.⁹

IV. ARGUMENT

A. **The trial court did not fail to comply with the mandate in Court of Appeals No. 58341-7-I (Stevenson Assignment of Error No. 1).**

Stevenson asserts that, at Canning’s urging, the trial court ignored and refused to comply with the mandate issued by this Court in appeal no. 58341-7-I. Her argument is without merit for the simple reason that the

⁹ The Order goes on, however, to state that “this Court GRANTS a supplemental award to David Canning of reasonable fees and costs incurred in this lawsuit in the amount of \$10,669.00.” CP 173.

trial court complied with the mandate by dismissing the lawsuit as a sanction for Stevenson's unyielding refusal to comply with the Civil Rules and the trial court's orders, and supporting the dismissal with written "findings of a willful violation, the prejudice to the other party, and the court's consideration of lesser sanctions." *Stevenson v. Canning*, No. 58341-7-I, 2007 Wash. App. LEXIS 1324 (May 29, 2007).

Stevenson argues that the mandate specifically required the trial court to provide written findings based solely on the record prior to Stevenson's first appeal. That was not, however, the only option available to the parties after the remand. Other than characterizing Canning's position as a request for a remand "for additional findings," 2007 Wash. App. LEXIS 1324, at *1, this Court did not adopt that request as part of its ruling. Instead, the Court remanded the case "for proceedings consistent with this opinion." *Id.* at *2. Given Judge Jones' confirmation as a federal district court judge in October 2007, it would have been difficult, at best, for a new judge to provide the necessary findings based solely on the record before Judge Jones.

Canning's decision to give Stevenson another opportunity to appear for her deposition was in no way inconsistent with this Court's decision in appeal no. 58341-7-I. It should be noted that in *none* of her materials submitted to the trial court prior to the dismissal of the lawsuit in

April 2009 did Stevenson raise the issue of the court's failure to comply with the mandate.¹⁰ Instead, in response to Canning's Motion to Lift Stay, Assign Case, and Establish New Case Schedule, CP 244-57, Stevenson "join[ed] with Defendant Canning" in the motion and "ask[ed] th[e] court to enter a new case schedule order allowing fair trial of this case." CP 1859-61. Stevenson can hardly complain about Canning seeking to establish a new case schedule with a trial date when she affirmatively requested the same relief.

Stevenson argues that "the mandate did not provide for Canning to engage in discovery." Br. at 34. She fails to explain, however, why *her* version of the mandate allowed *her* to engage in discovery while prohibiting Canning from doing the same. CP 1252, 1579-87, 1600-03.

Ultimately, Stevenson fails to identify how *her* version of what the mandate required would have benefitted her. Had the trial court entered findings based on the record before Judge Jones, her case would have been

¹⁰ As a result, Stevenson waived the issue on appeal. This Court does not review an issue, theory, argument, or claim of error not properly presented to the trial court. *See* RAP 2.5(a); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001). One purpose of the rule is to give the trial court "an opportunity to consider and rule on the relevant authority." *Bennett v. Hardy*, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990). Another purpose "is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials." *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001).

dismissed. Had Stevenson successfully convinced the trial court that the March 24, 2006 order compelling her to appear for a deposition, CP 220-21, was improperly granted, she would still have been required to *later* appear for her deposition. All of her complaints regarding proceedings prior to the first appeal of this case were rendered moot by Canning's decision to give Stevenson yet another opportunity to comply with the rules of discovery.

Even if there was error, the invited error doctrine prohibits Stevenson from setting up an error and then later complaining of it. *See Nania v. Pac. Northwest Bell Tel. Co.*, 60 Wn. App. 706, 709, 806 P.2d 787 (1991). "The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so." *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). When determining whether the doctrine applies, courts consider whether a party "affirmatively assented to the error, materially contributed to it, or benefited from it." *Momah*, 167 Wn.2d at 154. Here, even if the trial court erred by establishing a case schedule with a trial date and by not immediately entering written findings solely based on the record before Judge Jones, Stevenson assented to the error, materially contributed to it, *and* benefited from it. She was given, as *she* requested, an opportunity to pursue her claims to trial, and it was only when she continued the same

conduct that led the trial court to dismiss the case in 2006 that the court again dismissed the lawsuit, albeit this time with the required findings in compliance with the mandate.

B. There was no error relating to any “failure” to enforce the September 16, 2008 order (Stevenson Assignment of Error No. 8).

Stevenson’s contention that Canning “arranged” for the trial court to not enforce the September 16, 2008 order, Br. at 43, is both ludicrous and contradicted by *Stevenson’s* motion for a “new/amended case schedule order.” CP 2302. In *her* proposed case schedule, CP 2304, there is no mention of “the date the findings were to be returned to the appellate court” or any indication that “the matter would be back in the appellate court for further review pursuant to the mandate.” Br. at 43. Instead, Stevenson’s proposed order provided dates for the parties “to prepare for ‘trial.’” Br. at 43; CP 2304. Even if there was error, the invited error doctrine prevents Stevenson from complaining of it on appeal. *See Nania*, 60 Wn. App. at 709; *Momah*, 167 Wn.2d at 153-54. Further, Stevenson failed to raise the issue before the trial court and has thus waived it on appeal. *See* RAP 2.5(a); *Bennett*, 113 Wn.2d at 917; *Lindblad*, 108 Wn. App. at 207; *Demelash*, 105 Wn. App. at 527.

Stevenson argues throughout her brief that Canning was not entitled to engage in discovery and that the trial court had no authority to

compel her to appear for her deposition before a case schedule order was entered. Br. at 22, 46,¹¹ 51, 52, 55, 56, 57, 61, 71, 75. She provides no authority for this proposition and it is contradicted by the fact that *she* engaged in discovery before the case schedule order was entered and filed motions for the court to rule on. CP 260-65, 1252, 1579-87, 1600-03.

C. The trial court did not abuse its discretion in granting Canning’s motion to compel and motion to amend order compelling discovery (Stevenson Assignments of Error Nos. 7, 12, 44).

Stevenson argues that Canning did not comply with the “meet and confer” requirements of CR 26(i) and KCLR 37(e) and that, as a result, the trial court did not have authority to order her to appear for her deposition. Stevenson is wrong. Canning complied with the “meet and confer” requirements, and even if he failed to do so, the trial court still had authority to rule on his motion to compel.

1. Canning complied with CR 26(i).

Shortly after Stevenson failed to appear for her October 24, 2008 deposition, Canning’s counsel sent an e-mail to Stevenson:

Dear Ms. Stevenson:

¹¹ “The trial court had no authority to consider a motion to compel discovery, given that no case schedule order was on file at the time Canning filed the motion to compel discovery, and no case schedule order was in effect at the time the order granting the subject motion was filed.”

Once again, you have inexplicably failed to show up for your deposition that was scheduled for today. Although I do not believe CR 26(i) applies to pro se litigants such as you, I would like to give you an opportunity to explain why you did not appear and when you will appear for your deposition. Please call me at the number below on Tuesday, October 28 at 9:00 a.m. for a discovery conference. If you are not available at that time, please let me know of a more convenient time prior to Tuesday.

CP 1213.¹² On Monday, October 27, Stevenson sent an e-mail to

Canning's counsel:

Mr. Hansen:

The issue of whether your firm is disqualified needs to be addressed. Was an order issued, on the motion to disqualify? In any event, you have an affirmative duty to withdraw because of the conflict of interest.

