68256-3

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No. 68256-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re:

Christopher Matson

vs.

Dolores Van Hoof, et al

COURT OF APPEALS
STATE OF WASHINGTON
2012 JUL -0 PM 3:42

BRIEF OF APPELLANTS BARRY KOMBOL and DOLORES VAN HOOF

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A. **INTRODUCTION** Dolores Van Hoof (Van Hoof) appeals two judgments entered against her by Superior Court Judge Monica Benton; one on December 28, 2011 [**CP 281-2**] and the second on January 3 2012. [**CP 283-4**]

Both of the judgments Van Hoof appeals were against her in the sum of $2,525.00 and both were in favor of Plaintiff Christopher Matson. The second Judgment is a duplicate of the first.

Mrs. Van Hoof, joined by her attorney Barry Kombol, appeal the two judgments of $525.00 entered against Barry Kombol in favor of Mr. Matson, referenced as a '**Second Judgment**' on Lines 26-29 of **CP 281** (and again on the same lines of the duplicate judgment). [**CP 283**].

Mrs. Van Hoof, joined by her attorney Barry Kombol, appeal two judgments entered against Barry Kombol *and* Rainier Legal Center; one on December 28, 2011 [**CP 279-80**] and the second on January 3, 2012. [**CP 285-86**].[1]

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[1] **In the body of both Judgments, at Line 5 of CP 280 and the Line 5 of CP 286 the order states judgment is "against '*Delores* Barry Kombol'". Mrs. Van Hoof's first name is 'Dolores'. To the extent the reference to '*Delores*' was intended to relate to her, Van Hoof joins her attorney in appealing to the $1,225.00 judgment against " Kombol".**

Those judgments were in the amount of $1,225.00 and both were in favor of the law firm of 'Acebedo and Johnson, LLC'. The January 3rd judgment appears to be duplicate of the first.

B. **ASSIGNMENTS OF ERROR:**

(1) **Assignment of Error No. One**

The court erred in awarding Christopher L. Matson Judgments against Delores (sic) Van Hoof in the amount of $2,525.00 and against Barry Kombol in the amount of $525.00 and erred in entering the Order of August 19, 2011 on which they were based.

(2) **Assignment of Error No. Two**

The court erred in awarding Judgments in favor of Acebedo & Johnson, LLC. against Barry Kombol and Rainier Legal Center, Inc. in the amount of $1,225.00 and erred in entering the Order dated September 23, 2011 upon which those were based.

(3) **Assignment of Error No. Three**

The court committed error of law in Findings 15, 16, and 17[2] and 18, 19, 20, 21, 22, 23 and 24.

(4) **Assignment of Error No. Four**

The Court committed reversible error when it

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2 Differing versions of Findings of Fact 15 and 16 were entered [Compare **CP 274, Lines 7-11** with **CP 274 Lines 21-25**]. Three versions of Finding 17 were entered. Compare **CP 274, Lines 13-20** **CP 274 Lines 26-29** with **CP 275 Lines 1-7**] Appellant believes all three versions are erroneous.

entered Conclusions of Law 3, 5, 6, 5-6,[3] 7 and 8.

(5) **Assignment of Error No. Five**

The court committed error of law in continuing to hear motions and enter Findings, Conclusions and Judgments against a party and her counsel while failing to avoid an appearance of bias and prejudice in her comments and rulings.

B. **Issues Pertaining to Assignment of Error**

(1) Did the trial court commit reversible error in awarding Judgments against Delores (sic) Van Hoof in the amount of $2,525.00 and against Barry Kombol in the amount of $525.00?

(2) Did the trial court err in awarding several Judgments against Barry Kombol *and* Rainier Legal Center, Inc. in the amount of $1,225.00 and against 'Delores [*sic*] Barry Kombol'?

(3) Did the trial court abuse its discretion in entering Orders for Attorney fees upon which the above-referenced judgments were based?

(4) Did the trial court commit reversible error in Findings of Fact Nos. 15, 16, 17 and 18, 19, 20, 21, 22, 23 and 24?

---

3 Appellant makes double reference to Conclusions of Law 5 and 6. Just as was the case of Findings 15, 16 and 17, there are two different Conclusions of 5 and 6. [Compare **CP 277, lines 4-14** with **CP 277 Lines 22-26**]

(5) Did the Court avoid the appearance of bias or prejudice in the Court's rulings?

C. **STATEMENT OF THE CASE:**

Mrs. Van Hoof and two of her neighbors were defendants in an adverse possession case filed by Christopher Matson. Defendant Schoenbachler appeared pro se. Brent and Julie Okita initially appeared pro se but later retained counsel. Mrs. Van Hoof was represented by Barry Kombol.

Pre-trial Settlement. Pre-trial mediation resulted in settlement of Mr. Matson's claims against all defendants, including Mrs. Van Hoof. [**CP 7-10**]. The last section of the CR(2)(A) Settlement Agreement with Dolores Van Hoof stated:

> "**8) Neither of the parties to this Settlement Agreement shall be awarded Court Costs or Attorney's Fees.**" [**CP 10**]

Section 7 obligated Mrs. Van Hoof's attorney to make an initial draft of pleadings and orders consistent with the settlement.[**CP 9**] Mr. Matson's attorney, Cindy Johnson, was tasked with preparing orders consistent with her client's settlement with defendants Okita and Schoenbachler.

No timetable was set in the settlement for completing and entering the settlement documents.

Notice of Settlements. Pro se Defendant Schoenbachler filed a 'Notice of Settlement' of the case, 2011 and waited receipt of final drafts from Attorney Johnson. Counsel for the Plaintiff filed her 'Notice of Settlement' requesting that 'any trials or hearings be stricken from the court calendar'. [**CP 144-147**]

Interestingly, Pro Se defendant Schoenbachler filed a Declaration *see* [**CP 28 Lines 1-17**] where he described some of his concerns he had about the timing and content of documents he received from Mr. Matson's attorney while awaiting plaintiff's drafts of settlement documents. He declared:

> "I understand that Mrs. Johnson has filed a request to this Court to force Mrs. Van Hoof to sign final documents in our case. This is pretty incredible because I have not yet signed the settlement documents Cindy Johnson sent me in July, but no motion has been filed against me. I ask the court why Mrs. Van Hoof has been singled out for this treatment? Dolores is a widow and is understandably quite upset about being sued by Cindy Johnson's client.
>
> This Court should know that on numerous occasions I have received mail from Ms. Johnson's office at an address other than my own. .... I have not been treated [the way Mrs. Van Hoof has been treated], so why has Dolores Van Hoof been so pressured?"

Motion to Enforce Settlement. On August 10, 2011 Mr. Matson's attorney filed a 'Motion to Enforce Settlement Agreement and Attorney's Fees' noting it for August 19th, without oral argument.

The motion contained a "Statement of Facts" in which counsel stated the 'the trial date (was) looming', [**CP 149 line 24**] despite having filed a Notice of Settlement two weeks earlier asking that the trial be stricken.

Counsel for Plaintiff did *not* cite the CR 2A Settlement Agreement in the Motion to Enforce. No copy of the settlement was attached to the motion. Matson cited RCW 4.84.270 in support of the fee requests *or* in the alternative CR 11, "due to Defendant Van Hoof's counsel's repeated delay and increase in litigation and costs in the matter."

