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No. 68256-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DOLORES R. VAN HOOF, a single woman,  
**Appellant,**

vs.

CHRISTOPHER L. MATSON, a single man,  
**Respondent.**

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REPLY BRIEF OF APPELLANT

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**I. APPELLANT'S REPLY TO MATSON'S STATEMENT OF THE CASE**

**1.1 Background and Mediation Results.** Respondent's Statement of background and Mediation Results is in accord with the Statement contained in Appellant's Brief.

**1.2/1.3 CR 2A Settlement/Notice of Settlement.** Matson misstates the pendency of trial and related notices given to the Court by suggesting that time was of the essence because 'the trial day of August 1, 2011 was approaching in eleven days' without indicating that such a trial would involve Matson vs. Okita, not Van Hoof or Schoenbachler.

In the second and third paragraph on page 4 of Reply Brief, Matson again refers to the lack of settlement between himself and other parties in the case, but indicates that a settlement had, indeed, been reached with defendant Okita and a Notice of Settlement was filed on July 25<sup>th</sup>, thereby canceling the trial as all of the defendants had settled.

Given what was then a universal settlement, the pressure to file all settlement documents had disappeared. In fact, the settlement document Matson's counsel was tasked to prepare with Pro Se Schoenbachler were not sent to Judge Benton until August 26, 2011, fifteen days after Respondent's

Motion to Enforce. See Superior Ct. Sub. No. 44, See also, Schoenbachler's Declaration [CP 28].

## II. PROCEDURAL HISTORY.

### 2.1 Claimed False Representations/Dubious Tactics.

Matson asserts that 'Appellant's counsel alleged Johnson employed "bullying and bludgeoning tactics" as though that allegation was a 'False Representation' when, in fact, Schoenbachler made very similar allegations in a Declaration he signed on Aug. 19, [CP 28] where he stated:

**"This Court should know that on numerous occasions I've received mail from Ms. Johnson's office at an address other than my own. Last week I received an envelope [copy enclosed] addressed to my renter's address [which is not mine] which had to do with Ms. Johnson's attempt to force my neighbor (Van Hoof) to sign settlement agreements, the same settlement agreements that all Defendants reached in the mediation last April. I have not been treated this way, so why has Dolores Van Hoof been so pressured?"**

Schoenbachler's Declaration of August 19<sup>th</sup> contains numerous other allegations that Matson's attorney engaged in aggressive litigation conduct. [CP 30, Lines 1-6]:

**"...I think that your aggressive tactics caused Chris Matson to pull back on the verbal settlement we reached between the two of us, and to go to court to get more that we agreed upon. ...The suit you filed for Mr. Matson seems to me to have been not been necessary and....ran up costs and tension for all of us."**

and then continuing:

**"Why is there any rush? The rush seems to be only in Ms. Johnson's mind and is for no purpose other than to increase conflict."**

No support exists in the record that Van Hoof made 'False Representations' or engaged in 'Dubious Tactical Maneuvers.' Schoenbachler's Declaration suggests Matson's counsel did so.

## **2.2 Hearing to Review Conduct of Counsel.**

Respondent's Brief (at Page 7) asserts that Judge Benton's Order directing both attorneys to appear at a hearing on September 8, 2011 is incorrect. The Judge's Order set that hearing on Friday, September 14, 2011. [CP 174-75]

**"Plaintiff's Counsel and Counsel for Delores Van Hoof shall appear before this Court on September 14, 2011 where the Court shall consider those issues, allegations, and requests contained in their pleadings in this matter, (which) the court desires to resolve by a supplemental hearing."**

The last sentence on Page 7 of Respondent's Brief asserts: **"The determination why the Judge struck this motion is outside the record."** Such an assertion misrepresents the record below. Judge Benton entered an Order on August 24, 2011, based upon Van Hoof's Motion. Judge Benton's Order was never stricken or vacated.