Regarding discovery conferences, surely this would happen after the issue of disqualification was resolved. I have raised many times now, the problem of James Hurt's handling of the first set of interrogatories, where he caused David Canning's answers to exclude even Mr. Hurt's own knowledge, not to mention the knowledge of other members of your firm, and the other lawyers Mr. Canning has worked with.

Sincerely,
Karen Stevenson

CP 1216. Fifteen minutes later, Stevenson sent another e-mail:

¹² Both CR 26(i) and KCLR 37(e) referred specifically to "counsel" for the parties rather than the parties themselves. Stevenson's contumacious conduct as a *pro se* litigant offers an insight as to why the Supreme Court may not have intended to extend the rule to parties who are not represented by counsel.

Mr. Hansen:

Why would you schedule a deposition when a motion to disqualify your law firm is pending? I would prefer a telephone conference about discovery issues, after an agenda is agreed. This would apply only in the event the court denies the motion to disqualify and you ignore the conflict of interest that obliges your law firm to withdraw.

CP 1217.¹³ Stevenson did not call Canning's counsel as requested on or before October 28. Stevenson never contacted Canning's counsel to identify a more convenient time for a CR 26(i) conference. Instead, Stevenson clearly stated that she would not participate in a conference except according to her own timeline and on her terms. In spite of Stevenson's repeated allegations of discovery abuses by Canning, she never contacted Canning's counsel to schedule a CR 26(i) conference, even after an invitation to do so, and never filed a motion to compel. CP 514, 534-36.

Stevenson asserts that Canning was required, under KCLR 37(e),¹⁴ to file a motion to compel her to attend a "meet and confer" conference

¹³ Stevenson asserts that her communications about a pending motion to disqualify Canning's counsel "for misconduct" and that Canning "should not be conducting a deposition" constituted notice that she would not (or could not) appear for her deposition. Br. at 40. One has only to review those communications to see that no such notice was provided. CP 2354-55, 2358-81.

¹⁴ Prior to amendments to the local rules in September 2010, KCLR 37(e) provided, *inter alia*, that "[i]f the court finds that counsel for any

prior to filing a motion to compel her to attend her deposition. The rule contained no such requirement, and following Stevenson's twisted logic, it would be impossible to even bring a motion to compel her to "meet and confer" unless she first agrees to "meet and confer" regarding her refusal to "meet and confer."

Stevenson also asserts that Canning was required to agree to an agenda before conducting a CR 26(i) conference. Neither CR 26(i) nor KCLR 37(e) contained such a requirement, and in any event, Canning provided the agenda when his counsel wrote: "I would like to give you an opportunity to explain why you did not appear and when you will appear for your deposition." CP 1213.

2. Even if Canning failed to comply with CR 26(i), the trial court had the authority to consider and rule on Canning's motion to compel.

Stevenson contends that the trial court lacked authority to compel her to appear for her deposition because neither Mr. Canning's motion nor the accompanying declaration of counsel referenced KCLR 37. Her talismanic view of the pleadings ignores the fact that both the motion and declaration of counsel explicitly stated that counsel complied with CR

party . . . willfully refuses to meet and confer . . . , the court may take appropriate action to encourage future good faith compliance."

26(i), which contained the same requirements as KCLR 37(e) & (f).¹⁵ CP 278, 1199, 1213. Thus, by complying with CR 26(i), Canning's counsel also complied with KCLR 37(e) & (f).

Even if Canning's CR 26(i) certification was somehow defective or even absent, the trial court still had authority to hear Canning's motion to compel discovery. *See Amy v. Kmart of Wash. LLC*, 153 Wn. App. 846, 223 P.3d 1247 (2009). In *Amy*, this Court rejected the reasoning of the Division Two cases on which Stevenson relies to support her argument that the trial court lacked authority to hear a discovery motion absent strict compliance with CR 26(i): *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn. App. 861, 28 P.3d 813 (2001); *Case v. Dundom*, 115 Wn. App. 199, 58 P.3d 919 (2002); and *Clarke v. Office of Attorney Gen.*, 133 Wn. App. 767, 138 P.3d 144 (2006). *See Amy*, 153 Wn. App. at 854 n.10.

According to this Court, CR 26(i) “‘should be a shield that protects the court from becoming involved in half-baked discovery disputes, not a sword for the discovery violator to wield against the court.’” *Amy*, 153 Wn. App. at 857 (quoting *Case*, 115 Wn. App. at 205 (Morgan, J., dissenting)). “To allow a losing party in a discovery motion to object to a court's ruling on the basis that the prevailing party did not

¹⁵ This is vividly demonstrated by the fact that the September 2010 amendments to the King County local rules replaced the former language in KCLR 37(e) & (f) with the following: “See CR 26(i).”

strictly comply with CR 26(i) undermines the efficient use of often scarce judicial resources.” *Amy*, 153 Wn. App. at 858.

Stevenson provides no argument regarding the trial court’s February 10, 2009 order granting Canning’s motion to amend the November 17, 2008 order compelling Stevenson to appear for her deposition other than to repeat her arguments about the case schedule order, which is addressed herein at Part IV.B. Stevenson provides no authority for her assertion that the trial court lacked jurisdiction to rule on Canning’s motion to compel prior to the entry of a case schedule order.

D. The trial court did not abuse its discretion in dismissing Stevenson’s lawsuit as a discovery sanction (Stevenson Assignments of Error Nos. 15, 40, 41).

“Trial courts need not tolerate deliberate and willful discovery abuse.” *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 576, 220 P.3d 191 (2009) (affirming default judgment in favor of plaintiff as sanction for discovery violations by defendant). The Court reviews a trial court’s discovery sanction for abuse of discretion. *See Magaña*, 167 Wn.2d at 582; *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324, 54 P.3d 665 (2002). According to the Supreme Court,

[a] trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on

unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.

Magaña, 167 Wn.2d at 582-83 (internal quotation marks and citations omitted). "An appellate court can disturb a trial court's sanction only if it is clearly unsupported by the record." *Magaña*, 167 Wn.2d at 583.

The civil rules permit broad discovery. *See Magaña*, 167 Wn.2d at 584. If Stevenson objected to the taking of her deposition, she was required to seek a protective order under CR 26(c). *See also* CR 37(d).¹⁶ "If the party does not seek a protective order, then the party must respond to the discovery request. The party cannot simply ignore or fail to respond to the request." *Magaña*, 167 Wn.2d at 584.

Here, Stevenson repeatedly refused to appear for her deposition and the trial court properly dismissed her case as a sanction under CR 37(b). To dismiss a case under CR 37(b), "the record must clearly show (1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to

¹⁶ "The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c)." CR 37(d).

prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed.” *Magaña*, 167 Wn.2d at 584.

1. Stevenson willfully violated discovery rules and court orders.

“A party’s disregard of a court order without reasonable excuse or justification is deemed willful.” *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002); *Blair v. TA-Seattle East #176*, 150 Wn. App. 904, 909, 210 P.3d 326 (2009), *rev. granted*, 168 Wn.2d 1006 (February 10, 2010). By the time Canning filed the motion to dismiss Stevenson’s lawsuit in March 2009, Stevenson had already refused to obey two separate discovery orders from the trial court. Stevenson had no reasonable excuse or justification for failing to comply. Although Stevenson claims that “she had a legitimate reason not to comply with orders that were under challenge,” Br. at 51, “a court order that is ‘merely erroneous’ must be obeyed.” *In re Estates of Smaldino*, 151 Wn. App. 356, 366, 212 P.3d 579 (2009). In contrast, an order is void “[w]here a court lacks jurisdiction over the parties or the subject matter, or lacks the inherent power to make or enter the particular order.” *Id.* As

discussed above in Part IV.C, the trial court had jurisdiction and the authority to order Stevenson to appear for her deposition.¹⁷

Stevenson's correspondence to Canning's counsel and to the trial court provides ample evidence of her familiarity with the civil rules and her understanding of mandatory language. Ms. Stevenson established a clear pattern of following the civil rules when it benefited her (and demanding that others follow the rules) and ignoring the rules and the court's orders when it did not. As a result, the trial court properly determined that her refusal was willful and deliberate.

