

72601-3

72601-3

NO. 72601-3-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

THERESE BROWN JENSEN

Respondent,

v.

RUSSELL JAMES JENSEN JR.

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON

REVIEW FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY

RESPONDENT'S BRIEF

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. RESTATEMENT OF THE CASE2

III. ARGUMENT.....12

 A. THE ONLY ISSUE JAMIE PROPERLY RAISES ON APPEAL RELATES TO THE TRIAL COURT’S INTERLOCUTORY ORDER ALLOWING THERESE TO SELL THE FAMILY HOME.....12

 B. JAMIE CANNOT APPEAL THE TRIAL COURT’S INTERLOCUTORY ORDER REQUIRING THE SALE WHEN HE FAILS TO APPEAL THE DECREE OF DISSOLUTION AWARDED THERESE THE FAMILY HOME BASED ON THE PARTIES’ CR2A AGREEMENT13

 C. JAMIE’S APPEAL IS COMPLETELY FRIVOLOUS AND THERESE SHOULD BE AWARDED ATTORNEYS FEES AND SANCTIONS UNDER RAP 18.9(a) AND CR 11.....16

IV. CONCLUSION17

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Arkinson v. Ethan Allen, Inc.</u> , 160 Wn.2d 535, 160 P.3d 13 (2007).....	16
<u>Cowiche Canyon Conservacy v. Bosley</u> , 118 Wn.2d 801, 828 P.2d 549.....	13
<u>Fortier v. Fortier</u> , 22 Wn.2d 748, 749, 162 P.2d 438 (1945).....	15
<u>In re Guardianship of Cobb</u> , 172 Wn. App. 393, 292 P.3d 772 (2012), <u>review denied</u> , 177 Wn.2d 1017, 304 P.3d 114 (2013).....	17
<u>In re Guardianship of Lasky</u> , 54 Wn. App. 841, 776 P.2d 695 (1989).....	17
<u>Marriage of Kowalewski</u> , 163 Wn.2d 542, 182 P.3d 959 (2008).....	15
<u>Patterson v. Taylor</u> , 93 Wn. App. 579, 969 P.2d 1006 (1999).....	14
<u>Rhinehart v. Seattle Times Co.</u> , 51 Wn. App. 561, 754 P.2d 1243 (1988).....	17
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	15
<u>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</u> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	17-18

STATUTES

RCW 26.09.050(1).....15

COURT RULES

CR 2A..... 1-18, passim
CR 11.....16-19
RAP 2.5(a).....15
RAP 10.3(a)(6).....12
RAP 18.7.....17
RAP 18.9(a).....16-19

I. INTRODUCTION.

In this dissolution case, Appellant, Russell James Jensen Jr., hereinafter “Jamie,” wants to regain the marital home that was awarded to his wife, Respondent, Therese Jensen¹, pursuant to their CR 2A settlement agreement and Decree of Dissolution. The home has been sold, yet Jamie demands this Court “invalidate the deed,” and return the home to him because of an alleged error in the trial court’s interlocutory order allowing Therese to sell the home.

This Court rejected Jamie’s argument on discretionary review finding he did not demonstrate any error in the trial court’s interlocutory order and that he had consented to the sale of the home.² In this direct appeal, Jamie resurrects his earlier arguments despite the fact he agreed to award the family home to Therese as part of a mediated CR2A settlement agreement and the trial court entered a Decree of Dissolution consistent with that settlement.

The issue here comes down to whether Jaime can appeal the trial court’s interlocutory order when he does not appeal the trial court’s final orders. The answer is no. This Court should

¹ This brief will refer to the parties by their first names for clarity.

² In re Marriage of Jensen, No. 71619-1-I, attached as Appendix 3 to Appellant’s brief.

reject Jamie's wholly frivolous arguments, dismiss this appeal, and award Therese attorney fees and sanctions on appeal.