Difficulties/Absence of Van Hoof's Attorney. Counsel for Dolores Van Hoof was out of his office with his family for most of August of 2011. [**CP 42, lines 19-27**] He had experienced considerable difficulty in his sole proprietorship between May 1 and July 31, 2011 due the death of his office manager/litigation paralegal and the long absence of his receptionist due to hospitalizations due to

Non-Hodgkin's Leukemia in the spring and summer of 2011. [**CP 40, lines 8-13**].

Mr. Kombol was attempting to operate his office by himself assisted by a receptionist with little legal experience. Plaintiff's counsel had been advised of Kombol's problems. [**CP 40, 13-18**].

Kombol presented the Court with a declaration which outlined the difficulties he was having in drafting the final settlement Order and Decree and, in his "Reply to Motion to Enforce" asked the Court to allow the parties until Sept. 30, 2011 to complete the settlement. [**CP 39 L. 23**]

Mr. Kombol's Reply contained a request for:

> "The Court to consider whether it would be appropriate for the Court ... to schedule a hearing on the conduct of Ms. Johnson in this case" [**CP 43 Line 14-17**]

<u>Order for Attorneys to Appear in Court</u>. Judge Benton signed an Order on August 24, 2011 in response to Mr. Kombol's request. This Order was not filed until August 30, 2011. [**CP 174-75**]. The Court's ruling referenced that she had reviewed Mr. Matson's motion, the Declarations of Schoenbachler and Kombol as well as the Court file, Court Rules, Statutes and RPC's and provided:

> "Plaintiff's Counsel and Counsel for Dolores Van Hoof shall appear before this Court on September 14, 2011 at 8:30 a.m. where the Court shall consider those issues, allegations and requests contained in their pleadings on this matter that he court desires to resolve by a supplemental hearing."

Earlier Order to Enforce. However, the Judge had already entered an Order on August 19th which granted Plaintiff's Motion for the attorney's fees to as regards enforcing the settlement agreement. The Order contained three provisions:

> "**ORDERED, ADJUDGED and DECREED** that the Settlement Agreement is enforceable and that Defendant Van Hoof and its (sic) attorney shall comply with the terms of the agreement by providing Plaintiff Matson's attorney with "an initial draft of pleadings and orders consistent with this settlement" according to Sect. 7 of the Settlement Agreement by ***or*** before August 24th of 2011.
>
> "**ORDERED, ADJUDGED AND DECREED** that Defendant Van Hoof and defendant's attorney Mr. Barry Kombol of Rainier Legal Center, Inc. P.S. jointly shall pay reasonable attorney's fees in the amount of $525.00 to Plaintiff Matson for having to bring the Motion to enforce the CR 2A Agreement.
>
> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Defendant Van Hoof shall pay $500.00 in attorney fees for every day past August 19th that Defendant Van Hoof fails to comply with their (sic) duties under the Settlement Agreement." [**CP 155-6**]

Supplemental Hearing not Held. For reasons not clear in the record, the Sept. 14th 'supplemental' hearing scheduled by Judge Benton for counsel to appear before the Court was not held.

Efforts to Draft Judgment Quieting Title. In the interim, Counsel for Mr. Matson and Mrs. Van Hoof exchanged several drafts of a 'Stipulation and Judgment Quieting Title'. *See* [**CP 181 Line 24** through **CP 182 Lines 1-4**] and transmittal letters. [**CP 184-188**]. Because the drafting 'was not simple work' but required 'detailed attention to metes & bounds descriptions to assure accuracy' - as well as the other drafting problems described in Mr. Kombol's August 24th 31st and September 8th letters, the final draft of the Judgment Quieting Title was not done until mid September, 2011.

Van Hoof's Notice of Presentment. After drafting a last version of the final pleadings, Mrs. Van Hoof's counsel noted a hearing for September 23, 2012 to present the "Stipulation and Judgment Quieting Title" and included a "Motion for Relief from Order."

The primary basis for Mrs. Van Hoof's [and her attorney's] request for relief/reconsideration had to do with conflicts between the first and

third provisions of the August 19th Order where Judge Benton ordered:

#1 "... **Mrs. Van Hoof and its** (sic) **attorney ... [provide] Plaintiff Matson's attorney with an "initial draft of pleadings and orders consistent with this settlement" as according to Section 7 of the Settlement Agreement on or before August 24th of 2011."** *and*

#3 " ... **Defendant Van Hoof shall pay $500.00 in attorneys fees for every day past August 19th that Defendant Van Hoof fails to comply with their** (sic) **duties under the settlement agreement.'**

The September 23th Motion for Presentation [and Relief of the August 19th Order] was held on September 23, 2011. Counsel for Matson objected to Mrs. Van Hoof's Motion for Relief from the Orders and argued that her client was entitled to CR 11 Sanctions because Mrs. Van Hoof's motion 'only served to increase the cost of litigation for plaintiff.' [**CP 197, lines 11-12**]

The Verbatim Transcript of Audio Recorded Proceedings of the hearing of September 23rd hearing includes, in pertinent parts, the following discussion relating to Mrs. Van Hoof's and her attorney's difficulty in understanding the first and third sections of the August 19th Order:

See Verbatim Report, Page 4, beginning at Line 5:

THE COURT: All right. Very well. Thank you for coming today. I thought, because there were so many layers of this, that maybe it made sense to have you here. And I realize there's an expense to your clients, but I really felt, as though to resolve this, I needed to have all the parties in front of me.

So there's an order -- there is an Order -- your seeking relief for reconsideration of my order; is that correct?

MR. KOMBOL: Yes, Your Honor. Basically .. that would be the essence, not reconsideration, but relief from. Yes

THE COURT: Well, the central issue is the CR 2 agreement, right?

MR. KOMBOL: Yes Your Honor. And if I could just

THE COURT: Come to the podium, please.

MR. KOMBOL: the good news, Your Honor, is I have obtained this week the stipulated judgment between Plaintiff and Defendant. This

THE COURT: Well, that is good news.

MR. KOMBOL: Well, yes. And this was --

THE COURT: -- the whole idea.

MR. KOMBOL: This is the whole idea. We have a settlement. We have a resolution, Your Honor, and --

THE COURT: Hand it to my clerk, would you?

MR. KOMBOL: May I approach the bench? --

THE COURT: That's fine. Wherever you are now.

MR. KOMBOL: It has been signed by all the parties, and in essence, Your Honor, that is -- that is what settlement is all about, is having an agreed order.

THE COURT: Right. So do you need me?

MR. KOMBOL: Well, I -- you know, I think it's arguable, and I think -- I would

say, although there's orders in this -- in this proceeding that would tend to require some clarity, if that order is entered and there is no attorney fees awarded I think this case is resolved.

Now, I think that's the easiest way to think of it, although there are orders that I would hate to have come back to this Court and say whether I owe $2,000.00 or more than $2,000, or my client owes some money, and I -- I would propose that this agreed order resolves the whole case and we can go home.

But there's another motion in front of the Court I think, for sanctions So if -- I mean, I'm here to answer questions that the Court may have.

Ms. Johnson states: [**Pg 7 line 7** to **Pg 8 line 12**]

THE COURT: Well, I'm looking at your response to his motion, Pages 9 and 10.

MS. JOHNSON: Okay.

THE COURT: Where you outline the amount of attorney's fees of $1,225 for 16 months' representation, and --

MS. JOHNSON: That's in addition to -- that's for coming here today.

THE COURT: Ah, okay.

MS. JOHNSON: Yes.

THE COURT: So the underlying amount -- didn't I order a figure? --

MS. JOHNSON: Yes.

THE COURT: -- and I said it was to be divided between Counsel and client, correct?

