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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

VICKI G. WEATHERS,

Respondent,

v.

WILLIAM L. GHIORSO,

Appellant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Landlord Vicki Weathers (“Weathers”) respectfully argues that Appellant William L. Ghiorso (“Mr. Ghiorso”) failed to assert appealable error to a specific ruling of the trial court in Assignment of Error No. 1, and that even if he had, Mr. Ghiorso lacks standing to make those arguments which belong to Mr. Ghiorso’s former client, tenant Larry Yarbrough (“Yarbrough”) and were not pursued by Yarbrough on appeal.

Next, the trial court’s imposition of remedial sanctions against Mr. Ghiorso for a continuing contempt of court is also proper because Mr. Ghiorso and his former client could have avoided the imposition of sanctions by simply producing copies of the records ordered to be produced. Mr. Ghiorso and his former client withheld the records ordered to be produced and offered no explanation for their willful non-compliance with the performance ordered.

The trial court had subject matter jurisdiction over the unlawful detainer matter throughout the pendency of the lower court proceedings and the imposition of remedial sanctions against Mr. Ghiorso and his former client for their continuing violation of the Court’s orders on discovery should be affirmed.

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Restatement of Issues pertaining to Assignment of Error No. 1:

The trial court had subject matter jurisdiction over the unlawful detainer matter throughout the proceedings and Mr. Ghiorso, as the former *pro hac vice* counsel for the tenant, lacks standing to assert this assignment of error. Mr. Ghiorso also fails to appeal to any particular ruling of the lower court, instead asking this Court of Appeals for a second opinion on two years' worth of litigation.

B. Restatement of Issues pertaining to Assignment of Error No. 2:

As consistently held by this Court of Appeals in cases with nearly identical circumstances, the remedial sanctions imposed by the trial court against Mr. Ghiorso were proper where his conduct amounted to a willful, ongoing contempt in violation of court orders to produce documents that were within his control to produce.

III. STATEMENT OF THE CASE

On September 1, 2017, Weathers filed a Complaint for Unlawful Detainer for the eviction of Yarbrough from her real property.¹ On September 8, 2017, attorney Erin McAleer (“Mr. McAleer”) filed a notice

¹ While Weathers and Yarbrough were married in the 1970's, the parties divorced more than thirty years prior to Weather's sole purchase of the property in 2014.

of appearance for Tenant Larry Yarbrough (“Yarbrough”) in the unlawful detainer matter of *Weathers v. Yarbrough* in Clark County Superior Court.

On October 27, 2017, Weathers’ counsel served Mr. McAleer with Plaintiff’s First Request for Production. CP 70 at Ex. A. Request for Production No. 6 requested documents evidencing rent payments made from Yarbrough to Weathers or any other person from July 6, 2010 through the date of the Request. *Id.* Responsive documents were not produced.

On November 27, 2017, Mr. Ghiorso, an Oregon attorney, was admitted *pro hac vice* to represent Yarbrough in the trial court matter. On that same date, Mr. McAleer sent an email to Weathers’ counsel indicating that counsel should “primarily communicate with Mr. Ghiorso on all matters regarding this case” and to “feel free to leave me out of the loop.” CP 225 at ¶ 3. From that date forward, Mr. Ghiorso litigated the matter with little, if any, oversight from Mr. McAleer.

On December 13, 2017, Weathers’ counsel served Mr. Ghiorso and Mr. McAleer with Plaintiff’s Second Request for Production. CP 70 at Ex. D. Request for Production No.7 requested “[a]ll bank records, including copies of cancelled checks and account statements, for accounts held by [Yarbrough] for the time period of 2014 to Present.” *Id.* Responsive documents still were not produced.

On January 12, 2018, Yarbrough moved the trial court to dismiss for lack of jurisdiction, claiming that despite remaining in possession of Weather's premises, earlier procedural matters had somehow negated the trial court's statutorily vested jurisdiction over the matter. CP 54.

On January 25, 2018, Weathers' moved the trial court to compel Yarbrough's production of all outstanding documents from Plaintiff's First and Second Requests for Production. CP 71.

On February 2, 2018, the trial court heard oral argument on Yarbrough's Motion to Dismiss and on Weathers' Motion to Compel. The court denied Yarbrough's Motion to Dismiss and granted Weathers' motion ordering Yarbrough to provide Weathers with all responsive documents within seven (7) days of the hearing date. CP 86, 90. Responsive documents still were not produced.