II. RESTATEMENT OF THE CASE.

In 1981, Therese and Jamie Jensen married in St. Paul, MN. CP 192. Jamie is an attorney. In 1999, Therese Jensen was diagnosed with multiple sclerosis. She is severely disabled. CP 140. By summer of 2013, Jamie had become increasingly intolerant of Therese and her physical needs. If she did something to anger him, Jamie would punish her by leaving her alone to try to care for herself. Therese's family became so concerned about Therese's welfare they convinced Jamie to allow Therese to move from the family home in Mukilteo into a senior independent living community, Bloomfield Forum, in Omaha, NE, where she could get the services she needed for daily living. Jamie agreed with the family that it would be best for Therese to move. CP 640-41. Therese commenced this dissolution action on August 15, 2013.

On December 24, 2013, the trial court entered an order, without objection from Jamie, allowing Therese to take over the listing of the family home. CP 631-635; see also CP 575 (Jaime did not appear at hearing), CP 617-618 and 621-622 (Jamie agrees Therese can sell home and that he will not get in the way of sale).

Jamie had previously listed it for sale by owner. CP 644. Unbeknownst to anyone, Jamie's agreement to allow Therese to list the property for sale did not include his agreement that she could actually sell the property. See CP 464 (order only allows listing not sale); Appellant's brief, page 10. Jamie then began taking action to thwart an actual sale.

On January 24, 2014, Therese brought a motion to stop Jamie's shenanigans, including, but not limited to, putting up his own "for sale by owner" signs and listings, advising potential buyers title to the home would not clear, and threatening to allow the home to go into foreclosure. CP 616-630 (Therese's motion to remove Jamie from the home), CP 575-592 (Therese's response to Jamie's motion); see also Appellant's Brief, page 11 (acknowledging efforts to warn potential buyers "title is unlikely to be cleared for sale"); CP 592 (Jamie's sign on door of home). Simultaneously, Jamie also brought a motion to regain the ability to control the disposition of the family home. CP 594-615. On February 10, 2014, the court denied Jamie's motion, found Jamie had been obstructing the sale efforts, and awarded Therese attorney's fees in the amount of \$3,500.00. Based on Jamie's agreement he would cooperate with the pending sale, the court

allowed him to remain in the home. CP 531-532. Jamie's agreement to cooperate was completely worthless.

On the same day the court denied Jamie's motion to revise the February 10 order, Therese had to file a new motion to compel the sale and remove Jamie from the home. CP 521 (order on revision); CP 477-520 (motion). The pending sale would net the parties some money and save the home from foreclosure as a result of Jamie's failure to pay the mortgage. CP 479-481; see also CP 758-763 (declaration of real estate agent regarding listing and sale price); CP 766-784 (mortgage information); CP 795-97 (mortgage statement showing loan in default since June 2013). By the time of the hearing on March 7, 2014, Therese learned Jaime attempted to extort more money out of the buyers in exchange for his signature on the closing documents. CP 764-65. On March 7, the trial court (Commissioner Susan Gaer) ordered the sale of the home, ordered Jamie to execute the sales documents by March 24, 2014, and ordered Jamie to vacate the home by March 17, 2014. CP 424-426. On March 18, 2014, Judge Joseph Wilson denied Jamie's revision motion, and ordered him to vacate the home by March 19, 2014. CP 379-380.

Jamie sought discretionary review and a stay of the trial court's interlocutory order. CP 751-757. On April 17, 2014, Commissioner Kanazawa denied Jamie's motion for discretionary review, lifted the stay, and awarded Therese's \$2,000.00 in attorney fees. See Appellant's Brief, Appendix 3, Commissioner's Ruling Denying Discretionary Review, In re Marriage of Jensen, No. 71619-1-I. Unfortunately, the sale of the family home still fell through because Jamie threatened the buyers with continuing litigation. CP 333.

On May 12, 2014, Therese and Jamie participated in mediation with Harry Slusher. Jamie was now represented by Gail Nunn. On May 14, 2014, the parties executed a CR 2A Settlement Agreement, hereinafter "CR2A." CP 338-348. In the CR2A, the parties acknowledged

[t]his agreement is fair, equitable and the product of extended negotiations. Both parties intend to fully abide by the terms set forth herein. Each party understands that even though final documents yet need to be prepared, this stipulation and agreement is binding upon execution and enforceable in court.