On Sept. 8, 2011, Kombol noted a Hearing for Sept. 23rd

for Presentation of a Final Order as well as Relief from the Aug. 19<sup>th</sup> Order, based on the Court Order of Aug. 24. [CP 176]

A careful reading of the Verbatim Transcript of the Proceedings of September 23<sup>rd</sup> reveals that Kombol's remarks included not only the presentation of the Final Order Quieting Title; but also included an effort by Kombol to have the court with both counsel present to:

**"consider those issues, allegations, and requests contained in their pleading . . . that the court desires to resolve by a supplemental hearing."**

Rather than making such an inquiry, Judge Benton 'denied' Van Hoof's Motion for . . . Relief" and sanctioned Van Hoof's attorney \$1,225 in fees; apparently for asking the Court to consider the matters the Order of August 24<sup>th</sup> indicated the Court wanted both attorneys to address.

Respondent's Brief (Page 8) suggests that Kombol's Note of Issue dated Sept. 8<sup>th</sup> was solely for 'Reconsideration and Relief from Order' when in fact, the Note of Issue indicated it was a Note for Presentation of the Final Quiet Title Order.

**2.3 Alleged Misleading Purpose of Hearing.** The 2nd Paragraph of Section "d" of Matson's Statement of Facts alleges that "Contrary to the stated purpose of the (Sept. 23<sup>rd</sup>) hearing, rather than present a motion in any form...." Once

again, this Statement at best distorts, or at worst misrepresents the purposes of the hearing. As **CP 176** clearly shows, the Hearing was Noted for Presentation of a Final Order as well as to address Judge Benton's instructions that both counsel appear before her to address issues contained in her Order of August 24<sup>th</sup>.

#### **2.4 (Alleged False) Representations.**

[i] Language in the Order. Matson's reply brief asserts at page 9, that Appellant's counsel '*continued on his course of duplicity*' when on September 23<sup>rd</sup>, he argued to the Court that the draft of the Final Order he had received in early August failed to '*... impose on the plaintiff, (Matson) the two burdens that he had.*'

The record is to the contrary. It clearly establishes that Kombol had exchanged several drafts of the Final Order with Johnson [See: CP 181, Line 24 to **CP 182, Lines 1-4**, as well as several transmittal letters, **CP 184-188**].

The 'Stipulated Judgment' Kombol presented on Sept. 23, 2011 contained eight pages of detailed "pre-litigation" descriptions of Matson's and Van Hoof's property [**CP 202-205**]; three pages of 'Stipulations' including the burdens imposed on Matson in the CR 2A settlement to (a) construct a boundary

fence and (b) assign her title claims to Van Hoof clearly describing the real estate quieted in favor of Matson; and the revised new legal descriptions which resulted to both Matson's and Van Hoof's property.

Matson asserts, in the last paragraph of Page 9 of his brief: "Appellant's counsel...implied he reviewed the documents by stating he redrafted them..." As is shown above, there wasn't any 'implication' or 'misstatement' made to the Court; rather, Van Hoof's counsel exchanged several drafts of the Final Order with Johnson after August 24<sup>th</sup> because numerous corrections and additions had to be made, including express **language** setting out the obligations the CR 2A settlement imposed on Matson. (See **CP 181, Lines 7-15.**)

To suggest, as Matson does, that Kombol made a 'False Representation' to the Court by arguing that the Johnson's initial draft of the Quiet Title Order should have contained language establishing enforceable burdens on Matson - rather than an Order which simply made reference to a CR 2A Settlement document is astounding. No "false representation" was made. Simple reference to a CR 2A might have made for easier drafting, but Van Hoof's counsel's argument that making all of

the CR 2A terms in the Final Order (including those which bound Matson) was not misleading.

[ii] **Initial Pleadings**. Matson's counsel, while conceding that his "initial [final] pleadings" were not in the record (See Page 10, Para. 3 of Respondent's brief), nevertheless suggests that the initial draft she had prepared was virtually the same final order which was presented on September 23<sup>rd</sup>.

In this section of Matson's brief, not only does Respondent attempt to make reference to matters not in the record, but his argument isn't even supported by the record. The Verbatim Transcript of the Sept. 23<sup>rd</sup> Presentation hearing [Page 13, lines 10-25] reflects that Kombol informed Judge Benton that numerous drafts of the Order had to be exchanged before the Final Order was ready to present.