On February 7, 2018, Yarbrough filed a 'Notice of Appeal to Court of Appeals' seeking review by this Court of "the Order on Defendant Larry Yarbrough's Motion to Dismiss for Lack of Jurisdiction" and "the Order on Plaintiff Vicki Weathers' Motion to Vacate Order or in the Alternate Motion to Bifurcate Issues." CP 97. The Notice of Appeal was submitted with Mr. McAleer's signature block but signed by Mr. Ghiorso. *Id.*

On February 13, 2018 Weathers' moved the trial court for a finding of contempt against Yarbrough for failing to comply with the trial court's February 2, 2018 order compelling document production. CP 109. The trial court heard oral argument on Weathers' Motion for Contempt and held Yarbrough in contempt, ordering him to pay \$500 per day for each day of non-production beyond February 9, 2018, plus a small award of attorneys' fees. CP 121.

On February 28, 2018 Yarbrough produced to Weathers bank records for the requested time-period; copies of Yarbrough's canceled checks were not produced, despite remaining in contempt of court until produced. CP 127 at Ex. C.

A review of Yarbrough's bank records revealed that on January 24, 2018, the date upon which counsel conferred regarding Yarbrough's canceled checks, Umpqua Bank charged Yarbrough \$30 to research all checks drawn on his account between "2014-2017." CP 127 at Ex. C. Yarbrough's bank records also revealed that on February 9, 2018, Umpqua Bank charged Yarbrough \$40 fee to print the check images. *Id.* As of February 9, 2018, Yarbrough had in his possession and control copies of the rent checks he had written to Weathers from 2014-2017; these checks were never produced by the defense, to Weathers.

On March 20, 2018, Weathers filed a Motion for Sanctions for Failure to Comply with Court Order on the basis that, “It is clear that Defendant is now in possession of the cancelled checks yet has failed or refused to produce them.” CP 126 at 2:10-12. Additionally, Yarbrough had failed to remit any portion of the ongoing \$500 per day contempt forfeiture dating back to February 9, or the \$2,500 attorney fee award as ordered by the Court on February 16, 2018. *Id.* and CP 121.

In advance of the hearing set on Weathers’ Motion for Sanctions, the parties reached resolution on the previously ordered contempt sanctions for the time-period from February 9 through the date the statements were produced to Weathers, on February 28. CP 225 at Sec. I, ¶ 12. In written correspondence between counsel, Mr. Ghiorso was again asked for copies of Yarbrough’s canceled checks which had yet to be produced and for which Yarbrough remained in contempt of court.

With the unlawful detainer trial scheduled for 9:00 a.m. on Monday, April 30, 2018, and a strong suspicion that Yarbrough’s canceled checks would defeat his assertion that he had never paid rent to Weathers during his tenancy, Weathers’ incurred the time and expense of independently subpoenaing Yarbrough’s canceled checks directly from Umpqua Bank. CP 174 at Ex. G.

On April 27, 2018, Umpqua Bank delivered 297 pages of Yarbrough's bank records, including his cancelled checks². CP 199 at Ex. 2.

Due to procedural issues outside the scope of this review, the trial court held an evidentiary hearing on April 30, 2018 pursuant to RCW 59.18.380, instead of an unlawful detainer trial. During the course of the day-long hearing, Yarbrough authenticated his canceled checks from Umpqua Bank and testified that his cancelled checks for years 2014-2017 had been requested, printed, and produced by Umpqua Bank to Yarbrough as shown on his January 2018 bank statement. Yarbrough then testified that he had, in fact, given the checks to Mr. Ghiorso. CP 225 at Sec. I., ¶ 16. In violation of several court orders, and to this day, Mr. Ghiorso has never produced Yarbrough's canceled checks to Weathers' counsel.

On May 9, 2018, oral argument on Yarbrough's motion for discretionary review was held before Court Commissioner Aurora R. Bearnse (the "Commissioner") at the Washington Court of Appeals, Division

² The significance of the cancelled checks is that in defense of unlawful detainer, Yarbrough maintained, in part, that he had never paid 'Rent' to Weathers while living in her home. Weathers believed Yarbrough's canceled checks would refute his defense. Once received from Umpqua Bank, the cancelled checks revealed that they were written from Yarbrough, to Weathers, on a monthly basis, many of which contained the word, 'Rent,' in the For line. The canceled checks were in evidence submitted to the jury, and the jury found Yarbrough guilty of unlawful detainer. EX. 20 at 11, 12, 16, 18, 19.

II. Mr. McAleer did not appear at oral argument, and Mr. Ghiorso's primary argument was identical to that set forth herein: he argued that despite the fact that Yarbrough remained in possession of Weathers' real property, the Superior Court lacked jurisdiction to rule on the unlawful detainer matter of *Weathers v. Yarbrough* and was instead required to convert the unlawful detainer matter to some other form of action.