CP 338-339. The CR2A also stated the following general terms:

[e]ach party hereby agrees to execute upon presentation, any and all papers, deeds, applications, security agreements, deeds of trust, promissory notes, titles, waivers or relinquishments of interest, or other documents necessary to carry out the terms of this Agreement. The

party desiring the other party to execute a document shall cause such document to be prepared. Any party failing to carry out the terms of this Agreement shall be responsible for any court costs and reasonable attorney's fees of the other party incurred as the result of such failure. The law applied shall be the law of the State of Washington. It is hereby understood that the undertakings and commitments of both Husband and Wife in this Agreement are unique and that in the event of violation or of threat of violation by the Husband or the Wife of the terms, conditions or provisions hereof, the other party may not have an adequate remedy of law. Therefore, in addition to any other remedy available to the Husband or the Wife under this Agreement in equity or at law, either party shall have the remedies of specific enforcement and injunction in any court of competent jurisdiction to prevent violation of the terms thereof.

CP 340.

The agreed property division awarded the family home in Mukilteo to Therese. CP 346. Along with other property, Jamie was awarded all the parties' interest in property known as Blaine 5 subject to encumbrances in favor of Mr. James Brown (Therese's brother) for debt the parties owed him. CP 347. Jamie also specifically agreed the award of Blaine 5 was

[c]ontingent on [Jamie] transferring to [Therese] all real estate award (sic) to her, and transferring to J. Brown all real estate awarded to him, with no further litigation, delay, appeal, clouding of title.... . Otherwise, Blaine 5 goes directly to J. Brown.”

Id.

Any hope Therese had that she could finally sell the family home free of Jamie's interference was short lived. In early June, it became apparent Jamie was using an error in the way title to the family home originally vested in the parties³ to try to prevent Therese from selling the home and to "renegotiate" the terms of the CR2A. See Appellant's Brief, pg. 17 ("CR2A did not require Jamie to sign any sales contracts" and the agreement only awarded the property to Therese and "did not obligate Jamie to enter in to any contract with a third party"); Appellant's Brief, Appendix 4 (email dated June 2, 2014, indicating Jaime's refusal to sign further documents will be used to renegotiate the agreement). As of June 18, 2014, Therese's attorney sent proposed final orders (Decree of Dissolution and Findings of Fact) consistent with the CR2A. See CP 266 (motion to enforce); CP 287 (email between counsel with proposed final pleadings).

Jamie did not execute the final pleadings, or sign the documents necessary to close the sale. On June 30, 2014, Therese brought an ex parte motion to give Jamie the opportunity to

³ When the parties originally purchased the home, Chicago Title used Appellant's nickname, Jamie, instead of his legal name. When Therese tried to close the sale, using a Quit Claim Deed bearing Jamie's legal name, Chicago Title wanted Jamie to sign closing documents to reflect the name change and to prevent any future litigation regarding ownership. CP 334-335.

comply with CR2A and execute all the necessary closing documents so he would not lose his property interest in Blaine 5. CP 333-350. Jamie's attorney appeared at the hearing, but Jamie did not. The court entered an order giving Jamie additional time to execute the closing documents required by the escrow company, establishing a \$500.00 per day sanction if he failed to comply, and setting a review hearing for July 9, 2014. CP 332.

On July 9, 2014, the parties appeared before the court for the review hearing. Jamie did not file any responsive materials opposing Therese's motion. The July 9, 2014, order awarded Therese \$4,500.00 in sanctions pursuant the terms of the ex parte order, \$3,500.00 in attorney fees, and divested Jamie of his interest in Blaine 5. CP 328-330. Specifically, the court

...pursuant to the CR 2A Agreement signed by both parties, confirms that Respondent failed to cooperate in closing the sale of the Mukilteo Property which was a condition of Respondent being awarded the property referenced as "Blaine 5". Respondent's actions created further litigation and delay. This court ratifies and confirms the CR 2A Agreement and finds that Respondent's actions in failing to effectuate the necessary documents to transfer all of his interest in the Mukilteo property to Wife such that she could effectuate a sale of the property shall result in the property known at "Blaine 5" being transferred to James Brown (referenced as J. Brown in the CR 2 A Agreement) in compliance with the parties agreement. Respondent had every opportunity to comply with the request of Petitioner and requests of escrow. Respondent has confirmed in

written email that he knew he had to sign and would sign but only if Petitioner signed documents that he provided. Respondent was given sufficient time and notice to comply with the requests to sign documents and failed to do so which shall result in the CR 2 A Agreement being enforced and Respondent's claim to the Blaine 5 property being transferred to James Brown.