**2.5 Presentation of Judgments**. At page 11 of his brief, Matson argues that Van Hoof was not 'prejudiced' by Johnson's tardy filing of an Affidavit of Mailing (three days before the hearing) as if to suggest that the Note for Hearing and proposed FF/CL and Judgments had been mailed to Kombol on Nov. 21, 2011. The record shows Johnson didn't file an Affidavit of Mailing until Kombol's assistant informed her that no pleadings had been received. [CP 99]

The 'prejudice' Van Hoof experienced was not because of a delayed Affidavit of Mailing, but rather the lack of any notice at all. The last paragraph on Page 11 of his Brief, he asserts (without attribution or reference to the record) that his "**counsel mailed the transcripts to Appellant's counsel, who filed no objections.**" Again, Matson suggests, without reference to the record, that Van Hoof's attorney had received those transcripts.

**2.6 Four Scheduled Hearings.** Matson's Statement of Facts seems to question Kombol's confusion about a 'Notice of Unavailability' Johnson filed on November 14, 2011 and suggests that by failing to "disclose the fact that an Amended Notice of Unavailability had been filed" [Matson's Brief, page 13, end of Para. 2] as if to suggest Kombol should have been available for a hearing later scheduled for Dec. 16, 2011.

Again, the record doesn't support that proposition. True Johnson served a '**Notice of Unavailability**' (CP 222) indicating that she was unavailable for any hearings between December 16-31, 2011. It is also true that Johnson later amended that Notice of Unavailability to indicate the dates she was not available were between December 17-31, 2011.

The record clearly shows that in November, Kombol had scheduled (or attended) four separate hearings in Pierce County Superior Court that morning.

6). Judge Benton's Remarks and Reaction. Section 6 of Matson's Reply Brief correctly quotes Judge Benton's remarks at the December 16 hearing, including:

**"his (Kombol's) failure to appear was ...willful, so I'm going forward as though he's -- he's forfeited any objection."**

but nothing in the FF/CL entered below contained any finding of 'willfulness' or 'forfeiture' of objection."

8). Insufficient Alternative Security. The third paragraph of Sect. 8 of Respondent's statement of facts asserts that Van Hoof had "added additional errors to their not listed in her Notice of Appeal" and had "addressed issues not included in the original Notice of Appeal," without elaboration or recitation to the record.

Van Hoof's Notice of Appeal included her appeal of "the procedure of obtaining" as well as fifteen specific Findings of Fact, eleven Conclusions of Law, two Judgments as well as two duplicate Judgments and the Orders below. [CP 395]

It was impossible to refute the Statement of Facts in Matson's Reply Brief that 'errors' and 'issues' were not included

in Van Hoof's Notice of Appeal because his Reply Brief is devoid of any specifics about the issue of "additional errors" the Brief argues were made.

### III. APPELLANT'S REPLY ARGUMENT

#### 3.1 ARGUMENTS BELOW Re: AWARDS OF CR 11 FEES.

Respondent's opening arguments claims Van Hoof failed to raise any issue regarding a flawed application of CR 1 or "bad faith". The record doesn't support such an argument. Kombol filed an eight page **MEMORANDUM of AUTHORITIES** Re: Awards of Fees and Sanctions" [CP 214-221] which argued that 'Bad Faith' was an essential element of any sanction under RCW 2.28.010 and that to avoid the sort of 'Fee Shifting' which was discussed in Wash. State Insurance Exchange v. Fisions Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993), a court should consider requiring sanctions to be paid to a court-related fund and that a trial court should 'consider imposing the least severe sort of sanction that would be adequate to serve the purpose sought to be accomplished. Matson's suggestion that Van Hoof failed to address the Sanctions and CR 11 issues below is not accurate. No such waiver occurred. Rather, the issue was fully briefed.

**3.2 ABUSE OF DISCRETION** Re **ORDER OF 8-19-11**. Matson's argument in his Brief that Judge Benton didn't abuse her discretion as regards the award of sanctions ignores two essential issues:

**First**, the Order of August 19, 2011 was virtually impossible for Van Hoof or her attorney to understand or comply with. The Order contained three parts, the first part:

**"Van Hoof...shall...provid(e)...Matson's attorney with an initial draft of pleadings and orders consistent with th[e] settlement . . . by or before August 24<sup>th</sup> 2011."** [CP 156 lines 5-11) (Abbreviated for Clarity)

which conflicts with the third part:

**". . . Van Hoof shall pay \$500.00 in attorney's fees for every day past August 19<sup>th</sup> that (she) fails to comply with their (sic) duties under the settlement agreement."**

**Second**, not only are the provisions of the Order. Confusing, they contradict one another. When Van Hoof's attorney complied with the first part of the Order by providing Matson's counsel with "an initial draft of pleadings" on August 24<sup>th</sup>, (**See CP 184-186 and Verbatim Report** of Hearing of Sept. 23, 2011, **Page 13-14**); Matson's counsel argued that Judge Benton's Aug. 19 Order permitted an award of daily sanction of \$500.00 between Friday Aug. 19<sup>th</sup> and Wednesday

Aug. 24<sup>th</sup>, despite the fact that the 'Initial Draft had been delivered to Matson's counsel on August 24<sup>th</sup>.

The first part of the Court's Order implies Van Hoof wouldn't face sanction if her attorney sent Matson's counsel a draft of the Final Order by August 24<sup>th</sup>. Nevertheless, the Order imposed a daily sanction against Van Hoof from August 19<sup>th</sup> until the 24<sup>th</sup>.

Contrary to Respondent's arguments (in Section (1) (B) of his brief) that the Judgments against Van Hoof were not an abuse of discretion (arguing that it was appropriate to sanction Van Hoof for her attorney's alleged dilatory conduct), the sanctions imposed on Van Hoof worked to deny Justice to this litigant. Our courts have repeatedly held that it is an abuse of discretion (and a failure to ensure justice to litigants) when a Court imposes a loss upon a *client* for an *attorney's* dilatory conduct, especially when there is no conduct by the client causing prejudice to the opposing party.

Perhaps the best example is Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (Div. 1, 1990) which establishes proper standards for review of matters involving the abuse of

discretion.<sup>1</sup> In Coggle, the trial Court dismissed a Plaintiff's personal injury claim at a summary judgment motion, based on the allegedly dilatory conduct of Plaintiff's first attorney. This Court reversed, explaining:

“. . . [T]he Superior Court rules are to be construed to secure the *just, speedy, and inexpensive* determination of every action. CR 1. The record reveals the reason for Coggle's inability to produce the declarations in time for the summary judgment hearing. Coggle's new counsel filed the notice of association of counsel one week after Snow filed the motion for summary judgment. He had not had time to follow through on work begun by previous counsel . . .

The court (below) should have viewed the motions in the context of the new legal representation. We fail to see how justice is served by a draconian application of time limitations here . . . *nor do we perceive any prejudice*. We cannot discern a tenable ground or reason for the trial court's decision. The trial court improperly exercised its discretion in denying the motion for a continuance.” Coogle, Pages 507-508.

**(Emphasis Added)**

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<sup>1</sup> In Coggle, the Court stated that the abuse of discretion standard is not simply open-ended; it “requires decision-making founded upon principle and reason” in light of the specific task before the trial court. Coggle v. Snow, 56 Wn.App. 499, 505-506, 784 P.2d 554 (Wash.App. Div. 1 1990). To paraphrase the full standard, a trial court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds or reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. See Marriage of Littlefield, 133 Wn.2d 39 at p. 47, 940 P.2d 1362 (1997).

Similarly, in Simonson v. Fendell, 34 Wash. App. 324, Division III considered an analogous situation when it ruled on sanctions against an attorney who failed to timely request attorney's fees pursuant RAP 18.1, which at that time allowed the Court of Appeals to impose discretionary sanctions. The Court explained:

"The primary consequence of denying attorney's fees because an attorney did not fully comply with RAP 18.1 is to *place the monetary loss upon the client, not the attorney*. ... Bearing in mind the rules on appeal are to be liberally construed to promote justice, RAP 1.2(a), [2] it is inappropriate that the intent of RAP 18.1 be to deny a client his right to reasonable attorney's fees due to his attorney's failure to fully comply with the procedural rules....

We hold the proper sanction to be imposed for an attorney's noncompliance with RAP 18.1 is the imposition of monetary sanctions to be paid from the *attorney's* account. This sanction serves two purposes. First, it protects the client's right to recover his reasonable attorney's fees. *The client is not being penalized for his counsel's oversight or lack of familiarity with appellate practice. Second, it places the financial burden for noncompliance on the attorney.* Simonson, *supra*, at Pages 330-331.