On July 6, 2018, the Commissioner issued the Appellate Court's Ruling Denying Review. The Commissioner admonished Mr. Ghiorso for making extensive arguments outside the Notice of Appeal and for failing to assert specific errors in the lower court's rulings which could be addressed on review. CP 206. Next, the Commissioner examined Yarbrough's substantive argument and found that "*even were this court to reach the merits of the motion for discretionary review, it would deny the motion.*" *Id.* at 4 (emphasis added). The Court went on to examine the merits of the jurisdictional argument and found that under Washington law, the Superior Court maintained jurisdiction over the unlawful detainer matter. *Id.* The Commissioner held that Yarbrough failed to establish that the superior court committed obvious or probable error when it vacated its consolidation order and bifurcated the unlawful detainer action from the general civil action. *Id.*

Back in the trial court, and pursuant to RCW 7.21 et. seq. and CR 37(b)(2), the trial court employed its authority to impose remedial sanctions upon Yarbrough and his counsel for their continuing disobedience of the court's lawful orders through the date upon which Weathers was able to obtain the discovery through other means. *See id.* at Sec. II, ¶¶ 1-4. Despite the statutory right to impose remedial sanctions ranging from imprisonment to a forfeiture of \$2,000.00 per day, the trial court imposed a least injurious sanction jointly against Mr. McAleer, Mr. Ghiorso, and Yarbrough in the amount of \$100.00 per day. *See id.* at Sec. II, ¶¶ 5-10.

Mr. McAleer immediately paid his portion of the sanctions imposed and filed in the lower court his 'Notice of Intent to Withdrawal,' effective June 16, 2018. CP 180. On June 14, Mr. McAleer filed his 'Amended Notice of Intent to Withdrawal' with this appellate Court, effective June 24, 2018, whereby terminating his representation of Yarbrough in any Court, and revoking Mr. Ghiorso's permissive practice of law in Washington under APR 8(b). CP 202.

On October 23, 2018, Mr. Ghiorso moved for re-admission as *pro hac vice* counsel with new sponsorship. The Superior Court heard oral argument and issued an extensive written Order denying Mr. Ghiorso's motion based on his numerous transgressions before the Court, and a

finding that “[d]uring his previous representation of the Defendant Mr. Ghiorso engaged in conduct that led the court to find him in contempt on two separate occasions. [Mr. Ghiorso’s] behavior while representing the defendant has adversely affected the conduct of the litigation in this case.”. CP 244.1 at 5:15-17.

On October 26, 2018, Mr. Ghiorso filed a Notice of Appeal seeking review of the Order of the Superior Court imposing sanctions against Mr. Ghiorso for the repeated and willful violation of Court Orders³. CP 246. The Notice of Appeal seeks review of the Superior Court’s September 25, 2018 Ruling and Order on Plaintiff’s Amended Motion for Sanctions; Mr. Ghiorso attaches a copy of the written opinion as his sole exhibit. *Id.*

On April 8, 2019, Mr. Ghiorso filed Appellant’s Opening Brief (“Opening Brief”) which moves beyond the Notice of Appeal in asserting two assignments of error, one outside the Notice of Appeal and one within: (1) “The trial court erred by continuing to assert unlawful detainer subject matter jurisdiction over the case...;” and (2) “The trial court exceeded its authority by entering punitive sanctions against Yarbrough and Mr. Ghiorso....” Opening Brief at 2, ¶ 1, 2.

³ While Mr. Ghiorso began his appeal with the statement, “Attorney William L. Ghiorso seeks review...,” it should be noted that Mr. Ghiorso is not licensed to practice law in the state of Washington and was not so licensed at the time this Notice was filed. CP 244.1 Notice at 1:2.

IV. ARGUMENT

A. Legal Standard

No. 1: In an unlawful detainer matter, RCW 59.12.050 confers subject matter jurisdiction in the “superior court of the county in which the property or some part of it is situated.” Short of vacating the property, there is nothing the parties can do, or fail to do, that changes the Court’s statutory authority over unlawful detainer actions⁴. When the tenant vacates and the right to possession is no longer at issue, it is then within the trial court’s discretion in choosing whether to convert the unlawful detainer action into an ordinary civil damages action⁵.

No. 2: A trial court may hold a party in contempt for failing or refusing to perform “an act that is yet within the person's power to perform⁶.” Whether a party's actions warrant contempt is a matter within the sound discretion of the trial court; and, unless the trial court abuses that discretion, it should not be disturbed on appeal⁷.

⁴ *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075, 1084 (2012), citing *Munden v. Hazelrigg*, 105 Wn.2d 39, 40, 711 P.2d 295 (1985).

⁵ See *Angelo*, 167 Wn. App. at 817, citing *Munden*.

⁶ *In re Structured Settlement Payment Rights of Rapid Settlements, Ltd.*, 189 Wn. App. 584, 601-02, 359 P.3d 823, 832 (2015); see also *Rockwood v. Hadaller*, 2012 Wash. App. LEXIS 1089, *5-6, 2012 WL 1655946, quoting RCW 7.21.030(2) (unpublished).