2. Stevenson's violation of discovery rules and court orders substantially prejudiced Canning's ability to prepare for trial.

Trial in this case was scheduled for September 28, 2009, approximately six months from the date Canning moved to dismiss Stevenson's lawsuit. Under the case schedule, Canning was required to

¹⁷ Stevenson argues that the trial court "had no authority under the mandate even to order [her] to be deposed." Br. at 51. As discussed above in Part IV.A, Stevenson construes the mandate too narrowly and, in any event, failed to preserve that as an issue for review in her responses to the motion to compel and the motion to dismiss. CP 293-302, 386-92, 690-93, 1710-21. "[A] litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. The trial court must have an opportunity to consider and rule upon a litigant's theory of the case before [an appellate] court can consider it on appeal." *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967).

disclose primary witnesses by April 27, 2009. Stevenson's claim was based on eight promissory notes allegedly signed by the decedent, Mary Canning, in favor of Stevenson over a period of eighteen years, from 1982 until 2000. As the personal representative of the estate, Canning could not obtain meaningful information about and defend against the claim without taking Stevenson's deposition.

As in *Magaña*, Canning "was entitled to the discovery he requested." *Magaña*, 167 Wn.2d at 588. Stevenson "never requested a protective order, and the discovery requests were reasonably calculated to lead to the production of admissible evidence." *Id.* Stevenson should have appeared for her deposition, or at least let Canning know of a more convenient time for her deposition. Canning should not have been required to file a motion to compel Stevenson to appear for her deposition. *See Magaña*, 167 Wn.2d at 588.

It should be noted that in the course of some six years of litigation, Stevenson has never acknowledged Canning's right to take her deposition under CR 30. Instead, she "invited" Canning "to engage in informal discovery, to take her deposition on written questions (so Defendant Canning can answer the same sort of questions), to submit more interrogatories and requests for production, and to submit requests for

admission.” CP 390. Further, she subjected Canning and the trial court to a barrage of frivolous motions and accusations.

Canning’s ability to prepare for trial was substantially prejudiced because of Stevenson’s continued refusal to appear for her deposition. The evidence supports the trial court’s findings.

3. The trial court explicitly considered whether a lesser sanction would have sufficed and properly determined that it would not.

The “sanctions imposed by a trial court is a matter of judicial discretion to be exercised in light of the particular circumstances, but . . . the sanction imposed should be proportional to the nature of the discovery violation and the surrounding circumstances.” *Rivers*, 145 Wn.2d at 695. Stevenson’s goal in this litigation appeared to be nothing more than exposing the Estate to as much expense as possible. Given that Stevenson was the *plaintiff* in this lawsuit, the trial court took into consideration not only her refusal to obey the court’s orders to appear for her deposition, but also (1) her frivolous motion for reconsideration of the Court of Appeals decision in her favor, (2) her frivolous petition for review of the Court of Appeals decision in her favor, and (3) her numerous and frivolous motions for reconsideration of each of the trial court’s orders.

The trial court had already considered imposing monetary sanctions against Stevenson and determined that such sanction would have

no effect on her conduct.¹⁸ CP 430. The court also considered Stevenson's conduct in *Delany v. Canning*, 84 Wn. App. 498, 929 P.2d 475, *pet. denied & sanctions imposed*, 131 Wn.2d 1026, 937 P.2d 1101 (1997), where she was sanctioned by the trial court for refusal to participate in discovery, sanctioned by the Court of Appeals for her frivolous appeal, and sanctioned by the Supreme Court for her frivolous petition and motions. In light of the ineffectiveness of court sanctions in the *Delany* case, the trial court's determination that lesser sanctions would not suffice was amply justified. Instead, the order compelling Stevenson to appear for her deposition specifically warned her that the lawsuit could be dismissed if she refused to comply.

The U.S. Supreme Court's decision in *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976) is instructive. There, the plaintiff failed to answer interrogatories over a period of seventeen months after the trial court gave numerous warnings, including the threat of sanctions under Fed. R. Civ. P. 37. *See* 427 U.S. at 640-41. The Court agreed that the lack of compliance was in "flagrant bad faith" and affirmed the trial court's dismissal of the lawsuit.

¹⁸ In his motion to compel, Canning specifically asked the trial court to impose sanctions under CR 37(d), but the order signed by the court struck proposed language regarding such sanctions. CP 282, 313.

See 427 U.S. at 642.¹⁹ Of interest to the present case is the following statement by the Court:

It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.

427 U.S. at 642-43. It is important to recall that Stevenson's case had already been dismissed once before as a result of her refusal to appear for her deposition. Instead of being "duly chastened" by the experience and complying with subsequent discovery orders from the trial court, she appeared to be emboldened by her earlier "success" on appeal to persist in flouting discovery rules and court orders while at the same time using the discovery process to her own benefit.

Stevenson had many opportunities to comply with the civil rules and the trial court's orders. When specifically asked to voluntarily provide possible dates for a deposition, Stevenson ignored the request and attempted to change the topic through a barrage of illogical, repetitive, and irrelevant correspondence on issues such as the status of her numerous motions for reconsideration and supposed discovery abuses by Canning.²⁰

¹⁹ The federal court of appeals had earlier reversed the trial court's decision.

²⁰ Although Canning's counsel invited Stevenson on several occasions to schedule a CR 26(i) conference regarding her allegations of inadequate

Even when ordered to provide dates for her deposition with a specific warning that the lawsuit could be dismissed as a result of her continued intransigence, Stevenson persisted in her abusive conduct.

If the sanction of dismissal is not warranted by the circumstances of this case, it is difficult to imagine a set of facts under which the sanction could be applied. This Court reviews “the use of sanctions under an abuse of discretion standard that gives the trial court wide latitude in determining appropriate sanctions, reduces trial court reluctance to impose sanctions, and recognizes that the trial court is in a better position to determine this issue.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324, 54 P.3d 665 (2002).

The purpose of imposing sanctions generally is to deter, to punish, to compensate, and to ensure that the wrongdoer does not profit from the wrong. The trial court also has an interest in effectively managing its caseload, minimizing backlog, and conserving scarce judicial resources that justify the imposition of appropriate sanction.

Blair, 150 Wn. App. at 910 (internal citations omitted). The trial court’s decision to dismiss Stevenson’s lawsuit as a sanction for her persistent refusal to comply with discovery rules and the court’s orders should be affirmed.

discovery responses, she never pursued that remedy. Instead, she continued to send endless correspondence repeating her baseless allegations. CP 1471-1578, 2354-2419.

E. There were no errors regarding the findings of fact in the April 6, 2009 order; even if there were errors, they were harmless or not preserved for appeal (Assignments of Error Nos. 2, 3, 15-38).

Stevenson assigns error to many of the findings of fact in the trial court's April 6, 2009 order dismissing her complaint. Although the findings should be upheld because they are supported in the record, they should also be upheld because Stevenson failed to preserve them for review, and any errors were harmless.