See also Scully v. Employment Security Dept. 42 Wn.App. 596, 712 P.2d 870 (Div. 1, 1986) *Compare: Rivers v. Wash. Conf. of Mason Contractors*, 145 Wn.2d 674, particularly Justice Chambers comment at 701 that a client shouldn't be penalized by an attorney's failure to perform an order that would be difficult for the attorney to perform.

This case is on all fours with the above cases. Those cases indicate that the primary goal of the Court Rules is to promote justice (RAP 1.2(a) and CR 1) with the award of sanctions is discretionary with the trial court. Nowhere below was any dilatory conduct by Van Hoof alleged. All allegedly dilatory conduct was that of Van Hoof's attorney. See Pages 19-24 of Respondent's brief, and the record below. Even Respondent's attorney felt that it was Kombol who was responsible, not his client, stating on September 23, 2011:

"My logic was that he had to do it by the 24th, but that he knew of the order, and every day that it was going to take him not to do it, he should have to pay additional fees." **RP** 9/23/11 Pg 18, Lines 20-24 to Pg 19, Lines 5-7.

Johnson never claimed Van Hoof was responsible. The Court below never found that Van Hoof had engaged in any improper or dilatory conduct (much less bad faith) or conduct prejudicial to the administration of the case.

Nevertheless, Matson misleadingly suggests otherwise at Pg. 22 of his Brief).<sup>2</sup> In fact, the Court below stated that it was loath to impose a burden on Van Hoof, but did so based

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<sup>2</sup> In the third sentence of the last paragraph at Page 22 Respondent states that "She [Judge Benton] then found that Appellant and Appellant's counsel's actions were tantamount to bad faith." There is no reference to the Record that Van Hoof was found in bad faith.

on what can only be considered a vague sense (or standard) of "proportionality":

Now -- 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 to the client and a portion to the attorney. It seems to me that same proportionality ought to persist.* RP 9/23/12, Page 16 Lines 11-21.

Later in the same proceedings Judge Benton stated:

... If the *lawyers* are dilatory, then shame on them. And if the *lawyers* are not responsive, then a monetary fine is the midway point 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.* Page 20, Lines 7-12.

As in Coggle, imposing sanctions on Van Hoof (based on a vague standard of "proportionality") is untenable; it employs an incorrect legal standard; indeed, it reveals no workable standard beyond the judge's subjective sense of what is proportional.

According to Coggle, supra, at 507 and Simonson, supra, at 58 and Scully, supra, at 596, Judge Benton's ruling is beyond what involved "principled or reasoned" discretion.

Under the reasoning of the cases cited above, Judge Benton's actions are contrary to the policy of securing

justice, perhaps especially because her ruling imposed a loss upon a person not responsible for it. Imposing loss on the client is a manifestly unreasonable result, i.e. it is outside the range of acceptable choices, given the facts below and applicable legal standards. The trial court's Judge Benton's sanctions were based on untenable grounds.

There was no finding of bad conduct by Van Hoof, either express or implied; and all conduct at which the Court could have considered improper dilatory was that of her counsel. Assuming, there had been dilatory conduct on the part of Van Hoof. Plaintiff was not prejudiced in any way.

Judge Benton cited no prejudice to Matson, only that she wanted the case resolved more promptly. No financial prejudice to Matson was found (or argued) - no impending sale of real estate necessitated entering the judgment, and Plaintiff incurred no financial loss. The only possible prejudice mentioned in Matson's motion was the possible dismissal of the case if settlement documents were not filed within 45 days of the CR 41 Settlement Notice.

Even had this been a true statement, 45 days after filing the CR 41 Notice on July 27, 2011 was September 10,

2011, a month after Matson brought his Motion to Enforce. Even if none of the parties had submitted final pleadings by Sept. 8th, KCLCR 41(e) (3) allows a case to be reinstated on the trial docket if settlement documents are delayed. This can be accomplished by filing a Certificate of Settlement without Dismissal.

This possibility wasn't mentioned by Respondent's counsel. Judge Benton failed to consider such a possibility. She certainly could have directed that a Settlement (without Dismissal) be filed with a potential award of fees as a lesser sanction. In summary, Van Hoof shouldn't be penalized for delays never found occasioned by her actions.