⁷ *Id.*, citing *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

B. Weathers' Initial Objections

1. Mr. Ghiorso's Statement of the Case violates RAP Title 10

RAP 10.3(a)(5) provides that the appellant's brief *must present a fair statement of the facts* and procedure *relevant* to the issues presented for review, *without argument*⁸.

Here, Mr. Ghiorso's Statement of the Case is riddled with arguments, mostly those belonging to his former client, and almost entirely regarding facts and procedure irrelevant to the limited issue on appeal.

Not only is the Statement of the Case impermissibly argumentative, the arguments made are inconsistent with the Superior Court's rulings and the final jury verdict in the underlying unlawful detainer matter⁹. Even the Table of Contents to Mr. Ghiorso's Opening Brief is drowning in false accusations and second-hand arguments outside the scope of this appeal¹⁰.

⁸ RAP 10.3 (emphasis added).

⁹ Mr. Ghiorso's *pro hac vice* admission was revoked on June 16, 2018, such that Mr. Ghiorso's recitation of the facts and procedure arising between that date and the date of trial in November, 2018 (5 months later) could not be the first-hand knowledge of Mr. Ghiorso but must have come second or third hand from Yarbrough or Yarbrough's substitute counsel.

¹⁰ *See e.g.* "Weathers used a fake rental agreement as the basis for her unlawful detain action;" and "Weathers departed from the narrow subject matter jurisdiction of her unlawful detainer action." Opening Brief at 2, ¶C, G. The Superior Court never found that the rental agreement was "fake;" to the contrary, this was an issue of fact submitted to the jury and upon which the jury relied in reaching its verdict finding Yarbrough guilty of unlawful detainer.

Mr. Ghiorso failed to comply with RAP 10.3(a)(5), pursuant to RAP 10.7(2).

2. Mr. Ghiorso Lacks Standing to Advocate for Yarbrough

The Washington Supreme Court has held that, “[t]he doctrine of standing prohibits a litigant from raising another’s legal rights.”¹¹ Citing to the Supreme Court’s holding in *Haberman*, the Court of Appeals has also ruled that it is improper for a party lacking standing to assert the rights of other parties or nonparties, and that such claims fail because of the party’s lack of standing¹². In short, the claims of an individual lacking standing are not his or hers to assert and cannot be resolved in whole or in part on the merits¹³. “Standing is a party’s right to make a legal claim or seek judicial enforcement of a duty or right.”¹⁴

Mr. Ghiorso has no standing to make the claims belonging to, and previously asserted by his former client in this appellate Court. *See* Petitioner’s Motion for Discretionary Review, *Vicki G. Weathers v. Larry R. Yarbrough*, Washington Court of Appeals Division II, Case No. 51857-

¹¹ *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 1055 (1987); *citing Allen v. Wright*, 468 U.S. 737, 750-751 (1984).

¹² *Ullery v. Fulleton*, 162 Wn. App. 596, 604, 256 P.3d 406, 411 (2011); *citing Haberman*, 109 Wn.2d at 138.

¹³ *Id.* at 604-605.

¹⁴ *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610 (2007) (*quoting* Black’s Law Dictionary 1442 (8th ed. 2004)).

1-II. Mr. Ghiorso was sanctioned for his conduct in withholding records produced to him by Yarbrough. CP 225. Mr. Ghiorso's appeal was noticed as challenging the Superior Court's order imposing that sanction. CP 246. Mr. Ghiorso has no standing to challenge any other ruling or procedure in a case in which he has no legal claim or right.

3. Mr. Ghiorso's Opening Brief Violates RPC 5.5

RPC 5.5 states: (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so; and (b)(2) A lawyer who is not admitted to practice in this jurisdiction shall not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Mr. Ghiorso is a member of the Oregon Bar but is not licensed to practice in the state of Washington. His previous *pro hac vice* admission was revoked on June 16, 2018. Mr. Ghiorso was subsequently denied readmission based upon his repeated misconduct that adversely impacted the proceedings. CP 244.1.

Despite the fact that Mr. Ghiorso is not a member of the Washington Bar, and in express violation of the Washington Rules of Professional Conduct, Mr. Ghiorso continues to argue on Yarbrough's behalf as if his representation of Yarbrough continues.

While examples of Mr. Ghiorso’s professional misconduct can be found on nearly every page of his brief, the most telling remark is Mr. Ghiorso’s requested relief in the final sentence of his Conclusion, “...this case should be remanded to proceed as an ordinary civil case.” Opening Brief at 50. Mr. Ghiorso has impermissibly filed this sham of an appeal in an attempt to re-litigate his former client’s substantive arguments in defense of unlawful detainer. *See, e.g.*, Opening Brief at 25.