When challenged, the Court reviews findings of fact and conclusions of law for an abuse of discretion. *See Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003); *In re Estate of Freeberg*, 130 Wn. App. 202, 205, 122 P.3d 741 (2005). The "review is limited to determining whether the findings are supported by substantial evidence in the record and, if so, whether the conclusions of law are supported by those findings." *Estate of Freeberg*, 130 Wn. App. at 205. "Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

Under RAP 2.5(a), this Court will not review an issue, theory, argument, or claim of error not properly presented to the trial court. *See Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001). One

purpose of the rule is to give the trial court “an opportunity to consider and rule on the relevant authority.” *Bennett v. Hardy*, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990). Another purpose “is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials.” *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001).

In Stevenson’s responses to Canning’s motion to dismiss, she made the following arguments or raised the following factual disputes:

- Contested statement by Canning’s counsel that Stevenson did not contact him regarding the CR 26(i) conference (CP 387-88);
- Claimed that Canning’s counsel was required to seek an order compelling her to attend CR 26(i) conference (CP 388);
- Contested statement by Canning’s counsel that Stevenson did not inform him that she would not or could not attend her deposition (CP 388);
- Claimed that Canning’s counsel had failed to comply with CR 26(i) and KCLR 37 prior to filing the motion to compel (CP 388-89);
- Acknowledged that she was only willing to “engage in informal discovery” and respond to a deposition upon written questions under CR 31, to additional interrogatories and requests for production, and to requests for admission (CP 390);
- Contested fact that a motion to compel was filed after she failed to appear for her January 12, 2006 deposition (CP 1712);

- Contested fact that her former attorney requested that the motion to compel be stricken (based on her hearsay statements) (CP 1712);
- Claimed that the March 28, 2006 order compelling her to appear for her deposition was the product of collusion between Canning’s counsel and her former attorney (CP 1712-13);
- Claimed that her former attorney had a conflict of interest and did not adequately represent her (CP 1713);
- Claimed that she had raised a number of discovery issues with Canning’s counsel that were ignored (CP 1713);
- Contested statements regarding her prior litigation in *Delany v. Canning*, 84 Wn. App. 498, 929 P.2d 475 (1997) (CP 1713-14).

Stevenson did *not* make arguments or present competent evidence in opposition to the following findings of fact in the April 6 order that she is disputing now on appeal:

- Finding No. 3, stating that Stevenson failed to appear for her January 12, 2006 deposition (Assignment of Error No. 18);²¹
- Finding No. 4, stating that Stevenson’s former attorney appeared on her behalf and requested that the motion to compel be stricken (Assignment of Error No. 20);²²

²¹ Stevenson did not dispute this finding until *after* the trial court dismissed her case, and she failed to show that her “evidence” was newly discovered and could not have been produced in response to the motion to dismiss. CP 1973.

²² Stevenson contested this finding prior to the hearing, but only with inadmissible evidence regarding her speculations about her attorney’s mental state. CP 1712.

- Finding No. 5, stating that Stevenson’s former attorney appeared for her at the March 2, 2006 deposition and that Stevenson failed to appear (Assignment of Error No. 21);²³
- Finding No. 10, stating that after the mandate was issued, Canning served a notice of deposition on Stevenson to appear at her deposition on October 24, 2008 (Assignment of Error No. 23);²⁴
- Finding No. 10, stating that Stevenson responded to the motion to compel by filing a motion to strike the declaration of Canning’s counsel (Assignment of Error No. 26);²⁵
- Finding No. 12, stating that the order granting the motion to amend was not signed and filed until February 10, 2009 (Assignment of Error No. 27);²⁶
- Finding No. 14, stating that Stevenson did not comply with the February 10, 2009 order compelling her to appear for her deposition (Assignment of Error No. 28);²⁷

²³ Stevenson did not dispute this finding until *after* the court dismissed her case, and she failed to show that her “evidence” was newly discovered and could not have been produced in response to the motion to dismiss. CP 1974.

²⁴ Stevenson did not dispute this finding until *after* the court dismissed her case, and she failed to show that her “evidence” was newly discovered and could not have been produced in response to the motion to dismiss. CP 1975.

²⁵ Stevenson did not dispute this finding until *after* the court dismissed her case, and she failed to show that her “evidence” was newly discovered and could not have been produced in response to the motion to dismiss. CP 1976-77.

²⁶ Stevenson did not dispute this finding until *after* the court dismissed her case, and she failed to show that her “evidence” was newly discovered and could not have been produced in response to the motion to dismiss. CP 1977.

²⁷ Stevenson did not dispute this finding until *after* the court dismissed her complaint and failed to show that her “evidence” was newly

- Finding No. 15, stating that James Canning represented himself and Stevenson in the *Delany v. Canning*, 84 Wn. App. 498, 929 P.2d 475 (1997) case (Assignment of Error No. 29);²⁸
- Finding No. 15, stating that Stevenson was sanctioned in the *Delany v. Canning*, 84 Wn. App. 498, 929 P.2d 475 (1997) case (Assignment of Error No. 30);²⁹
- Finding No. 16, stating that James Canning is currently suspended from the practice of law (Assignment of Error No. 31);³⁰
- Finding No. 15, stating that Stevenson has cohabitated with James Canning since 1980 (Assignment of Error No. 32);³¹
- Finding No. 20, stating that Stevenson’s claim is based on promissory notes allegedly signed by the decedent (Assignment of Error No. 35);³²

discovered and could not have been produced in response to the motion to dismiss. CP 1977.

²⁸ Stevenson did not dispute this finding until *after* the court dismissed her case, and she failed to show that her “evidence” was newly discovered and could not have been produced in response to the motion to dismiss. CP 1977-78.

²⁹ Stevenson did not dispute this finding until *after* the court dismissed her case, and she failed to show that her “evidence” was newly discovered and could not have been produced in response to the motion to dismiss. CP 1978.

³⁰ Stevenson did not dispute this finding until *after* the court dismissed her case, and she failed to show that her “evidence” was newly discovered and could not have been produced in response to the motion to dismiss. CP 1979-80.

³¹ Stevenson did not dispute this finding until *after* the court dismissed her case, and she failed to show that her “evidence” was newly discovered that she could not have produced in response to the motion to dismiss. CP 1980.

- Finding No. 20, stating that Canning cannot defend against Stevenson’s claim with taking her deposition (Assignment of Error No. 36);³³
- Finding No. 22, stating that there was no suggestion in the decision on the first appeal in this case that Stevenson should be excused from appearing for her deposition (Assignment of Error No. 38).³⁴

By failing to contest these findings prior to the entry of the order dismissing her complaint and by failing to show that her subsequent controverting evidence was “newly discovered” under CR 59(a)(4), Stevenson waived all of these assignments of error.

Even if Stevenson had preserved the claimed errors in the findings of fact, the findings were accurate and supported by substantial evidence in the record before the trial court:

- Finding No. 3, stating that Stevenson failed to appear for her January 12, 2006 deposition. CP 177, 350, 425, 1170-71.

³² Stevenson did not dispute this finding until *after* the court dismissed her case, and she failed to show that her “evidence” was newly discovered and could not have been produced in response to the motion to dismiss. CP 1982.

³³ Stevenson did not dispute this finding until *after* the court dismissed her case, and she failed to show that her “evidence” was newly discovered and could not have been produced in response to the motion to dismiss. CP 1984.

³⁴ Stevenson did not dispute this finding until *after* the court dismissed her case, and she failed to show that her “evidence” was newly discovered and could not have been produced in response to the motion to dismiss. CP 1983.