MS. JOHNSON: There - yes. It should be -- I think there was $500 -- I have the order right here. It was $525 for Barry Kombol and then there was $500 a day in attorney fees that Defendant Van Hoof failed to comply after August

19th. And he ended up complying on the 24th, so it would have been $500 a day until the 24th.

THE COURT: Okay.

MS. JOHNSON: So I was going to then file a presentation of judgment for that amount. And then my understanding was that this reconsideration was based on -- on that amount.

And I didn't feel that he really had an argument, based on the fact that he waited until the 24th to actually do the initial pleadings [4] when he received my order on the 19th [5] and could have simply just sat down at that time and made the revisions --

THE COURT: All right, You're right. Maybe you don't need to respond as much as he needs to. Mr. Kombol, Did you want to make a record that's not already made in the case?

MR. KOMBOL: Well, Your Honor --

THE COURT: As to the delay or the reason why the Court should waive --

MR. KOMBOL: Well, I know the Court has reviewed all of the Pleadings. And, first of all, I think that, when we -- when the order -- or motion was made, there was -- that was the August 19th motion, there was a great deal of discussion of why attorney' fees would be appropriate; no mention whatsoever of the underlying agreement that barred the award of attorney's fees.

THE COURT: Where is it barring the award of attorney's fees?

---

4 Counsel's argument to the Court assumes that the first paragraph of the August 19th Order should be ignored and only the third paragraph should have been enforced.

5 Counsel's statement to Judge Benton that opposing counsel received the Court's Order on August 19th is contradicted by Finding of Fact #14 [**CP 274** and Footnote 2 of Johnson's Declaration in opposition to Van Hoof's Motion for Relief [Footnote 2 to **CP 194**]

MR. KOMBOL: The settlement agreement itself, Page 8 -- Section 8 says: "Neither of the parties to the settlement agreement shall be awarded costs or attorney's fees." and so if -- I mean, it's striking to me that that [provision] was never mentioned.

THE COURT: Direct me to the page.

MR. KOMBOL: Oh, well ... it's Pg. 4 of 4 of the handwritten -- the handwritten --

THE COURT: Handwritten.

MR. KOMBOL: -- settlement agreement.

THE COURT: All right. It's not reduced to writing on the one you proposed propounded to me today?]

MR. KOMBOL: Oh, I'm sorry.

THE COURT: Is it on there?

MR. KOMBOL: The handwritten -- I can show it to you, if you'd like, Your Honor. I have the original.

THE COURT: No, no. In the one you handed to me today, is it in here? The stipulated judgment?

MR. KOMBOL: Oh, no, no. That's the resolution of the underlying case. I'm sorry, Your Honor, that's the --

THE COURT: The CR 2 agreement, is that what you're referring to?

MR. KOMBOL: Yes, I am referring to the CR 2 agreement, and I have it here, if you like.

THE COURT: Just read it aloud.

MR. KOMBOL: "Neither of the parties to the settlement agreement shall be awarded costs or attorney's fees."

THE COURT: All right.

MR. KOMBOL: And so that was not mentioned; that the court was not aware of when the motion to enforce was before the court on ... [the] 19th.

...

...

Kombol argument continues at Page 12, Line 17

MR. KOMBOL: Now, it's 30 days later -- actually it's more than 30 days later.

THE COURT: It is.

MR. KOMBOL: And just now have we come to enter into the final documents. Now I did an experiment this last month & each time Counsel sent me a pleading, every time, I responded on that day. And we're here just this week. Now, if this was an easy thing to do, why would it have taken this long? --

THE COURT: Let me ask a question.

MR. KOMBOL: Yes.

THE COURT: Who needed to sign the stipulated judgment?

MR. KOMBOL: All four parties.

THE COURT: All right. And who received it on the 19th?

MR. KOMBOL: I did.

THE COURT: All right. Would it have been circuated from you, to whom, after your client signed -- you & your client?

MR. KOMBOL: Well, it would have gone back and forth, back and forth, and -- which it did about four -- three, four times, Counsel?

THE COURT: And is that what caused the delay through the 24th, having to reach all the parties?

MR. KOMBOL: Oh, no Your Honor. On the 24th -- on the 24th, pursuant to the court order of enforcement, that order was returned with the revisions, with the inclusions that were missing, by 5:00 that day. I didn't receive the [*signed*] order on the 19th because I didn't receive it [*on the day it was signed*] and though it was signed, if you'll recall, I filed pleadings, and an order had been set by the Court to have us return here. And so I -- on the day I received this order, I worked all day. I returned a revised [*draft of*] the stipulated order of judgment, and then it took three weeks after that to come to final terms.

THE COURT: All right. And is -- is that supported by a doc -- a declaration?

MR. KOMBOL: Yes, Your Honor.

THE COURT: Very well. Thank you.

NOTE: Sections in *italics* bracketed by ***[ ]*** have been added for clarification

Following arguments by Ms. Johnson [Page 14, line 13 to Page 16, line 5 Judge Benton commented on the reasons for her Aug. 19th ruling as well as for the ruling she made on September 23, 2012.

THE COURT: All right, Ms. Johnson, I'm persuaded that, you know -- probably not a surprise to you, that I was right the first time, and that the Court will enforce its August 19th order to include attorney's fees for every day past August 18th (sic).

It's not the first case where I've had to issue a sanction where parties have just let things sit too long, and better it be a monetary penalty than one from the bar association, [6] is what I would think.

Now -- so I'm going to deny the motions for reconsideration of any diminution of attorney's fees to be paid. I'm loath, really, in general, to have the client bear the burden, and the underlying order that I signed essentially assigns a portion tot he client and a portion to the attorney. It seems to me that same proportionality ought to persist.

MS. JOHNSON: Okay.

---

6 Ms. Johnson had not suggested that referral had been made to the Washington State Bar Association or that one was contemplated. Judge Benton did not make reference to any conduct by counsel for any party that warranted such a referral.

THE COURT: So let me look at the -- do you have a proper order that reflects that?

MS. JOHNSON: I have -- ...

.....

.....

MR. KOMBOL: -- Your Honor --

THE COURT: I'm listening.

MR. KOMBOL: Before the Court enters the order --

THE COURT: Yes.

MR. KOMBOL: -- can I point out, and if we review the order of August 19 --

THE COURT: Yes.

MR. KOMBOL: -- I think that there is, if anything, not much clarity in that order because it -- I think I pointed out first it says "Defendant Van Hoof and its attorney shall comply with the terms, with an initial draft of pleadings and orders consistent with this settlement as according to Section 7 of the settlement agreement by August 14 2011

THE COURT: The 24th yeah.

MR. KOMBOL: The 24th. Now, that was complied with. There's no doubt that, that was complied with.

THE COURT: And further that you would pay reasonable attorney fees.

MR. KOMBOL: Okay, Then there is an attorney fee award of $525.00 ..... You understand that [that would have the effect to] impose a penalty over a weekend even if there's compliance with Paragraph 1.

It seems a bit inconsistent and difficult to understand how one could comply with that. In other words, if one complied with one part, ... the first part, why would there be sanctions for the Saturday, Sunday, Monday, Tuesday? It's not logical.

....

Between Page 19, line 13 and Page 20, line 22, Judge Benton revealed her reasoning behind granting an Order for CR 11 Sanctions [**CP 199-200**] against Mrs. Van Hoof's counsel on September 24, 2011

THE COURT: .....