C. The Superior Court *Shall* Have Jurisdiction In Unlawful Detainer Proceedings

In unlawful detainer proceedings, RCW 59.12.050 confers subject matter jurisdiction in the “superior court of the county in which the property or some part of it is situated.” There is nothing the parties can do, or fail to do, that changes the Court’s statutorily vested jurisdiction over unlawful detainer actions¹⁵.

1. It Is Within The Trial Court’s Discretion To Convert An Unlawful Detainer Action Once Possession Ceases To Be At Issue

In addressing under which circumstances a tenant’s counterclaims may be heard, the Washington Supreme Court explains that when the tenant vacates and the right to possession is no longer at issue, it is then within the

¹⁵ *See Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075, 1084 (2012), citing *Munden v. Hazelrigg*, 105 Wn.2d 39, 40, 711 P.2d 295 (1985). *See also, First Union Management v. Slack*, 36 Wn. App. 849, 853-4, 679 P.2d 936, 939 (1984).

trial court's *discretion* in choosing whether to convert the unlawful detainer action into an ordinary civil damages action so that counterclaims can also be heard¹⁶. There is neither statutory authority nor common law mandating a superior court to convert an unlawful detainer action at any time; to the contrary, and as previously held by this very Court, Washington law is clear that once vested, subject matter jurisdiction over unlawful detainer remains with the superior court¹⁷.

Weathers and Yarbrough were the only parties to an unlawful detainer action filed in 2017. *See* CP 3. Despite a Writ of Restitution issuing in May, 2018, Yarbrough remained in possession of Weather's real property until invited to vacate by the Clark County Sheriff's Office in the summer of 2018. CP 177. In it an uncontested fact that at the time Yarbrough moved the trial court for an order dismissing the unlawful detainer action for lack of subject matter jurisdiction in January, 2018, he remained in possession of Weathers' property. It is also a matter of procedural fact that following his eviction from the premises in the summer of 2018, Yarbrough did not move the trial court for a grant of its discretionary authority in converting

¹⁶ *See Munden*, 105 Wn.2d at 45-46; *see also Angelo*, 167 Wn. App. at 817 (emphasis added). *See e.g., See also, Barr v. Young*, 187 Wn. App. 105, 106, 347 P.3d 947, 949 (2015) (Because premise possession issues had been resolved, the trial court did not abuse its discretion in effectively converting the remaining counterclaims into a civil suit when referring the case to mandatory arbitration).

¹⁷ *See Angelo, supra*.

the matter to a general civil action¹⁸. Likewise, it is a matter of fact that Mr. Ghiorso was no longer Yarbrough's attorney following the eviction and therefore has no first-hand information or experience from that point forward. Instead, Yarbrough, through new counsel, demanded the case proceed to trial by jury.

2. Yarbrough Was Judicially Estopped From Claiming Legal Or Equitable Ownership in Weathers' Property

On November 6, 2018, a jury of his peers found Yarbrough guilty of unlawful detainer of Weathers' property. CP 289. As of the filing of this Brief, Yarbrough still has counterclaims pending against Weathers in a separate action filed in 2017 in the Superior Court. *See Larry Yarbrough v. Vicki Weathers*, Clark County Superior Court Case No. 17-2-05408-2. The reason Yarbrough has never prosecuted those counterclaims pending against Weathers since September, 2017 is the same reason Mr. Ghiorso's

¹⁸ Mr. Ghiorso misrepresents the procedural history of the trial court action in attempting to make his case, by stating, "When the trial court refused to convert the case into an ordinary civil action for ejectment after it evicted Yarbrough on May 1, 2018...." Opening Brief at p. 25, ¶ 3. The trial court denied Yarbrough's Motion to Dismiss for Lack of Subject Matter Jurisdiction on February 2, 2018. CP 80. Yarbrough sought Discretionary Review of the trial court's ruling on dismissal which was denied. CP 206. An evidentiary hearing was held on April 30, 2018, during which Yarbrough testified that he had received his cancelled checks and turned them over to Mr. Ghiorso as ordered by the Court on three separate occasions, and the Court thereafter issued a Writ of Restitution on May 24, 2019. CP 177. Yarbrough remained in possession following the issuance of the Writ until finally evicted in the summer of 2018. A motion for conversion of the unlawful detainer action to a general civil action based on the Court's discretionary authority was never filed with the Court following Yarbrough's eviction, nor was an appeal on those issues ever pursued by Yarbrough following his jury trial.

argument in this appeal cannot stand: during the pendency of this action, Weathers' counsel's discovered that Yarbrough had filed a March, 2015 Voluntary Petition for bankruptcy with the United States Bankruptcy Court in the Western District of Washington. EX. 9. Yarbrough's Bankruptcy Petition, certified under penalty of perjury punishable by imprisonment, quashes every one of Yarbrough's claims to legal or equitable ownership in Weathers' property and leaves Yarbrough vulnerable to additional criminal charges for perjury under RCW 9A.72. *Id.* Yarbrough was legally prohibited from claiming any interest in Weathers' property after disclaiming such an interest under penalty of perjury in the bankruptcy court¹⁹.