- Finding No. 3, stating that Canning filed a motion to compel Stevenson to appear for her deposition after she failed to appear on January 12, 2006. The finding accurately stated that the hearing notice and motion were mistakenly filed under the probate case number for the Estate of Mary Canning, No. 04-4-05181-6 SEA, while the declaration of counsel in support of the motion was filed under the proper case number. CP 177, 197-201, 350, 425, 1170-71.
- Finding No. 4, stating that Stevenson's former attorney, James Bittner, served a notice of appearance prior to the hearing and requested that the motion to compel be stricken. CP 177, 193-95, 350, 425.
- Finding No. 5, stating that, while still representing Stevenson, Bittner appeared on March 2, 2006 for Stevenson's deposition and that Stevenson failed to appear. CP 177, 207-09, 350-51, 425-26. On March 6, 2006, *after* Stevenson failed to appear for her deposition, she identified Bittner as her attorney and objected to his withdrawal. CP 1191-92.
- Finding No. 6, stating that Canning filed a second motion to compel on March 16, 2006 and Stevenson responded to the motion. CP 210-15, 216-17, 351, 426.
- Finding No. 10, stating that Canning served a notice for Stevenson to appear for her deposition and that Stevenson failed to appear. CP 352, 427, 1198-99, 1202-1211.³⁵
- Finding No. 10, stating that Canning filed a third motion to compel. CP 278-83, 352, 427.
- Finding No. 10, stating that Stevenson's response to the motion to compel did not identify any reason that she should not attend her deposition. CP 293-99, 303-08, 352, 427, 2354-2419.

³⁵ Stevenson asserts that this finding is in error because Canning had no right to conduct discovery under the mandate and before a case schedule order was issued. These assertions are addressed in Parts IV.A & IV.B.

- Finding No. 10, stating that Stevenson filed a motion to strike the declaration of Canning’s counsel. The finding should state that Stevenson filed a motion to strike portions of the declaration of Canning’s counsel, but the error is harmless.³⁶ CP 287-92, 352, 427.
- Finding No. 12, stating that on February 10, 2009, the court granted the motion to amend the order compelling Stevenson to appear for her deposition. CP 353, 427, 1233-34.
- Finding No. 14, stating that Stevenson failed to comply with the February 10, 2009 order compelling her to appear for her deposition. CP 353, 428, 1251, 1256, 1258, 1260, 1262.
- Finding No. 15, stating that James Canning represented himself and Stevenson in the *Delany v. Canning*, 84 Wn. App. 498, 929 P.2d 475 (1997) case. CP 354, 428; *Delany*, 84 Wn. App. at 501 (“Mr. Canning, also a Washington lawyer, represented both himself and Ms. Stevenson.”).
- Finding No. 15, stating that James Canning and Stevenson were sanctioned for their conduct in the *Delany* case. CP 354, 428; *Delany*, 84 Wn. App. at 504, 509-10.
- Finding No. 15, stating that Stevenson has cohabitated with James Canning since approximately 1980. CP 428, 1237-39.
- Finding No. 16, stating that James Canning is currently suspended from practicing law. CP 429; <http://www.wsba.org> (lawyer directory search for James Canning).

³⁶ “A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *Anfinson v. FedEx Ground Package Sys.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010) (quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

- Finding No. 18, stating that Stevenson served two sets of requests for admissions and that Canning timely responded to the discovery and Stevenson’s concerns about Canning’s responses to earlier discovery requests. CP 429, 1252-53, 1579-1619.³⁷
- Finding No. 19, stating that Stevenson refused to obey two separate discovery orders and provided no reasonable justification for failing to comply. CP 220-21, 312-14, 429, 1233-34.³⁸
- Finding No. 20, stating that Stevenson’s claim is based on promissory notes allegedly signed by the decedent. CP 10-17, 430.
- Finding No. 20, stating that Canning cannot obtain meaningful information and defend against Stevenson’s claim without taking Stevenson’s deposition. CP 430.³⁹
- Finding No. 22, stating that there was no suggestion in the earlier Court of Appeals decision in Appeal No. 58341-7 that Stevenson should be excused from appearing for her deposition. CP 430-31.⁴⁰

³⁷ Stevenson asserts that this finding is in error because Canning had no right to conduct discovery under the mandate and before a case schedule order was issued. These assertions are addressed in Parts IV.A & IV.B. Canning “voluntarily” responded to Stevenson’s discovery requests because he was required to do so under the Civil Rules.

³⁸ Stevenson’s assertion that the trial court had no authority to compel her to attend her deposition without strict compliance with CR 26(i) is addressed in Part IV.C and the obligation to obey even an erroneous court order is addressed in Part IV.D.1.

³⁹ Stevenson’s assertion that Canning had no right to conduct discovery under the mandate is addressed in Part IV.A.

⁴⁰ Stevenson’s assertion that Canning had no right to conduct discovery under the mandate is addressed in Part IV.A.

- Finding No. 22, stating that Stevenson had ample opportunity to comply with the Civil Rules and the court’s order, and her refusal to do so harmed Canning and the judicial system. CP 431.⁴¹
- Unnumbered finding, stating that the trial court contacted the parties to schedule a hearing and proposed possible dates. CP 432, 484-90, 523-28. While the handwritten finding should have referred to a “status conference” rather than a “hearing,” the error was harmless. *See Anfinson v. FedEx Ground Package Sys.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010).

F. The trial court did not err in scheduling a status conference on April 6, 2009, in entering the order dismissing the complaint on April 6, or in denying Stevenson’s motion to vacate the April 6 order (Assignments of Error Nos. 4, 6, 39).

Stevenson’s argument regarding the April 6, 2009 status conference is a red herring. She identifies no harm to herself as a result of the trial court conducting the conference. Although the court considered Stevenson to be “in contempt of court” for failing to appear, CP 423, Stevenson was not sanctioned in any way for her contempt and she did not appeal the contempt decision.⁴²

⁴¹ Stevenson’s assertion that Canning had no right to conduct discovery under the mandate is addressed in Part IV.A, her assertion that the court had no authority to rule on a motion to compel without strict compliance with CR 26(i) is addressed in Part IV.C, and her assertion that the trial court was required to rule on her various motions for reconsideration before she was required to appear for her deposition is addressed in Part IV.J.

⁴² Stevenson failed to include her notices of appeal as part of the clerk’s papers, as required by RAP 9.6(b)(1)(A).

For reasons unknown to Canning, the trial court contacted the parties via e-mail on March 24, 2009 to schedule “an in-court status conference on this case,” providing four possible dates and asking the parties to respond as to their availability. CP 524. Stevenson responded the same day, asking about the status of earlier pleadings she had filed. CP 524. The court responded that those issues would “be discussed at the status conference” and again asked for Stevenson’s availability as to the four possible dates, stating that “[i]f a mutually agreeable time cannot be found Judge Washington will set a date.” CP 524. After Canning’s counsel contacted the court with his available dates and Stevenson failed to respond, the Court selected one of the identified dates, April 6, 2009, for the conference. CP 523.

Stevenson then waited for over a week, until April 2, 2009, to file an objection to the conference, stating that “there is no basis at this time for a pretrial conference.” CP 418. On Friday, April 3, 2009, Stevenson sent an e-mail to the trial court, stating that “[t]he first Monday of any month is not a date that is acceptable to me, due to scheduling issues.” CP 526. During the April 6 status conference, the trial court noted that although Stevenson had contacted the court to state that she “couldn’t be here on Mondays,” CP 485, she rejected the opportunity to “pose her own dates” and “only responded after a date had been set, unilaterally

indicating that she would not be here, with no explanation and with no other date offered.” CP 488.