I mean, the whole point of sanctions and setting terms is to move the ball down the field, to get this done. And if any party wants to wait, this order, my order, give them fair notice to know what the cost of waiting would be, which was $500 a day, be it a weekend -- there's no case law that says you can't include weekends. I mean, the bottom line is, this needed to be done. Here it is, not even signed until the 21st (sic) of September. I mean -- let me give the big picture.

The big picture is that you bring a matter to the Court because you want resolution. And the expectation of the parties, whether it's the lawyers or not, the expectation of the parties is that it's going to move efficiently through the court system . . . But it can't just lay there indefinitely because the parties truly came to the Court for a resolution. If the lawyers are dilatory, then shame on them. And if the lawyers are not responsive, then a monetary fine is the midway point that the Court takes to try to move this through. And presumably the order that I signed didn't put the burden on the client any more than it put the burden on the lawyer.

So I'm persuaded that what I agreed to do was a good, reasoned order, because you have to have some consequences in order to move things along. Seldom am I asked to sign something that really has the perforce of getting things done by assigning a fee per day, but I think it's smart and I think it's likely to produce the right results. So I'm -- I'm going to stand by it. I'm going to stand by it.

December 16, 2011 Hearing to Present FF/CL.

On November 14, 2011 Counsel for Matson filed a and served on Mr. Kombol a Notice of Unavailability of Counsel, **CP 222-23**, indicating:

> "**Cindy A. Johnson** . . . . . attorney for Christopher Matson will be out of the office from **December 16, 2011** through and including December 30, 2011."[**Emphasis Added**]

On November 22, 2012 at 9:06 a.m and again at 9:08 a.m. Counsel for Matson *filed* documents with the Court titled "Notice for Hearing" on December **16**, 2011, **CP 226**, for "Presentation of Findings of Fact and Conclusions of Law". [Emphasis Added]

This notice was dated "***July 30, 2010***" **CP 227**] [*See* also **CP 230**] and on the next page of each notice, listed the following telephone number for Van Hoof's attorney: ***206-963-8878*** [7].[**CP 228** and **231**]

Counsel for Plaintiff did not contemporaneously sign and file an "Affidavit of Service" to establish the Notice for Hearing and a Motion and Declaration, **CP 232-260**, had been mailed to Van Hoof's attorney.

On December 16, 2011 Mr. Kombol filed and served a 'Objection to Hearing Date' [**CP 95-97**],

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4 The date Ms. Johnson states the Notice was signed is obviously erroneous. The telephone number 206-963-8878 is for a cellular phone number of an individual with a street address on 8th Avenue in Seattle, not Mr. Kombol's office number.

informing the court and counsel that he had not received any notice of the hearing[8] *and* that he was scheduled to be in Tacoma the entire morning of December 16th. This 'Objection' included a Declaration from the attorney's assistant stating Kombol's office had not received the documents in November attaching a letter, dated December 13, 2012 in which Kombol's assistant asked the December 16th to be stricken and for the hearing be rescheduled to a date when both counsel could be present. **[CP 99]**

Ms. Johnson responded to Ms. Burnett's letter by signing 'Declaration of Mailing' **[CP 109-110'** dated and filed on December 13, 2011, asserting that she ***had*** mailed a Note for Motion for Presentation to Mr. Kombol on November 21, 2011.

Ms. Johnson also filed a lengthy declaration (with attachments) arguing that Mr. Kombol did not need to be in Tacoma on December 16th. [**CP 103-137**]. Johnson's Declaration caused Mr. Kombol's Paralegal to file a 5 page Declaration [**CP 138-142**] describing the four proceedings which Mr. Kombol was scheduled to attend in Pierce County on December 16th. [**CP 143**]

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8 That was not the first time in this litigation that a party filed a Declaration stating that Ms. Johnson had mailed documents and pleadings to the wrong person at an incorrect address. See Schoenbachler's Declaration of August 19th.. **CP 27-32.**

Ms. Johnson declined to agree to continue the hearing of December 16th, so Mr. Kombol could be present. Mr. Kombol then arranged for his Paralegal to attend the hearing along with an colleague of his, Ms. Loretta Fiori, an Auburn attorney. A summary of the Verbatim Transcript of Audio Recorded Proceedings on December 16, 2011 at Pg. 3 follows:

THE COURT:	The Court received an objection to the hearing from Mr. Kombol. Well, let me be clear, signed by Susan Burnett.[9] Is that a firm you're familiar with or a person you're familiar with?
MS. FIORI:	Susan Bennett is here in the courtroom. She is Mr. Kombol's secretary.
THE COURT:	Okay. Is he (sic) a lawyer?
MR. FIORI:	Mr. Kombol is a lawyer.
THE COURT:	All right.
MS. FIORI:	He is currently in Pierce County on several matters . . . He did request a continuance of this case from Ms. -- Ms. Johnson. She hasn't agreed to it and won't agree to it. I'm here with dates the first week in January, and in -- the second week and third and fourth weeks of January that Mr. Kombol is available.
THE COURT:	All right. Let's address what was put in the declaration by Ms. Johnson. Ms. Johnson, you say on Page two of your declaration "A simple oversight with the declaration of mailing was not immediately filed" but you indicate that there were, in fact, declarations of mailing dated November 21st, correct?
MS. JOHNSON:	The note for motions were mailed to him and e-mailed to him, which was normal correspondence for us & I brought copies of e-mails -- e-mail correspondence back

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9 The Court was mistaken on the issue who signed the objection. Attorney Kombol signed the Objection **[CP 95-96]** Ms. Burnett signed a Declaration and attached three pages of exhibits. **[CP 97-100]**

and forth between Mr. Kombol and I. E-mail was better for me to get to him because I would try to fax things to him and it wouldn't go through to him, so I would e-mail things to him whereas he would fax things to me a lot of time.[10]

THE COURT: Very well. He has and is, I guess, in Federal Court. I presume that you're not ready to argue the merits of this motion, are you, Ms. Fiori? [11]

MS. FIORI: Absolutely not. I received pleadings late last night, got to look at them this morning. So it would be difficult for me to argue any merits.

I do know that Mr. Kombol, he's in Pierce County Superior Court. He does have a Federal Court matter that is scheduled, but I believe that matter is without oral argument. He is in Pierce County Superior Court on four other show cause -- ... this morning, which is why --

THE COURT: Representing other clients?

MS. FIORI: Pardon?

THE COURT: Representing other clients?

MS. FIORI: That is correct. I think he's actually the guardian ad litem for at least one of the show cause appearances in the Pierce Co. Superior Court this morning

THE COURT: ... findings of fact were to be entered today, correct?

MS. JOHNSON: That is correct, Your Honor. And I'd like to address quickly the reason why I do not want this continued.

THE COURT: Yes. Yes, go ahead.

MS. JOHNSON: First of all, I received the objection and it stated, Mr. Kombol cannot be here because he has an important US District Court case. So I looked up the case, and it was a summary judgment without oral argument. I thought it was dishonest.

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10 Nothing Ms. Johnson filed established that Mr. Kombol received or responded to an e-mail allegedly sent to him on November 21, 2011.

11 The hearing was scheduled to present Findings of Fact and Conclusions of Law

	Last night at 4:30, I received notice that he was in four different cases this morning. So I looked up those cases, and
THE COURT:	What did you learn?
MS. JOHNSON:	I have a copy for Your Honor.
THE COURT:	That's fine.
MS. FIORI:	Does she have a copy for me?
MS. JOHNSON:	No, I didn't think Mr. Kombol was going to show up today, so I didn't --
THE COURT:	All right. Well, let's not be obnoxious. Hand her the copy you had for me.
MS. FIORI:	Thank you.
THE COURT:	What does it say?