Prior to the start of trial, Weathers filed a Supplemental Motion in Limine addressing these issues and after hearing oral argument, the Court granted the motion. CP 259, 270 at 2. The trial court's order judicially estopped Yarbrough from taking a position or presenting evidence contrary to the certifications previously made in his Bankruptcy Petition; Yarbrough

¹⁹ Mr. Ghiorso has no standing to make Yarbrough's substantive arguments on appeal, especially where Yarbrough was judicially estopped from making these arguments for himself in the trial court. Mr. Ghiorso's assertion that the trial court had a legal obligation to take Yarbrough's perjurious statements set forth in his Answer at face value in dismissing the unlawful detainer lawsuit is without merit or a scintilla of legal support and is not his argument to make.

did not proceed with an appeal on the trial court's judicial estoppel ruling nor the jury verdict against him. *Id.*

Mr. Ghiorso's permissive practice of law in Washington ended in June, 2018; he was not Yarbrough's attorney in the six months leading up to trial, nor at the trial. CP 180, 244.1. As such, the arguments set forth in Mr. Ghiorso's Opening Brief misrepresent the procedure and substance of the underlying action and re-affirm his standing to make the arguments. Mr. Ghiorso does not have permissive authority to represent Yarbrough, or any client, in the state of Washington and therefore lacks standing to assert the misstated, untenable, substantive arguments arising out of Yarbrough's defense in the unlawful detainer proceedings. This Court does not have before it Yarbrough's pursuit of an appeal on the November 6, 2018 jury verdict; nor did Yarbrough file a brief appealing the trial court's discovery sanctions as raised in Mr. Ghiorso's Opening Brief.

The Superior Court had subject matter jurisdiction over Weathers' unlawful detainer action against Yarbrough at all times relevant to Mr. Ghiorso's representation of Yarbrough, and therefore all rulings on the defense's willful noncompliance with discovery orders were also within the trial court's jurisdiction. Mr. Ghiorso's first argument on appeal therefore fails.

D. The Trial Court Properly Assessed Remedial Sanctions For Mr. Ghiorso’s Willful, Ongoing Discovery Misconduct And Contempt Of Court

A trial court may hold a party in contempt for failing or refusing to perform “an act that is yet within the person's power to perform.” Whether a party's actions warrant contempt is a matter within the sound discretion of the trial court; and, unless the trial court abuses that discretion, it should not be disturbed on appeal²⁰.

1. Yarbrough Is Compelled To Produce His Checks

In defense of the unlawful detainer Complaint filed against him, Yarbrough claimed that he had never paid rent to Weathers. Weathers contested this assertion and requested copies of Yarbrough’s bank statements and checks to Weathers over the term of his tenancy on her property; Weathers’ repeated Requests for Production went unfulfilled. CP 175.

²⁰ *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725, 728, 1995, citing *In re King*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988). To the contrary, the very first sentence of Mr. Ghiorso’s second issue on appeal is a misstatement of law regarding the standard of law on appeal. Mr. Ghiorso asserts that the standard on appeal is de novo, and cites to a Division III case that makes clear that a *state’s waiver of sovereign immunity* is reviewed de novo, not an order of sanctions; the case also ultimately holds in favor of Weathers’ position and contrary to Mr. Ghiorso’s on the imposition of sanctions. See *State v. Sims*, 406 P.3d 649, 651, 1 Wn. App. 2d 472, 476 (2017) (RCW 7.21.030(2)(b) authorizes a limited forfeiture for each day a contempt of court continues after a contempt finding), *overturned, in part*, by 193 Wn.2d 86, 88, 441 P.3d 262, 263 (2019).

On or about January 24, 2018, Weathers' counsel conferred with Mr. Ghiorso via telephone regarding the outstanding Requests for Production. On January 25, 2018, Weathers filed her first Motion to Compel the production of Yarbrough's bank statements and canceled checks for the relevant time-period of 2014-2017. CP 71. On February 2, 2018, the trial court heard oral argument on Plaintiff's Motion before compelling Yarbrough to produce his bank records and copies of cancelled checks. CP 90. Yarbrough did not thereafter produce his bank records nor copies of his canceled checks.