Under RCW 4.28.020, from the time a lawsuit is commenced, “the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings.” A court’s exercise of this control is discretionary. *See Swan v. Landgren*, 6 Wn. App. 713, 716, 495 P.2d 1044 (1972). Under CR 16(a)(5), a court may order “the attorneys for the parties to appear before it for a conference to consider . . . [s]uch other matters as may aid in the disposition of the action,” and under CR 77(k), a judge may “at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.” An “order” is defined as “[a] mandate; precept; command or direction authoritatively given; rule or regulation. Direction of a court or judge made or entered in writing, and not included in a judgment, which determines some point or directs some step in the proceedings.” BLACK’S LAW DICTIONARY 1096 (6th ed. 1990). The e-mail communications on March 24 and 25, 2009 constituted written directions from the Court directing a particular step in the proceedings. Although Stevenson appears to argue that the Civil Rules require a formal written order on pleading paper, she provides no authority in support of her argument.

Stevenson was not prejudiced by the trial court's entry of the order dismissing her complaint on April 6, 2009. Canning filed and served his motion to dismiss the complaint on March 9 and 10, respectively, noting the hearing *without* oral argument for March 19, 2009. CP 349-71, 1235-36. The proposed order submitted with the motion was identical with the order entered on April 6, with the exception of the interlineated language regarding Ms. Stevenson's failure to attend the status conference. *Compare* CP 362-71 *with* CP 424-33. Stevenson filed her response in opposition to the motion on March 16. CP 386-92. Canning filed a reply brief on March 17. CP 398-400. Stevenson then filed an untimely declaration in opposition to the motion on March 18. CP 1710-21. Although Stevenson requested oral argument on the second page of her response, CP 387, she failed to "request oral argument by placing 'ORAL ARGUMENT REQUESTED' on the upper right corner of the first page" of her opposition, as required by KCLR 7(b)(4)(C).

Even if Stevenson had properly requested oral argument, the trial court was under no obligation to grant her request. As noted by the Supreme Court in *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 697, 41 P.3d 1175 (2002), "oral argument is not prescribed for motions under CR 37 for sanctions for discovery abuse" and " 'oral argument [on a motion] is not a due process right.' " (*quoting*

Hanson v. Shim, 87 Wn. App. 538, 551, 943 P.2d 322 (1997)). Instead, due process “requires only ‘that a party receive proper notice of proceedings and an opportunity to present [its] position before a competent tribunal.’” *Id.* Stevenson was according due process in the motion to dismiss. She had ample opportunity to present her position and did so. Prior to dismissing her lawsuit, the trial court considered her response to the motion to dismiss as well as her untimely declaration. CP 424. The fact that Stevenson did not take advantage of a *further* opportunity to explain to the trial court why she did not comply with its earlier order does not constitute a reason to overturn the order dismissing the lawsuit.

Stevenson argues that the April 6, 2009 order should have been vacated due to “surprise,” “irregularity,” or “fraud.” Br. at 66. As discussed above, Canning noted the hearing on his motion to dismiss the lawsuit without oral argument, and provided a proposed order. Stevenson had ample opportunity to respond to Canning’s motion to dismiss and did so. The trial court considered Stevenson’s response before ruling on the motion to dismiss. The fact that Stevenson refused to appear for a status conference set by the trial court and of which she received notice does not constitute a basis for vacating the April 6 order.

G. The trial court did not err in denying Stevenson’s April 16, 2009 CR 60 motion to vacate the April 6, 2009 order (Stevenson Assignments of Error Nos. 9, 39, 53).

Stevenson’s argument that she received no prior notice before the trial court “entertain[ed]” and granted Canning’s motion to dismiss is addressed above at Part IV.F. To the extent the trial court properly granted the motion to dismiss, there is no basis for Stevenson’s argument that the court erred in denying her motion to vacate the order.

Stevenson fails to provide any argument for her assertion that the trial court should not have denied her motion to vacate “without providing grounds or reasons.” Br. at 44. This Court’s decision in *Estate of Treadwell v. Wright*, 115 Wn. App. 238, 61 P.3d 1214 (2003) does not support Stevenson’s argument that a trial court is required to provide a statement of reasons for denying a motion to vacate. In *Estate of Treadwell*, the trial court did not provide a statement of reasons, so this Court considered both of the possible bases for the trial court’s decision. This Court ruled that under either basis, the trial court abused its discretion by denying the motion to vacate. It did not rule, as Stevenson urges, that the trial court abused its discretion by not providing reasons for its decision. There is no such requirement under CR 60.

H. The trial court did not err in denying Stevenson’s April 16, 2009 CR 59 motion for reconsideration of the April 6, 2009 order (Stevenson Assignment of Error No. 53).

Stevenson argues that the trial court was required to provide grounds or reasons for denying her motion for reconsideration of the order dismissing her complaint. She is wrong. Civil Rule 59(f) requires the court to “give definite reasons of law and facts for its order” when *granting* a motion for a new trial when the order is based on the record, and to “state the facts and circumstances upon which it relied” when *granting* a motion for a new trial when the order is based on matters outside the record. There is no such requirement for a statement of reasons when the court *denies* a motion for a new trial, or when a court grants or denies a motion for reconsideration.

A former version of CR 59(f), then called Rule 16, required a trial court “to give ‘definite reasons of law and facts’ ” in an “order granting or denying a motion for a new trial.” *Johnson v. Howard*, 45 Wn.2d 433, 437, 275 P.2d 736 (1954). That rule no longer applies. Even if the rule was still in effect, the present case does not involve a motion for a new trial, so the rule would be inapplicable to Stevenson’s motions for reconsideration.

A review of Stevenson’s motion for reconsideration demonstrates that she failed to address any of the standards under CR 59(a) for granting

a motion for reconsideration. CP 455-76. Stevenson's motion was nothing more than a rehash of the same arguments she made in response to Canning's motion to compel and motion to dismiss. The trial court properly denied the motion for reconsideration.

I. There was no error in entering the Omnibus Order filed on October 29, 2009 (Assignment of Error No. 10).

Stevenson asserts that the trial court erred by entering the October 29, 2009 "Omnibus Order" because there was no prior notice of presentation. On October 13, 2009, the court e-mailed the parties to ask for "a list of motions each party feels is still outstanding." The court further asked the parties to "include an original order on each motion" and stated that "Judge Washington will review the lists/orders and let you know if he wants oral argument on any motion." CP 814, 831. Canning's counsel complied on October 14, preparing an order and providing a copy to Stevenson. CP 813, 817, 819-23, 832. Stevenson objected to the request and neither provided a list of pending motions nor provided any proposed orders. CP 576-90, 811-12, 815, 832, 838-39.

If there was any error in entering the order without a prior notice of presentation under CR 54(f), it was harmless. "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way

affected the final outcome of the case.” *Anfinson v. FedEx Ground Package Sys.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010) (quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). Stevenson received the court’s request to provide proposed orders for any motions that she believed had not yet been decided, and she provided a “procedural objection” to the court’s request. CP 576-92. Significantly, her procedural objection did not include any argument that the court lacked authority to enter Canning’s proposed order without a CR 54(f) notice of presentation. As such, she waived any such objection for the purpose of this appeal. Even apart from her waiver, “[a]s long as a party has a meaningful opportunity to be heard and adequate time to prepare, [a] technical deviation from proper procedure is inconsequential.” *Lindgren v. Lindgren*, 58 Wn. App. 588, 594, 794 P.2d 526 (1990). To the extent a notice of presentation was required for the entry of the Omnibus Order, its absence was inconsequential because Stevenson had *more* than the time required under CR 54(f) to prepare and a meaningful opportunity to be heard with her objections to the order.