The Verbatim Transcript continues for two pages of Ms. Johnson characterization of the nature of the Pierce County Superior Court hearings Mr. Kombol was attending in Tacoma and then continued at Page 8:

MS. JOHNSON:	. . . So as a result, I find it deceptive that he is requesting a continuance for a simple matter of a guardianship, which is the only one of these four matter that should have been requiring appearance before Pierce County. (Sic)
THE COURT:	Typically, though, the remedy would not be to go forward, but rather to sanction and require fees to be paid.
MS. JOHNSON:	Well, we've been trying to do that for quite some time now.[12]
THE COURT:	It's -- Ms. Fiori, you've inherited a snake in a basket, and it is fighting its way out of the basket, on its way to the state bar.[13] So I want you to communicate that to Mr. Kombol.
MS. FIORI:	I will.
THE COURT:	All right. I'm going to review the findings of fact. If Mr. Kombol does not

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12 The record does not reveal the identity of the person or persons to whom Ms. Johnson makes reference when she states "**we've** been trying to do that for quite some time now."

13 Nothing in the record supports a referral to the Bar Association. Ms. Johnson never suggested that any such referral was contemplated or pending.

	contact my office by 4:00 this afternoon, I will be entering the findings today.
MS. JOHNSON:	So the Motion for Continuance --
THE COURT:	Will be denied.
MS. JOHNSON:	-- is denied.
MS. FIORI:	Mr. Kombol asked me that I make a record, which included some testimony of his paralegal, who is here today, and available to answer a set of questions.
THE COURT:	Concerning what? Questions concerning what?
MS. FIORI:	Concerning whether he received notice of this hearing.
THE COURT:	Oh, he can file any declaration he wants, or you may file, or any declaration that Ms. Burnett chooses to file.
...	
...	Do you have copies of the findings of fact today, Ms. Fiori?
MS. FIORI:	I had copies of her proposed findings.
THE COURT:	Okay.
MS. FIORI:	I don't have copies of what she just passed forward.
THE COURT:	So, we'll make a copy for you there.
MS. FIORI:	Thank you.
THE COURT:	All right. You know, in other words, I'm not satisfied that his failure to appear is anything but willful, so I'm going to go forward as though he's -- forfeited any objection.
MS. FIORI:	So for the record, my motion for continuance has been denied.
THE COURT:	Yes.

On December 16, 2011, at 2:25 P.M. Mr. Kombol attempted to contact Judge Benton and her Bailiff, Laura Dorris by telephone but received no answer. He left a message on Ms. Dorris's answering machine. At 2:38 P.M. Mr. Kombol sent and e-mail to Ms. Dorris informing her and Judge Benton that he had left a message with the bailiff. **[CP 268]**. He also indicated that he was

available to receive a call at his office until the end of the day [**CP 268**].

On December 21, 2011 Mr. Kombol corresponded with Judge Benton's Bailiff & Ms. Johnson **[CP 267]** confirming that he had attempted to contact the court on December 16th as he had been ordered. Mr. Kombol also confirmed that he preferred contact between his office and Ms. Johnson and the Court by U.S. 1st Class Mail.

Mr. Kombol also informed the Court and Counsel that he had endorsed the e-mailed Findings and Conclusions and two Judgments. Those endorsements were:

CP 278	***Copy Received by e-mail*** */s/ Barry Kombol* **BARRY C. KOMBOL, WSBA #15206** [14]
CP 280	***Unsigned Copy Received by e-mail* - Objections to Presentation Argued in open Court by Loretta Fiori** */s/ Barry Kombol* **BARRY C. KOMBOL, WSBA #15206**
CP 282	***Unsigned Copy Received by e-mail* - Objections Argued by Loretta Fiori** */s/ Barry Kombol* **BARRY C. KOMBOL, WSBA #15206**

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14 The Findings and Conclusions prepared by Ms. Johnson misstated Mr. Kombol's WSBA Number

On December 27, 2011 Judge Benton signed the Findings of Fact and Conclusions of Law Matson's counsel had presented on December 16, 2011 [**CP 278**]. Two Judgments were signed on the same day and filed with the Superior Ct. Clerk on December 28th.[**CP 279-80** & **281-82**]

On January 3, 2012 Judge Benton signed and entered an *identical* set of the same judgment. **[CP 283-84-85-86**]

On January 12, 2012, Dolores Van Hoof and her attorney Barry Kombol filed a Notice of Appeal of the Findings of Fact and Conclusions of Law, the Judgments entered on December 28, 2011 as well as the duplicate Judgments entered on January 3, 2012.

D. **SUMMARY OF ARGUMENT**

The Trial Court abused its discretion in entering an award for attorney fees and daily sanctions when, in the August 19, 2011 Order Enforcing Settlement Agreement, when that CR(2)(A) agreement, by its express terms, said "Neither of the parties to this Settlement Agreement shall be awarded Court Costs or Attorney Fees." Judge Monica Benton abused her discretion when, on August 19,

2011, she signed and entered an order for sanctions against Mrs. Van Hoof and her attorney *because* the delay in Mrs. Hoof's attorney's preparation of final pleadings was excusable *and because* the order presented by Plaintiff's counsel and entered by the Court contained ambiguous and conflicting provisions.

The Trial Court abused its discretion in entering CR 11 sanctions against Mr. Kombol and Rainier Legal Center, Inc. on September 23, 2011 *because* the court failed to consider, in their entirety, all of the filings and arguments of the parties and *because* had they been considered it would have been clear they were not "frivolous as a whole".

The Trial Court erred in reducing the August 19th and September 23rd Judgment Orders to Judgments against Dolores Van Hoof on December 28, 2011 [and then did so again on January 3, 2012 *because* the Judgment and Order signed by the Court *on* September 23, 2011 provided that:

> " . . . the terms of that certain CR2A Settlement agreement entered into by and between the parties on or about April 26, 2011 shall be the *final disposition* of this case and that this case shall otherwise be dismissed as between the Plaintiff Matson and Defendant Van Hoof with prejudice and *without* an *award of costs or fees*, ... " [Emph. Added}

The Trial Court erred in entering duplicate Judgments against Mrs. Van Hoof and against Barry Kombol and against Rainier Legal Center.

Finally, Judge Benton erred by making rulings in the case and imposing sanctions after having expressed prejudice and bias against Mrs. Van Hoof's attorney.

E. **ARGUMENT**

1. **The Standard of Review**

1.1 A trial court's threshold decision to grant or deny attorney fees is reviewed de novo. Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 277, 215 P.3d 990 (2009). Cases applying a de novo review standard agree that the trial court's threshold determination on whether there' a statutory, contractual or equitable basis for fees is a question of law to be reviewed de novo. Unifund v. Sunde, 163 Wn. App. 472, at 483-84 (2011), Ethridge v. Hwang, 105 Wn. App. 447, 459-60, 20 P.3d 958 (2001).

When the record on review does not adequately demonstrate the basis for an award of attorney fees, the case may be remanded for an adjustment of the award or to determine of its basis. Osborne v. Seymour, 164 Wn. App. 820 (2011).