CP 329-330.

Contrary to Jamie's claims in his brief, activity was occurring in the case between July and August 2014. See Appellant's Brief, pg. 21; see also CP 207 (showing activity on case between May 16, 2014 and September 9, 2014). Ms. Nunn filed a Notice of Intent to Withdraw as Jamie's attorney on July 24, 2014. CP 294-295. Before her withdrawal was effective, Ms. Nunn proposed revisions to the final pleadings. CP 297-99. Jamie wouldn't agree to Ms. Nunn's withdrawal, so she had to file a motion. CP 661, 664-667. Jamie eventually withdrew his objection, and the court entered an order allowing Ms. Nunn to withdraw on August 19, 2014. CP 658. On the same day, Ms. Nunn, not Jamie, filed a notice of trial setting. Compare CP 324-325 with Appellant's Brief, page 21.

On September 9, 2014, Therese filed a motion to enforce the CR2A and for entry of final pleadings consistent with the CR2A. CP 265-323. Therese's proposed final pleadings

incorporated some of the changes Jamie requested on August 4, 2014. CP 267. Jamie opposed the motion to enforce “due to violations of [the CR2A] agreement by Therese.” Appellant’s Brief, page 21; see also CP 140-148 (Jamie’s response to motion to enforce).

On September 23, 2014, the parties appeared before Judge Anita L. Farris for hearing on Therese’s motion. The parties spent considerable time going over the CR2A and comparing it to the proposed Findings and Conclusions. Where there were disputes, the court ruled, and the final pleadings were changed to reflect the court’s rulings. 9/23/14 RP 2-10. Jamie agreed the final pleadings, as amended, matched the parties’ CR2A. Id. at 2, 10.

At the conclusion of the hearing, the trial entered an unchallenged finding that the CR2A was binding and enforceable. CP 198. The court identified the changes that had been made to Decree and Findings of Fact. CP 198-99. The court also made the following unchallenged findings:

At this hearing, neither side disputed that there was a CR 2 A agreement previously entered into between the parties and that the exhibit attached to the motion [to enforce] is an accurate copy of the CR 2 A agreement signed and agreed to by both sides.

Mr. Jensen raised issues as to which side had violated the CR 2 A agreement after it was signed and became binding, and Mr. Jensen argued property and the parties' positions changed after the CR 2 [A agreement] was signed and binding, and Mr. Jensen alleged he would have made a different agreement had he known different things at the time of the agreement. However, Mr. Jensen did not dispute he entered into the CR 2 A agreement while represented by counsel and the document accurately represented what he intended to agree to, nor was there a motion to vacate the agreement based on fraud or any other grounds.

Mr. Jensen argued some of the provisions of the Findings of Fact and Decree did not match the CR 2 A [agreement]. The court went through each of those provisions and changed any not matching the CR 2 A [agreement] or not reflecting court orders entered after entry of the CR 2 A [agreement] by other superior court judges.

CP 199-201; 9/23/14 RP 12-13. The court then went on to conclude "the Findings and Decree as signed on this date accurately reflect the CR 2 A agreement of the parties and subsequent court orders," and approved the entry of the corrected final orders. CP 201. The court signed the Findings and Decree and advised both parties the dissolution would be final that day. CP 170-90, 191-97; 9/23/14 RP 14. Jamie replied "that will be great." 9/23/14 RP 14.