J. Although the trial court failed to decide every motion in a timely manner, there was no harm unique to Stevenson and the motions were decided fairly (Stevenson Assignments of Error Nos. 5, 40, 43, 46, 49, 50, 51).

There is no question that the trial court's delay in ruling on motions in this case was frustrating to the parties. Given that the Estate of Mary Canning cannot be closed until this lawsuit is resolved, Canning was harmed by the delays. Given that the trial court denied all of her motions for reconsideration, Stevenson was not harmed by the delays. As noted above, "a court order that is 'merely erroneous' must be obeyed." *In re Estates of Smaldino*, 151 Wn. App. 356, 366, 212 P.3d 579 (2009). Stevenson provides no authority that her frivolous motions for reconsideration should have been granted merely because the trial court failed to timely rule on the motions.

K. There was no error in not entering an order to show cause for consideration of Stevenson's motions to vacate (Stevenson Assignment of Error No. 50).

Stevenson argues that the trial court erred by "refusing" to enter an order to show cause, by not requesting further briefing, and by not conducting an oral hearing. It should be noted that Stevenson's purported CR 60 motion to vacate was titled: "Motion for Reconsideration of Order Dismissing Complaint and for Other Relief." CP 455. There is no hint other than the reference to "other relief" on the first page of the motion

that she was asking the Court to vacate the order. Likewise, her notice for hearing said nothing about a motion to vacate. CP 1933.

Given this context, any error in not entering an order to show cause was harmless. Stevenson had “a meaningful opportunity to be heard” in her motion to vacate, and any “technical deviation from proper procedure [was] inconsequential.” *Lindgren v. Lindgren*, 58 Wn. App. 588, 594, 794 P.2d 526 (1990).

L. There was no error in denying Stevenson’s motion for change of judges (Stevenson Assignments of Error Nos. 11, 42, 52).

Stevenson argues that Judge Washington was biased against her because he “stalled, delaying ruling on the motions for reconsideration of the discovery order and the amended discovery order, and ultimately failed to decide the motions until six months after he dismissed the complaint for failure to comply with the amended discovery order.” Br. at 69. “The trial court is presumed . . . to perform its functions regularly and properly without bias or prejudice. A party claiming to the contrary must support the claim; prejudice is not presumed as it is when a party files an affidavit of prejudice under RCW 4.12.050.” *Wolfkill Feed & Fertilizer v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000) (internal citations omitted). A party alleging judicial bias must present evidence of actual or

potential bias. *See State v. Post*, 118 Wn.2d 596, 618, 619 n.9, 826 P.2d 172 (1992).

Other than the timing of Judge Washington rulings, which harmed Canning as much as it did Stevenson, Stevenson fails to point to any evidence that the judge was biased against her in any way. The fact that Judge Washington did not efficiently or timely decide motions (filed by either party) is insufficient, by itself, to show any bias. Stevenson's dissatisfaction with the outcome of the motions does not amount to judicial bias against her.

Stevenson provides no argument or authority for her assertion that the trial court erred by not deciding her motion to change judges before dismissing the complaint. As such, she is deemed to have abandoned that issue. *See* RAP 10.3(a)(6); *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241 n.12, 122 P.3d 729 (2005).

M. There was no error in failing to determine motion to produce copy of notice (Stevenson Assignments of Error Nos. 43 & 49).

Given that Stevenson received the same e-mails from the trial court that Canning received, CP 523-28, her request for a copy of the "notice" was ridiculous and specious. Canning did not oppose the motion, and Stevenson cannot identify any harm from the trial court not rendering a decision on the motion.

N. There was no error in not ruling on Stevenson’s objection to a status conference (Stevenson Assignment of Error No. 45).

Stevenson claims that the trial court should have “ruled” on her objections to the April 6, 2009 status conference. It is not clear how the court could have done so, however, when Stevenson did not file a motion regarding her objections, did not file a notice of hearing, and did not submit a proposed order, all as required under KCLR 7(b)(4) & (5).

O. Stevenson’s Assignments of Error relating to 2006 trial court proceedings are moot (Stevenson Assignments of Error Nos. 14, 47, 48).

All of the issues raised by Stevenson regarding the March 2006 order compelling Stevenson to appear for her deposition, CP 220-21, the May 2006 order dismissing the complaint, CP 231-33, and Stevenson’s May 2006 motion for reconsideration, CP 234-37, are moot. Stevenson fails to explain how a decision in her favor would change anything in this lawsuit or excuse her failure to appear for her deposition. There was no error in ordering Stevenson to appear for her deposition, and the May 2006 order dismissing her complaint was reversed by this Court in Appeal No. 58341-7.

P. There was no error in findings and conclusions in order granting attorneys fees (Stevenson Assignments of Error Nos. 13 & 54).

Although Stevenson assigns error to findings and conclusions nos. 1-7 in the October 29, 2009 order awarding attorneys' fees and costs to Canning, CP 133-35, she provides no argument or authority on findings and conclusions nos. 1-6. As such, she is deemed to have abandoned her appeal as to those findings and conclusions issue. *See* RAP 10.3(a)(6); *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241 n.12, 122 P.3d 729 (2005). In addition, other than asserting that Canning's counsel was engaged in a scam against her, she provides no argument or authority in support of her assertion that the amount of time spent by Canning's counsel was reasonable and necessary, and that the amount of fees and costs was reasonable. Further, she waived the issue on appeal by failing to raise it before the trial court in response to Canning's motion for fees and costs. CP 94-104.

Q. The trial court erred by failing to award all of the fees and costs that it found to be reasonable and necessary.

Courts should be guided in calculating fee awards by the lodestar method. *See Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998). Under that method, "a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the

client.” *Id.* at 434. “The court must also determine the reasonableness of the hourly rate of counsel at the time the lawyer actually billed the client for the services.” *Id.* “Finally, the lodestar fee, calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result, may, in rare instances, be adjusted upward or downward in the trial court’s discretion.” *Id.*

Written findings of fact and conclusions of law are required to establish an adequate record on review to support a fee award. *See Mahler*, 135 Wn.2d at 435. Although fee decisions are entrusted to the discretion of the trial court, a reviewing court must “ensure that discretion is exercised on articulable grounds.” *Id.* “[A]n award of substantially less than the amount requested should indicate at least approximately how the court arrived at the final numbers and explain why discounts were applied.” *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 146, 144 P.3d 1185 (2006) (citing *Absher Constr. Co. v. Kent Sch. Dist.* 415, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995)).

Here, in both the October 27, 2009 order and the January 22, 2010 order, the trial court made express findings of fact and conclusions of law as required by *Mahler*. The court determined that Canning was entitled to fees under the terms of the promissory notes relied upon by Stevenson. CP 133, ¶ 1; CP 171, ¶ 1. The court reviewed contemporaneous records

submitted by Canning's counsel detailing the hours worked and tasks performed. CP 134, ¶¶ 2-4; CP 172, ¶¶ 2-4. The court reviewed the hourly rates of Canning's attorneys and found that those rates were "comparable to or less than rates charged by other King County firms for lawyers for similar experience and background, and are thus reasonable." CP 134, ¶ 5; CP 172, ¶ 5. The court reviewed the description of services performed and found that no hours for which fees were sought included duplicative efforts, unproductive time, or time on issues unrelated to the lawsuit. CP 134, ¶ 6; CP 172, ¶ 6.