When a trial court imposes sanctions under its inherent authority, or CR 11, the standard of review is whether or not the court abused its discretion. Manteufel v. Safeco Insurance Co. Of America, 117 Wn. App 168, 175-76, 68 P.3d 1093, review denied 150 Wn. 2d 1021 (2003), State vs. S.H. 102 Wn App. 468, 473, 8 P. 3d 1058 (2000).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. State v. Perrett, 86 Wn. App. 312, 936 P.2d 426 (1997).

1.2 Whether the amount of fees awarded by the trial court are reasonable is reviewed under an abuse of discretion standard. *Ethridge*, 105 Wn. App. At 460 (citing American National Fire Insurance Co. v. B & L Trucking, 82 Wn. App. 646, 699, 920 P.2d 192 (1996)) aff'd, 134 Wn.2d 413, 915 P.2d 250 (1998).

A trial judge has broad discretion in determining the reasonableness of an attorney fee award and, in order to reverse the award, the opponent must show that the trial court manifestly abused its discretion, *Ethridge*, Pg. 646, 669, 920 P.2d 192 (1996), aff'd, 134 Wn.2d 413, 951 P.2d 250 (1998)).

1.3 When a party asserts that a trial judge has

exhibited bias or prejudice in the proceedings below, the Court of Appeals conducts an independent, de novo review of the record. Saldivar v. Momah, 145 Wn. App. 365 (2008), State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972); *see also*, In re Custody of R, 88 Wn. App. 746, 762, 947 P.2d 745 (1997), 137 Wn. App. 136, 151 P.3d 1060 (2007), Chicago, Milwaukee, St. Paul and Pacific R.R. Co. v. Washington State Human Rights Comm'n, 87 Wn.2d 802, 808, 557 P.2d 307 (1996); *see also* In Re Marriage of McCausland, 129 Wn. App.390, 118 P.3d 944 (2005}, reversed on other grounds, 159 Wn.2d 607, 152 P.3d 1013 (2007)

2. **The Sanctions Awarded on August 19, 2011** Matson relied in his Motion to Enforce Settlement Agreement *not* upon the settlement agreement itself (which did not contain a provision which allowed an party award of fees or costs), *but* upon CR 2A and RCW 2.44.010 [**CP 151, Line 16**].

Neither that Court Rule nor the statute he cited expressly permit an award of attorney fees to a litigant.

Mr. Matson's motion also cited the RCW 4.84.270 and CR 11 as authority for a fee award. RCW 4.84.270 provides:

> "The . . . party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded,

> exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280."

Nothing in RCW 4.84.270 applies to the issue Mr. Matson brought before the court. Nor does CR 11 appear to apply to any issues discussed in his counsel's motion.

CR 11 provides, in pertinent part:

> " . . .
> The signature of a party or an attorney constitutes a certificate by the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . "

At the time Mr. Matson filed his Motion to Enforce Settlement Agreement, neither Mrs. Van Hoof nor her attorney had signed any "pleading, motion or legal memorandum," Plaintiff's citation to the Code of Professional Responsibility [**CP 153**} does not justify a fee award, but simply to sets forth when fees are considered to be reasonable. Note that in citing the RPC's between lines 4-6, Plaintiff wrote:

> "The Code of Professional Responsibility provides guideline as to what a reasonable amount for attorney's fees should be."

Mrs. Van Hoof did not personally respond to Matson's Motion to enforce Settlement Agreement. Her attorney was on

a holiday with his family when the motion was filed [**CP 42, lines 24-27**] **<u>and</u>** that both of his assistants had been absent between May 1st and mid-August because of the May 1st death of his office manager/Paralegal and the long-term hospitalization of his receptionist due to non-hodgkin's leukemia. **[CP 40, Lines 8-15**]

When Mr. Kombol returned from holiday he discovered that Plaintiff's motion was scheduled to be heard without oral argument on August 19th. Mr. Kombol prepared a reply which contained a request for continuance of the matter until final documents could be prepared and circulated and he could be present to have them entered.

Mr. Kombol's reply also pointed out that because the case had been settled and the trial date stricken, there would be no disadvantage to Matson if the Court continued the matter until September to permit the final settlement documents to be drafted and circulated. [**CP 41, 5-17**].

Judge Benton signed and entered an Order [**CP 85-85**] that granted the relief Mr. Matson had requested, including a provision that ordered Van Hoof to:

> "comply with the terms of the settlement agreement by providing Plaintiff's attorney with "an initial draft of pleadings and orders consistent with the settlement" ... by or before August 24th of 2011."

Mrs. Van Hoof was also ordered to pay Matson attorney

fees the sum of $525.00 "for having to bring the motion to enforce." Daily sanctions were ordered, commencing on Saturday, August 20th.

> " . . . Defendant Van Hoof shall pay $500.00 in attorneys fees for every day past August 19th that Defendant Van Hoof fails to comply with their duties under the settlement agreement."

Five days later Judge Benton signed an Order that Mr. Kombol had left in the Court's mail room on August 19th when he filed his reply. That Order, signed on August 24, 2012 ordered counsel for Van Hoof and Matson to appear before her on September 14, 2011 were for the Court to:

> "Consider the issues, allegations and requests contained in [the parties'] pleadings in this matter that the Court desires to resolve by a supplemental hearing."

The September 14th hearing was not held.

As Mr. Kombol argued [Verbatim Transcript, Page 18] at the Presentation hearing on September 23rd that the Court's August 19th sanction order was "inconsistent and difficult to understand ... [or] comply with ... "

The Court declined to reverse or amend the Order for Sanctions, ruling that:

> "the whole point of sanctions and setting terms is to move the ball down the field, to get this done" [Transcript Page 19].

and later, at page 20 of the Transcript, stating:

> "Seldom am I asked to sign something that really has the perforce of getting things done by assigning a fee per day, but I think its smart and I think it's likely to produce the right results. So I'm going to stand by it. I'm going to stand by it."

The Judge misconstrued settled law enabling the Court to award fees and sanctions. This Court has ruled that while a Judge has inherent authority under RCW 2.28.010(2) & (3) to fashion and impose appropriate sanctions for misconduct of the parties or their counsel, that power is not unlimited. State v. S.H. D.O.B. 03-03084 and Public Defender Assoc., 102 Wn. App. 468, 8 P.3d 1058 (2000).

In State v. S.H., despite having awarded just $50.00 in sanctions against a public defender association for not having expeditiously entered into a diversion agreement, this court ordered the case remanded to the trial judge because of the absence of an 'express finding of bad faith' on the part of the public defender attorneys; even though the record below might have supported such finding.

When a trial court awards sanctions under its inherent authority to sanction litigation conduct, it must make express findings of bad faith. *SH*, 102 Wn. App. At 479, In re Recall of Pearsall-Stipek, 136 Wn.2d 267 (1988).

Pursuant to State v. S.H., supra, this court should be constrained to require the high threshold of an express finding of bad faith. Many reported and unreported decisions of this court rigorously require express findings when a party seeks sanctions based upon the court's inherent authority to sanction litigation conduct.

None of the findings entered by Judge Benton mention the existence of 'bad faith' on the part of Mr. Kombol or Mrs. Van Hoof. Rather, Findings of Fact 3-5 and 8-9 simply reveal Ms. Johnson's frustration with Mr. Kombol's lack of communication and diligence. The record reveals that Kombol was absent from his office while on vacation until mid-August and earlier in 2011 had lost both members of his staff, leaving only a part-time receptionist to assist him. Those undisputed facts don't support a finding of bad faith.