The record below doesn't indicate that Judge Benton considered the ruling of Wash. Insurance Exchange v. Fisions, (supra), by ordering sanctions be paid to a court fund. By failing to consider what the Supreme Court recommended, the sort of 'fee shifting' derided in the Fisions' decision became the norm in this case and the case ceased being about Adverse Possession and Quiet Title, and was transformed into a case about fee requests.

**3.3 STATE v. S.H. (Part (1) [C] of MATSON BRIEF.** Part (1) [C] of Matson's Brief suggests that despite having failed to make an 'express finding' that any of Van Hoof's (or her attorney's) actions were done in 'Bad Faith' 'evidence of tactical maneuvers undertaken in bad faith,' could be a basis for a finding of misconduct that justified sanctions. Van Hoof's Notice of Appeal included reference to Conclusion of Law No. 3 in which Judge Benton found "The Initial Order signed by the Court granted fees for unreasonable and repeated delay which is tantamount to bad faith under CR 11."

If the record below is considered (and the death of Kombol's paralegal and the cancer of his receptionist are taken into account) there was no history of 'repeated delay' making Finding of Fact No. 3 not only arbitrary and capricious but clearly erroneous.

**3.4 KOMBOL and FIRM NOT AN APPELLANT.** In a motion earlier decided by this Court, Kombol and his firm were not allowed to participate in this appeal. Nevertheless, Van Hoof's Notice of Appeal included appeal of the way Matson's counsel obtained the Orders and Judgments below without notice; as well as fifteen of the Court's Findings, eleven of

its Conclusions of Law; two Judgments against Van Hoof and Kombol, Kombol-Rainier Legal Center; and duplicates of those Judgments.

As was pointed out in Kombol's Motion to join in this Appeal (and in Van Hoof's joinder in same) it's difficult to understand how this Court could correct only parts of Findings, Conclusions Orders and Judgments below which pertain to Van Hoof without addressing the effect on her counsel of the errors below.

However, neither Van Hoof nor Kombol will be tasked with drafting the Opinion of this Court. Van Hoof has been counseled by a separate attorney and understands what this court decides as regards to her appeal may not be in accord with how this Court deals with issues relating to Kombol.

Van Hoof does point out in this Reply to Section (1) (E) of Matson's Brief that 'abuse of discretion' is not the standard of review as regards to a trial court's 'threshold decision to grant or deny attorney's fees.' Such threshold decisions are reviewed de novo. Deep Water Brewing v. Fairway Res. Ltd., 152 Wn. App. 229, 277, 215 P.3d 990 (2009). The appellate court should determine, de novo, whether there is a statutory,

contractual or equitable basis for any fee awards. Unifund v. Sunde, 163 Wn. App. 472, at 483-84 (2011), Ethridge v. Hwang, 105 Wn. App. 447, 20 P.3d 958 (2001).

When the record being reviewed doesn't adequately demonstrate the basis for an award of attorney fees, the case may be remanded for an adjustment of the award or to determine if it is proper. Osborne v. Seymour, 164 Wn. App. 820, \_\_\_ P.3d. \_\_\_. Remand of this case to an unbiased jurist is one alternative this court could order.

#### IV. WAIVER OF APPEAL OF FINDINGS and CONCLUSIONS.

Matson argues in Section (2) (A) of his brief that Van Hoof failed to timely preserve "issues for appeal". Apparently Matson believes that when neither Van Hoof nor her attorney were informed that a hearing was scheduled on December 16, 2011 - and one of Johnson's filings indicates that Kombol had received:

"A true and correct copy of the following: **MOTION AND DECLARATION TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW** By Publication and Motion and Declaration for Alternative Service by Mailing ... [CP 260 Lines 23-29]

created evidence that Kombol had received adequate notice. However, the Court Rules and justice require proper notice of Motions to enter Findings. Notices which indicate "by

Publication" are not acceptable. Failure to furnish any Notice (See Kombol's 'Objection to Hearing' [CP 95-97] as well as 'Declaration of Susan Burnett' [CP 99]) create a situation where Van Hoof's counsel couldn't be expected to attend the hearing. Such a situation could hardly result in Van Hoof waiving her right to appeal "unchallenged" Findings of Fact' (See Page 28 of Matson's brief).