In the October 27, 2009 order, the trial court concluded that the total number of hours spent by Canning's counsel in this lawsuit "were reasonable and necessary," and that the total amount of fees requested by Canning for the legal services, \$28,013.50, was reasonable. CP 135, ¶ 7. The court also reviewed a detailed summary of costs and found that Canning incurred a total of \$1,013.00 in recoverable costs. CP 134, ¶¶ 2, 6. The court concluded that the costs were reasonable. CP 135, ¶ 7.

In the January 22, 2010 order, the trial court concluded that the hours spent by Canning's counsel "were reasonable and necessary." CP 172, ¶ 7. The court also reviewed a detailed summary of costs and found that Canning incurred a total of \$230.07 in recoverable costs. CP 172, ¶¶ 2, 6. The court concluded that the costs were reasonable. CP 172, ¶ 7.

In her response to Canning's first motion for an award of fees and costs, Stevenson did not dispute Canning's right to an award. Further, she did not dispute the hourly rates of Canning's counsel, the number of hours expended in this litigation, or the amount requested for fees and costs. CP 94-107.⁴³ Instead, Stevenson continued her barrage of baseless accusations against Canning, Canning's counsel, and the trial court. Stevenson filed no response to Canning's second motion for fees and costs other than a letter to the trial court and pleadings relating to a motion to strike and continue the hearing. CP 939-51, 1742-67. In none of those documents did she challenge the reasonableness of Canning's counsel's hourly rate or the amount of time spent by Canning's counsel in this litigation.

Although the trial court concluded in its October 27, 2009 order that the hourly rates of Canning's attorneys were reasonable, that the total hours spent by Canning's attorneys were reasonable and necessary, and that the fees and costs incurred and requested by Canning (\$29,026.50) were reasonable, it only awarded \$9,013.00 to Canning. CP 135.

⁴³ Stevenson filed a motion to stay proceedings and continue the hearing on Canning's motion for fees and costs, arguing that the court should not hear Canning's motion until it made decisions on her various motions. CP 1722-39. The issue was moot because the court did not grant Canning's motion for fees and costs until October 27, 2009, the same day as it denied her subject motions. CP 133-35 & 593-96.

Similarly, it concluded in its January 22, 2010 order that the hourly rate of Canning's attorney was reasonable, that the total hours spent by Canning's attorney after April 21, 2009 were reasonable and necessary, and that the additional costs incurred were reasonable, it only awarded \$5,230.07 to Canning. CP 172-173.⁴⁴ The court did not explain any basis for adjusting the award downward in either order. This was clearly an abuse of the court's discretion.

Under the lodestar method, the court was required to follow its "initial formula: a reasonable hourly rate for a reasonable number of hours worked. A trial judge who strays from this formula will typically have a difficult time establishing that an award of attorney fees is actually reasonable." *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 316-17, 202 P.3d 1024 (2009). The court's award of only \$9,013.00 in fees and costs in the October 27, 2009 order was unreasonable given the court's findings and conclusions that an award of \$29,026.50 was reasonable and necessary. The court's award of only \$5,230.07 in fees and costs in the January 22, 2010 order was unreasonable given the court's

⁴⁴ Although the trial court's order was internally inconsistent when it stated that it "GRANTS a supplemental award to David Canning of reasonable fees and costs incurred in this lawsuit in the amount of \$10,669.00," CP 173, Canning presented a judgment based on the order that reflected the court's conclusion that an award of \$5,000 for fees and \$230.07 for costs was reasonable. CP 1086-87.

findings and conclusions that that an award of \$10,899.07 was reasonable and necessary. There are no articulable grounds for either of the reductions and this Court should remand and order the trial court to award the full amount requested and supported by the court's findings and conclusions.

R. Canning is entitled to an award of fees on appeal.

Pursuant to RAP 18.1 and the promissory notes at issue in this lawsuit, Canning requests that the Court order Stevenson to pay his costs and attorneys' fees on appeal. In any lawsuit based on a contract that provides for attorneys' fees, "reasonable fees shall be awarded to the prevailing party." *Metro. Mortgage & Sec. Co. v. Becker*, 64 Wn. App. 626, 632, 825 P.2d 360 (1992). The court's discretion is "limited to deciding the amount of reasonable fees." *Id.* The promissory notes provide for attorneys' fees to the holder of the note, CP 10-17, which under RCW 4.84.330 is made reciprocal.

The fact that Canning has taken the position that the notes are invalid does not affect his right to fees under RCW 4.84.330. *See Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984) ("[W]e conclude that the broad language . . . in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a

contract.”); *Meenach v. Triple “E” Meats, Inc.*, 39 Wn. App. 635, 640-41, 694 P.2d 1125 (1985).

Canning is also entitled to fees under CR 11 and RAP 18.9 because Stevenson’s appeal and arguments are frivolous and used only for the purpose of delay. An appeal is frivolous if it presents no debatable issues upon which reasonable minds might differ and is so totally without merit that there is no reasonable possibility of a reversal. *See State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998). In addition, CR 11 discourages filings that are not “well grounded in fact” and “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law,” or are interposed for an improper purpose, “such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” CR 11(a)(1)-(3). CR 11 permits a court to award sanctions, including expenses and attorneys’ fees, where a litigant acts in bad faith in instituting or conducting litigation. *See Delany v. Canning*, 84 Wn. App. 498, 509, 929 P.2d 475 (1997).

Stevenson’s brief is part of a pattern of filing frivolous pleadings before the trial court, this Court, and the Supreme Court, apparently with the sole purpose of prolonging this litigation as long as possible to damage the estate. In ruling on Ms. Stevenson’s motion for discretionary review

to the Supreme Court on August 9, 2010, Supreme Court Commissioner

Goff stated:

Apparently a request for sanctions will likely be addressed by the Court of Appeals panel that decides the case. With that in mind, I note that Ms. Stevenson's motions to this court present nothing even minimally resembling a basis for review. Indeed, the only action by this court which may become appropriate, if Ms. Stevenson continues her campaign of ill-conceived filings that require the attention of opposing counsel and the court, is the imposition of sanctions under RAP 18.9. I therefore urge Ms. Stevenson to abandon this misguided litigation strategy.

CP 2211.

V. CONCLUSION

For the foregoing reasons, respondent David M. Canning respectfully requests that the Court affirm all of the trial court's decisions that are challenged by Karen Stevenson. Canning further requests that the Court reverse the downward adjustments made in the orders awarding attorneys' fees to Canning. Finally, the Court should further award Canning his reasonable fees and costs incurred in this appeal.

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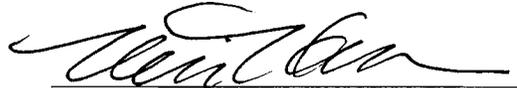
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Respectfully submitted this 7th day of April, 2011

LIVENGOOD, FITZGERALD
& ALSKOG, PLLC

A handwritten signature in black ink, appearing to read "Kevin B. Hansen", written over a horizontal line.

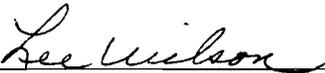
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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on April 7, 2011, I caused service of the foregoing as follows:

Karen A. Stevenson, <i>pro se</i> 424 – 21 st Avenue Seattle, WA 98122 (206) 860-3701	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile <input type="checkbox"/> via Overnight Mail
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Dated: April 7, 2011



Lee Wilson