Finally, the record is clear that Mr. Kombol complied with the first section of the Court's Order Enforcing Settlement Agreement by sending Ms. Johnson the 'initial draft of pleadings and orders ... by .... August 24th. Mr. Kombol's Declaration at [**CP 181, lines 19-24**] establishes that he returned an initial draft the afternoon of the 24th.

Mr. Matson's counsel concedes as much [See **C.P. 196, Lines 19-22**],[Transcript Pg 7, lines 23-24 & Pg. 16 L. 1-3] and **CP 224, lines 6-10**].

3. **The Sanctions Awarded on September 23, 2011**. Judge Benton's award of fees in the Order of September 23rd was based on CR 11. [**CP 197, Lines 8-2**]. The September 23rd hearing was noted by Mr. Kombol to present the "Stipulated Judgment and Order Quieting Title" which the parties had completed and readied in September for presentment.

Mr. Kombol believed the Court wanted the parties' attorneys to discuss the matters described in the Court's Order of August 24th which ordered both to appear. Ms. Johnson and Judge Benton did not agree.

Ms. Johnson argued that her firm was entitled to an award of attorney fees against Mr. Kombol and his law firm because of her need to prepare pleadings to resist Mr. Kombol's effort to convince the Court that its August 19th Order contained inconsistencies and was illogical. The Court granted Ms. Johnson's request for an award of fees pursuant to CR 11.

The application of a court rule to particular facts is a question of law that is reviewed on appeal, de novo. In Re Firestorm, 129 Wn.2d 130 (1996). Attorney fee awards for

bad faith filing of pleadings or for filing pleadings not grounded in fact or warranted by law ... are discretionary with the trial judge. Skimming v. Boxer, 119 Wn. App. 748, 82 P.3d 707, review denied, 152 Wn. 2d 1016 (2004), Koch v. Mutual of Enumclaw, 108 Wn. App. 500, 31 P.3d 698, review denied, 145 Wn. 2d 1028 (2001).

Judge Benton abused her discretion because the decision to impose CR 11 sanctions was manifestly unreasonable and based on untenable grounds. State v. Perrett, 86 Wn. App. 312, 936 P.2d 426 (1997), Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994)

Mr. Kombol's arguments at that hearing pointed out problems with the August 19th order, but much of the discussion on September 23rd had to do with the difficulty both counsel had in drafting the relatively complex Stipulation and Order, the number of drafts which were exchanged, and the fact that it took nearly a month to finish work on the Stipulation and Order, and that work had commenced on August 24th in working out the language of the Stipulation, as the Court had ordered.

Despite basing the sanctions against Kombol CR 11, Judge Benton did not that any of the pleadings filed by Mr.

Kombol were frivolous. Even had the judge found some of Kombol's pleadings frivolous, any award of CR 11 sanctions would have been an abuse of the court's discretion *because* the trial court must view the filings in their entirety and enter sanctions under CR 11 only if the pleadings are frivolous as a whole. Jackle v. Crotty, 120 Wn. App. 374, 85 P.3d 931, reviewed denied, 152 Wn.2d 1029 (2004).

Either because the court failed to find *all* of Mr. Kombol's filings frivolous or this Court's de novo review of the record, the sanctions issued on September 23rd were manifestly unreasonable and based upon untenable grounds

4. **Findings of Fact/Conclusions of Law and Judgments**.

The Court held a Presentation hearing on December 16, 2011 despite being advised by Mr. Kombol *and* his Paralegal *and* by the attorney he arranged to be present that he: (i) had not received proper notice of the hearing and (ii) was scheduled to be at four hearings that day at the Pierce County Superior Court as well as a hearing at the U.S. District Court in Tacoma.

In the face of clear evidence of irregularity in the scheduling of the hearing and the unavailability of Van Hoof's counsel, Judge Benton denied Mr. Kombol's and Ms.

Fiori's requests to continue the hearing until a time that both Mr. Kombol and Ms. Johnson could be present. Refusing to continue the hearing was an abuse of discretion.

Ms. Johnson argued in a Declaration signed and filed three days before the hearing that her failure, on November 21st to establish she had mailed notice to Kombol was: "Simple oversight that a Declaration of Mailing was not immediately filed on these documents." **CP 102, Lines 10-12**

Either Ms. Johnson was telling the truth and Mr. Kombol's assistant lied in her declaration, or Ms. Johnson lied about mailing documents to Kombol on November 21st.

As regards the possibility that Johnson was badly mistaken in her recollection that she *had* mailed notice to Kombol, please review Michael Schoenbachler's declaration of August 19, 2011 reporting the mailing irregularities he had experienced from Ms. Johnson's firm. [**CP 27-32**].

Other members of Johnson's staff apparently have difficulties in identifying the manner in which documents are sent to other parties and their counsel.

In a 'Declaration of Mailing' dated December 5th, Shawn Jones of Ms. Johnson's office declared that she had caused a 'Motion and Declaration to Enter Findings of Fact and Conclusions of Law to Kombol:

"By *Publication* and Motion and Declaration for Alternative to Service by Mailing ..." [**CP 260**]

Ms. Johnson argued to Judge Benton that even had Mr. Kombol not received documents from her office by mail, she had given adequate notice to Kombol by sending him an e-mail containing pleadings for the hearing of December 16th. [**CP 102 Lines 16-18**]. CR 5(b)(2) mandates service by mail. If an attorney wants to use other means to serve pleadings (such as facsimile transmission or e-mail) consent must first be obtained in writing by the person sought to be served. CR 5(b)(7). No such consent was given by Mr. Kombol.

Judge Benton abused her discretion in holding the presentation hearing without Mr. Kombol being present.

5. **Appearances of Bias and Partiality**. The Court's rulings below, particularly the Findings of Fact and Conclusions of Law, as well as the resulting judgments should be reversed because of various examples of Judge Benton's bias and prejudice revealed in her comments about Mrs. Van Hoof's counsel.

The law requires not only an impartial judge but that the judge appear to be impartial. State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). *See* also, In Re Custody of R, 88 Wn. App. 746, 947 P.2d 745 (1997).

Justice must satisfy the appearance of impartiality. In re Marriage of Tostado,137 Wn. App. 136, 151 P.3d 1060 (2007)

The judiciary should avoid even mere suspicion of irregularity or the appearance of bias or prejudice. See In re Custody of R where the trial judge was removed from hearing a case after she had refused to grant continuance to permit a party to obtain a certified copy of a foreign decree and telling the mother in a custody case:

> **"I don't like what you did. You took his son with the intent of never telling him where he was. We don't like that as judges."**

The Ninth Circuit has held that reassignment on remand is justified if the trial judge has shown a personal bias or if unusual circumstances exist. McSherry v. City of Long Beach, 423 F.3d 1015, 1023 99th Cir. (2005).

Such circumstances include:

(i) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected; (ii) whether reassignment is advisable to preserve the appearance of justice; and (iii) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. If either of the first two factors are present, reassignment is appropriate. McSherry, 423 F.3rd at page 1023 (quoting U.S.

v. Sears and Roebuck, 785 F.2d 777, 779-80 (9th Circuit) Cert. Denied 479 U.S. 988 (1986)

Here, Judge Benton twice raised the specter of a bar referral without having heard any argument by opposing counsel that anything Mr. Kombol did was unethical. Nothing in the record shows any misconduct by Mrs. Van Hoof's attorney.