2. Yarbrough Is Held In Contempt

On February 16, 2018, Weathers' Motion for Contempt for [Yarbrough's] Refusal to Comply with Court Order came before the trial court. CP 109. After hearing oral argument, the trial court ordered Yarbrough to "forfeit the sum of \$500.00 per day, payable to Plaintiff, for each day the contempt continues following the deadline of February 9, 2018..." plus an award of attorney fees in the amount of \$2,500.00 payable within 10 days of the Order. CP 121.

On February 28, 2018, Mr. Ghiorso produced to Weathers' counsel the bank statements ordered to have been produced by February 9, 2018; Yarbrough did not produce copies of his cancelled checks despite remaining

in contempt of court. CP 225. However, the bank records produced did reveal that on January 24, 2018²¹ Umpqua Bank posted a \$30.00 charge against Yarbrough's checking account to research all checks drawn on the account between 2014-2017. CP 127, Ex. C. Similarly, on February 9, 2018, Umpqua Bank posted a \$40.00 charge against Yarbrough's checking account for printing the check images previously researched. *Id.* Despite Yarbrough being in possession of his cancelled checks on or about February 9, 2018, Yarbrough withheld these documents, presumably choosing to remain in contempt of the court's prior orders. CP 225.

3. Weathers Circumvents Yarbrough/Mr. Ghiorso And Independently Obtains The Withheld Records

With trial in the action set for April 30, 2018, on March 20, 2018, Weathers moved the court for enforcement of its sanctions for Yarbrough's continuing, willful disobedience of the court's orders on discovery. CP 126. Weathers' Motion sought an entry of judgment for the outstanding sanction payments and a default judgment against Yarbrough for his failure to produce copies of his cancelled checks in support of his claims. *Id.* A hearing on Weathers' Motion was set for April 6, 2018.

²¹ The date upon which Weathers' counsel conferred with Mr. Ghiorso regarding Yarbrough's non-production of his bank records and canceled checks.

In the days leading up to the hearing, Mr. Ghiorso made repeated phone calls to Weathers' counsel pleading for cancellation of the hearing, relinquishment of the claim for default judgment, and offering to make payment of the then outstanding sanctions. CP 187 at ¶ 9.

Weathers' counsel continued to demand production of the cancelled checks and received one implausible excuse after another from Mr. Ghiorso. CP 175 at 3:11-23. By April, 2018, the exorbitant amount of money being hemorrhaged by Weathers in seeking records to which the court had entitled her months earlier led her to accept Yarbrough's payment of sanctions then incurred, as ordered by the court for the time period of February 9, 2018 through February 28, 2018. Weathers also relinquished her pending claim for default judgment and cancelled the April 6 hearing. There was no agreement to forgo Weathers' entitlement to Yarbrough's cancelled checks, nor could the parties have negotiated Yarbrough out of contempt of a court's standing order.

With trial still set for 9am on Monday, April 30, 2018, and certain that Yarbrough's withheld records proved that he had been a rent-paying tenant now in unlawful detainer of Weathers' property, Weathers instead directed her counsel to independently subpoena Yarbrough's canceled checks. CP 174, Ex. G.

Umpqua Bank responded to Weathers' subpoena and Yarbrough's cancelled checks, in 297 pages of records, were produced by Umpqua Bank on the afternoon of Friday, April 27, 2018. CP 199 at Ex. 2. The "smoking guns," so to speak, came in the form of monthly checks from Yarbrough, to Weathers, many of which were expressly designated for "rent." EX. 20. Weathers was forced to incur additional financial injury as her counsel scrambled to incorporate the newly received records over the weekend prior to April 30, 2018. CP 175.

4. Mr. Ghiorso Is Implicated As The Contemnor And Held Jointly Accountable

For reasons outside the scope of this appeal, on April 30, 2018, the trial court held a full-day evidentiary hearing during which Yarbrough, who was still in possession of Weathers' real property, took the witness stand, and offered sworn testimony before the court. CP 155. Yarbrough authenticated copies of his cancelled checks produced by Umpqua Bank, and affirmed that he had properly been charged by the bank on January 24 and February 9 for researching and producing copies of the checks. Yarbrough then testified that he did receive copies of the cancelled checks from Umpqua Bank and provided those records to Mr. Ghiorso, his attorney at that time. *Id.*

On May 24, 2018, Weathers' moved the trial court for enforcement of the court's contempt order which had properly imposed a daily forfeiture for each day the contempt of court continued after the contempt finding. CP 175. The court heard oral argument on Weathers' motion and offered Mr. Ghiorso and Yarbrough an opportunity to justify their willful misconduct; both failed. Their inaction was indefensible. CP 225.

Yarbrough, and by proxy his attorneys, were in contempt of court for willfully withholding records from February 9 through April 27, 2018 when Weathers' counsel independently obtained the documents through extraordinary measures. CP 121. While Mr. Ghiorso negotiated payment of the outstanding sanctions through February 28, 2018, there was no agreement regarding the willful withholding of records ordered to have been produced months earlier. CP 225. Weathers' and her counsel incurred significant time and expense in obtaining these records and twice preparing for trial, which was originally set for April 30, 2018, without the damning records Yarbrough, and then his counsel, had in their possession but refused to produce.