Similarly, without any reference to the record or other attribution, Matson argues at Page 29 of his brief that Van Hoof and her attorney had 'ample opportunity to file objections to the FF/CL.' Without notice of the hearing or copies of the pleadings, how could they have done so?

Later in his brief, Matson alleges, despite evidence in the record clearly to the contrary, that his attorney had 'timely sent the Notes for Motion and gave Appellant's counsel almost **a month before.**' As Ms. Fiori pointed out, either Kombol's assistant was not truthful in her Declaration or Johnson was mistaken about having mailed the pleadings to Kombol in November.

On the issue of mailings from Ms. Johnson's office, Appellant has cited numerous instances where Johnson's

pleadings contained not 'Scrivener's Errors' but significant errors in addresses, dates, types of service and the like, including:

- a. Failure to file a Declaration of Mailing of the Note of Issue and Motion for Presentation until the issue of notice was raised by Kombol's assistant three days before the hearing of December 16<sup>th</sup>;
- b. Filing a Notice of Unavailability indicating she would not be available between December 16-31, 2011 (later amended to reflect different dates);
- c. Two Notes for Hearing [**CP 227** and **230**] dated 07/30/10 and with a phone number listed that wasn't Kombol's;
- d. Errors in mailings to Michael Schoenbachler [**CP 28**] including mailings to incorrect addresses.

Despite these significant errors in mailing of documents, Matson suggests, at Page 32 of his Brief, that by declining to grant Van Hoof the continuance Kombol [and fill-in attorney Fiori] requested:

"... Any issue regarding credibility and conflicting testimony regarding the testimony offered on December 16, 2011, should be deferred to Judge Benton."

Such reasoning suggests that even if a Trial Court is Arbitrary and Capricious in deciding to enter Findings, Conclusions and Judgments outside of the presence of opposing counsel - and even if counsel's non-appearance is allegedly a consequence of lack of notice to him - such an order [and

the Findings and Conclusions entered at such a hearing] can't be appealed - because appealable issues weren't objected to [by a party who did not appear] at the time of the hearing. If that proposition were so then attorneys could fail to give notices of hearings, urge Judges to find that the other side's failure to appear was "Willful" and then argue the hearing should "go forward as though he's — forfeited any objection," as was done on December 16, 2011. **Transcript Pg. 11.** Matson completely ignores the fact that Kombol hadn't received advance copies of the Findings and Conclusions - nor any notice of the presentation - and wasn't in court - when the Findings and Conclusions were presented. Judge Benton did indicate, **See Page 9** of the Verbatim Transcript of the Dec. 16<sup>th</sup> proceedings lines 9-12:

*"If Mr. Kombol does not contact my office by 4:00 this afternoon, I will enter the findings today."*

When Kombol did attempt to contact Judge Benton's bailiff on December 16<sup>th</sup> by telephone and also in an e-mail sent to Chambers at 2:38 p.m. [**CP 267-268**]; he received no answer. How Matson can argue that Findings which were entered when Van Hoof's attorney was not present in open court

can't be challenged is astounding. Matson offers no authority for such a proposition.

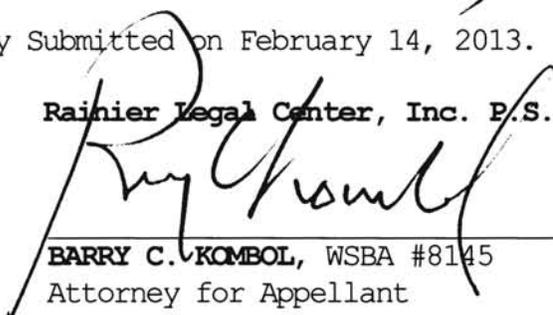
**V. CONCLUSION.**

Judge Benton's rulings and orders below were either clearly erroneous or constituted abuses of a trial court's discretion. Van Hoof respectfully requests that those rulings be reversed or (in the alternative) any issues this court believes need to be resolved in the Superior Court should be remanded to an unbiased Judge below.

Van Hoof requests this Court award her fees and costs incurred in this appeal as requested in her opening brief.

Respectfully Submitted on February 14, 2013.

**Rainier Legal Center, Inc. P.S.**



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