From the Verbatim Transcript of September 23rd:

> ' . . . **better it be a monetary penalty that one from the bar association, is what I would think'** [Page 16, Lines 13-14]

On December 16th, Judge Benton stated:

> ' . . . **Ms. Fiori, you've inherited a snake in a basket, and it is fighting its way out of the basket, on its way to the state bar. So I want you to communicate that to Mr. Kombol."** [Page 9, Lines 5-7]

It's difficult to determine whether Judge Benton's comments constituted an implied threat of a referral of the matter to the Washington State Bar Association to compel Mr. Kombol to buckle under to Mr. Matson's attorney's fee demands *or* were simply illustrative of the bias and prejudice she held against Van Hoof's attorney.

In either event the Judge's comments are clear expressions of partiality as well as her inability to prevent bias or prejudice from coloring her rulings.

Judge Benton's comments warrant great scrutiny by this Court to ensure that earlier rulings by Judge Benton were not tainted by impermissible biases.

Judge Benton considered three motions in this case and scheduled one herself. The Hearing she set for September 14th to discuss timing problems with both attorneys was never held.

On each of the other three occasions, Judge Benton entered significant fee awards against Mrs. Van Hoof and against Van Hoof's attorney and also confirmed judgments on those erroneous fee awards. Counsel for Matson was granted every request she made of the Court. None of Mr. Kombol's request were granted and he was sanctioned for having argued that the August Order should be clarified.

With the exception of granting Mr. Kombol's request that both attorneys appear before the judge [which the Court later struck from her calendar] neither of the continuances Mr. Kombol requested were granted and Mr. Kombol was faulted with failing to appear at a hearing that Matson's counsel failed to furnish proper notice, and which he was unable to attend due to prior commitments.

It's hard to imagine a less level playing field than the one set up by Judge Benton in this case under appeal.

This case should not be remanded to Judge Benton if this court decides to reverse *all* of her Orders for fees and sanctions and decides to remand this matter for further proceedings in the Superior Court.

6. **Duplicate Judgments**. The easiest ruling this Court has to make relate to Judge Benton's inattention to the Judgments that were presented to her by counsel for Mr. Matson following the December 16th hearing. Apparently the Judge signed one original set of Judgments against Mrs Van Hoof and Kombol and his law firm on December 28th and then signed and entered another set [possibly the Judge's working drafts] on January 3, 2012.

However as discussed above, Judge Benton's inattention to detail as regards inadvertently signing and filing duplicate documents is only a symptom of the various errors committed throughout the entire case.

7. **Costs and Fees on Appeal**

If this court issues an opinion in favor of Mrs. Van Hoof, then, per RAP 14.2, she should be awarded costs she incurred in this appeal. Costs may be awarded to a party prevailing on appeal. N.W. Television Club, Inc. v. Gross Seattle, Inc., 96 Wn.2d 973, 640 P.2d 710 (1981).

Van Hoof also seeks an award of reasonable attorney fees on appeal pursuant to RCW 4.84.250 and 270, as well as CR 11. RAP 18.1 (a) authorizes an appeal court to recover attorney fees on review if applicable law grants a right to recover such fees.

RCW 4.84.270 provides:

> Attorneys' fees as costs in damage actions of ten thousand dollars or less - When defendant is deemed prevailing party.
>
> The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed by RCW 4.84.250, recovers nothing

RCW 4.84.250 permits this court to award Van Hoof reasonable attorney fees if she prevails on appeal.

RCW 4.84.250 provides:

> If any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is ten thousand dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees.

CR 11 furnishes Mrs. Van Hoof an alternative basis for an award of reasonable attorney fees in the nature of a sanction for violation of that Court Rule. CR 11 Sanctions, particularly against Ms. Johnson and the firm of Acebedo and Johnson, LLC are warranted in this case

because of five separate filings made by attorney Johnson in violation of CR 11.

On November 14, 2011 Ms. Johnson signed and filed a pleading indicating that she would be "*out of the office* ***from*** **December** ***16***, 2011 through and including December 30, 2011." Thereafter, without consulting with opposing counsel, Ms. Johnson filed a Notice which scheduled a hearing before Judge Benton on **December** ***16***, 2016.

In two Notices of Hearing {**CP 227** and **230**], the date "**07/30/10**" appeared under Ms. Johnson's signature. On the next page of each notice was typed a cellular phone number of an unknown party. The date and contact information of Ms. Johnson's pleading was clearly incorrect.

After failing to sign and file a Declaration that the Notice of Hearing had been mailed to Van Hoof's attorney, Ms. Johnson signed a Declaration on December 13, 2011 asserting that she *had* mailed a Note for Motion for Presentation of Findings and Re-Note for Motion for Presentation of Judgment [**CP 262-63**] asserting in a separate filing that her failure to sign and file a Declaration of Mailing contemporaneously with the Notice of Hearings she signed was due to "Simple oversight [in

failing to mail] Declaration of Mailing" (bracketed words inserted for clarity)

On December 5, 2011, a member of Ms. Johnson's staff signed and filed a 'Declaration of Mailing' stating that she had caused a 'Motion and Declaration to Enter Findings of Fact and Conclusions of Law to Kombol:

> **"By *Publication* and Motion and Declaration *for* *Alternative* to Service by Mailing..."** [**CP 260**]
> [Emphasis Added]

No explanation has been given by Ms. Johnson for the existence of five separate irregularities in pleadings she signed and filed with the Court between November 14 and December 13, 2011. After having filed those confusing and erroneous pleadings, Ms. Johnson argued vehemently [and successfully] that the court should enter the Findings of Fact and Conclusions of Law and Judgments she presented to the court on December 16, 2011 while Kombol was in Tacoma.

Under the circumstances of counsel's spurious filings, it is abundantly clear that Ms. Johnson engaged in conduct *and* filed pleadings in violation of CR 11(a)(3) which forbids filings with are:

> **"(3) . . . interposed for any improper purpose, such as to harass or to cause . . . needless increase in the cost of litigation."**

The only question that exists over the imposition of sanctions and attorney fees is the person or entity against whom the sanctions should issue. In other words, should the sins of the parent be visited on the children?

Ms. Johnson and her law firm inserted themselves directly into this litigation, and this appeal, by requesting and obtaining Judgments against Van Hoof's counsel and his firm in the amount of $1,225.00. Nothing in the record shows that Christopher Matson participated in drafting any of the pleadings filed by his attorney. In fact, nothing in the record was signed by Mr. Matson except the April, 2011 CR(2)(A) settlement and Judgment and Order Quieting Title he approved for entry in September of 2011.

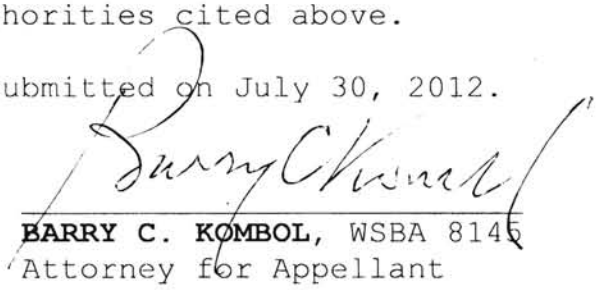
Mrs. Van Hoof therefore asks that any sanctions issued by this court and any fees or costs awarded on appeal be against Mr. Matson's counsel and her firm, not against him, personally.

F. **CONCLUSION**

This court should reverse the four Judgments issued below on December 28, 2011 and January 3, 2012, vacate the Orders for fees and sanctions entered below on August 19,

2011 and September 23, 2011 and award Dolores Van Hoof and her attorney costs and reasonable attorney fees on appeal pursuant to the authorities cited above.

Respectfully Submitted on July 30, 2012.



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