After entry of the final orders, Jamie began threatening he would appeal "the many orders...issued in this case." CP 102. On October 2, 2014, Jamie filed a motion to compel Therese to

execute documents so he could “effectuate” the terms of the Decree. CP 100-137. On October 17, 2014, the court denied Jamie’s motion, and, finding it was frivolous, awarded Therese an additional \$5,000.00 in attorney fees. CP 668-70. On the same day, Jamie filed this appeal. CP 1-67.

IV. ARGUMENT.

A. THE ONLY ISSUE JAMIE PROPERLY RAISES ON APPEAL RELATES TO THE TRIAL COURT’S INTERLOCUTORY ORDER ALLOWING THERESE TO SELL THE FAMILY HOME.

Although Jamie attaches a plethora of court orders to his notice of appeal, and identifies three issues in his opening brief, he provides argument on only the first issue:

[c]an the Superior Court disregard three statutes in a divorce proceeding and, without any equitable basis, authorize the wife, a non-resident of any community property, to sell the family home, for no proceeds to either party, without the consent or approval of the husband?

Appellant’s Brief, pg. 6. An appellant must provide “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” RAP 10.3(a)(6). Arguments that are not supported by any reference to the record or by citation of authority need not be

considered. Cowiche Canyon Conservacy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Here, Jamie not only fails to provide any argument regarding his second issue (relating to the trial court's June 30, 2014 ex parte order imposing sanctions) and his third issue (relating to the trial court's decision October 2, 2014, order denying Jamie's motion to enforce the Decree), he outright abandons them when he states:

[a]ll of the orders that resulted in the sale of the family home and which awarded attorney's fees against Jamie are grouped together into one concept for purposes of this appeal. If this court determines that one spouse can sell community property over the objections of another spouse, and that a court commissioner can grant that power, then this court should ratify all the orders.

Appellant's Brief, pg. 24. With this statement, it is clear Jamie only seeks review of the trial court's interlocutory order allowing Therese to sell the family home.

B. JAMIE CANNOT APPEAL THE TRIAL COURT'S INTERLOCUTORY ORDER REQUIRING THE SALE OF THE FAMILY HOME WHEN HE DOES NOT APPEAL THE DECREE OF DISSOLUTION AWARDING THERESE THE FAMILY HOME BASED ON THE PARTIES' CR2A AGREEMENT.

Jamie mischaracterizes the issue on appeal. The issue is not whether a commissioner can enter an interlocutory order

requiring the sale of a marital home over the objection of one spouse⁴. The issue is whether Jamie can appeal the trial court's interlocutory order allowing Therese to sell the home after he has agreed to entry of final orders awarding her family home, and he does not appeal those orders.

Jamie concedes the CR2A awarded the family home to Therese. Appellant's Brief, pg. 19. By its terms, the CR2A agreement was "effective as of the date of signing." CP 339. Therefore, as of May 16, 2015, the family home, and all rights associated with the family home's ownership, were awarded to Therese. Civil Rule 2A compels enforcement of a written settlement agreement signed by the parties. Patterson v. Taylor, 93 Wn. App. 579, 585, 969 P.2d 1106 (1999). Jamie opposed Therese's motion to enforce the CR2A. CP 140-169. The court rejected his claim and specifically found:

...there is a CR2A Agreement that is binding and enforceable between the parties which was signed by both parties and their counsel.

CP 198; 9/23/14 RP 11. The court also found:

Mr. Jensen did not dispute he entered into the CR 2 A agreement while represented by counsel and the document

⁴ This Court has already addressed and rejected the arguments Jamie raises again on direct review in its April 17, 2014, decision denying discretionary review. See Appellant's Brief, Appendix 3.

accurately represented what he intended to agree to, nor was there a motion to vacate the agreement based on fraud or any other grounds.

CP 199-200; 9/23/14 RP 12⁵. Jamie does not assign error to these factual findings on appeal. Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644870 P.2d 313 (1994). Jamie confirmed the trial court's Decree and Findings of Fact represented the parties' CR2A agreement. 9/23/14 RP 2, 10.

Once the trial court entered final orders, the interlocutory order was of no further moment. The Decree, not the interlocutory order, determined Jamie and Therese's rights regarding the family home with finality. See Fortier v. Fortier, 22 Wn.2d 748, 749, 162 P.2d 438 (1945) (upon entry of final order prior interlocutory orders are vacated). The Decree divested Jamie of any right or interest in the family home and vested title in Therese. RCW 26.09.050(1); see also Marriage of Kowalewski, 163 Wn.2d 542, 548, 182 P.3d 959 (2008) (decree awarding real property has

⁵ Jamie's bare assertion in his brief that he felt "forced to grant that the [family] home would go to Therese" in the CR2A should be disregarded. See RAP 2.5(a) (appellate court need not address issues raised for the first time on appeal).

operative effect of transferring title)⁶. Jamie's only recourse lies in appealing the trial court's final orders of September 23, 2014.

Jamie does not appeal those orders, and he cannot. By seeking to avail himself of the benefit the final orders in October 2014, he is judicially estopped from now challenging their validity on appeal. Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (judicial estoppel precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position). By his own actions, Jamie has simply waived any right he had to challenge the trial court's interlocutory order.

C. JAMIE'S APPEAL IS COMPLETELY FRIVOLOUS AND THERESE SHOULD BE AWARDED ATTONREYS FEES AND SANCTIONS UNDER RAP 18.9(a) AND CR 11.

RAP 18.9(a) allows this Court to consider and impose sanctions for frivolous appeals. The rule provides:

[t]he appellate court...may order a party or counsel...who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

⁶ Appellant is familiar with the holding of this case despite the fact he has attempted, in other appearances before this Court, to argue to the contrary.

RAP 18.9(a). A frivolous appeal is one which, when all doubts are resolved in favor of the appellant, is so devoid of merit that there is no chance of reversal. In re Guardianship of Cobb, 172 Wn. App. 393, 406, 292 P.3d 772 (2012), review denied, 177 Wn.2d 1017, 304 P.3d 114 (2013).

RAP 18.7 makes CR 11 applicable to appeals. In re Guardianship of Lasky, 54 Wn. App. 841, 856, 776 P.2d 695 (1989), citing Rhinehart v. Seattle Times Co., 51 Wn. App. 561, 580-81, 754 P.2d 1243 (1988). CR 11 provides, in pertinent part:

[t]he signature of a party or of an attorney constitutes a certificate by him that he has read the pleading, motion, or legal memorandum; that to the best of his knowledge, information, and belief, *formed after reasonable inquiry it is well grounded in fact* and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative *shall impose* upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11 (emphasis added). Courts impose sanctions under CR 11 “to deter, to punish, to compensate and to educate.” Wash. State

Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 356, 858 P.2d 1054 (1993).

In this case, sanctions under RAP 18.9(a) and CR 11 are clearly appropriate. It is inconceivable Jaime, as an attorney, does not understand the futility of this appeal in the manner he has presented it. He intentionally overlooks or blatantly ignores the legal finality of the Decree of Dissolution because he knows it is fatal to his appeal. Instead, he essentially re-raises issues this Court has already rejected on discretionary review.

Jamie continued with this appeal knowing there is absolutely no chance of success. This court should award Therese all of her fees and costs on appeal under RAP 18.9(a), and an additional sum of \$15,000.00 under CR 11. This sum is appropriate and necessary to deter Jamie from future frivolous filings either in the appellate court or in the trial court.

IV. CONCLUSION.

Jamie does not appeal the trial court's order enforcing the parties' CR2A or the Decree of Dissolution. Instead, he attempts to appeal an interlocutory order that became ineffective upon execution of the CR2A and upon entry of the Decree. Jamie's appeal is wholly frivolous and must be dismissed. This Court

should award Therese her costs, attorney's fees, and \$15,000.00 in sanctions against Jamie under RAP 18.9(a) and CR 11.

Dated this 20 day of February, 2015.

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By 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 20th day of February, 2014, I arranged for service of the original and one copy of the foregoing Respondent's Brief to be delivered to the following:

Office of Clerk, Court of Appeals, Division I

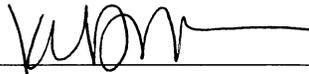
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