5. The Trial Court Did Not Abuse Its Discretion In Enforcing Its Order on Contempt

a. Mr. Ghiorso's Sanctions Were Remedial and Proper

Pursuant to RCW 7.21.010(1)(b), intentional disobedience of any lawful order of the court is a contempt of court²². RCW 7.21.030(3) permits a court to hold a party in contempt for failing or refusing to perform an act that is within the person's power to perform. The Washington Supreme Court has consistently held that a party bears the burden of both production and persuasion regarding his claimed inability to comply with the court's order²³.

Although prior on-point rulings of this Division II of the Court of Appeals are rarely reported, this Court has repeatedly applied the Supreme Court's holdings in *Moreman* and *In re King* in affirming trial court rulings nearly identical to the one at issue in this case²⁴.

For instance, in 2012, this Court addressed substantive issues identical to those presently before the court- including the burden on contempt and whether supplemental sanctions for contempt were remedial or punitive- in *Rockwood v. Hadaller*²⁵.

²² *Moreman*, 126 Wn.2d at 40, citing *In re King*, 110 Wn.2d at 797-98.

²³ *Id.*

²⁴ See, e.g., *Rekhi v. Olason*, 28 Wn. App. 751, 752, 626 P.2d 513, 514 (1981); *Manza v. Kovanen*, 2004 Wash. App. LEXIS 788 (Wash. Ct. App., April 27, 2004); *Rockwood v. Hadaller*, 2012 Wash. App. LEXIS 1089 (Wash. Ct. App., May 10, 2012).

²⁵ *Id.* (unpublished).

In *Rockwood*, dispute arose out of a contract. Rockwood leased property from Hadaller with the option to purchase. When Rockwood opted to purchase, Hadaller failed to perform and refused to sell the property. The trial court ordered specific performance and required Hadaller to comply with its order. When Hadaller still failed to comply, upon Rockwood's motion, the court held Hadaller in contempt. The trial court appointed an attorney to move forward with the sale of the property on Hadaller's behalf if he failed to do so willingly by a specified date.

Despite the trial court's contempt order, Hadaller still failed to comply and the appointed attorney moved forward with the closing on his behalf. The sale closed on August 13, 2010. Identical to the facts in the present matter, Rockwood then brought a supplemental motion for an order enforcing contempt and for additional attorney fees and costs because Hadaller had not taken "all necessary steps to facilitate the order of sale," as ordered by the court²⁶.

In September, 2010, the trial court held Hadaller in continuing contempt of court based on his prior actions/inactions regarding the August 13, 2010 closing. The court, citing to Hadaller's failure to take all necessary

²⁶ *See, id.*

steps to facilitate the closing, sanctioned Hadaller \$10,000, payable to Rockwood within 90 days²⁷.

On appeal, Hadaller argued the sanctions imposed for past conduct were punitive, and not remedial because he could no longer comply with the Court's order as the conduct ordered of him had been competed by another²⁸. This Court found the contemnor, Hadaller, bore the burden of proving, with evidence the trial court found credible, that he could not comply with the trial court's prior order²⁹. When he failed to do so, because the trial court did not find his evidence credible, the Court of Appeals found Hadaller failed to demonstrate any abuse of discretion by the trial court when it found him in contempt and imposed remedial sanctions in the amount of \$10,000³⁰.

In addressing the classification of remedial v. punitive sanctions, and based on settled common law, this very Court crafted the following litmus test on appeal³¹:

Hadaller argues that the trial court erred in sanctioning him \$10,000 for his failure to comply with the June 18 court order. Specifically, he claims he purged his contempt and that assessment of the \$10,000 sanction would then amount to punitive sanctions—which would have required additional due process

²⁷ *Id.*

²⁸ *Id.* at 8.

²⁹ *Id.* at 7-8.

³⁰ *Id.* at 8.

³¹ *Id.* at 8-11 (emphasis added).

considerations. Again, the trial court did not abuse its discretion in finding Hadaller failed to purge his contempt and imposing civil sanctions. A trial court may impose remedial sanctions to ensure compliance with a court order or, “for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.” RCW 7.21.010(3); .030 And, if the sole purpose of the sanction is to coerce compliance with the trial court's lawful order, then it is civil. *In re King*, 110 Wn.2d at 799.

When punishment in contempt cases is not inevitable but can be controlled by the party itself, such contempt actions are not criminal but remedial civil sanctions. *In re Marriage of Bralley*, 70 Wn. App. 646, 652, 855 P.2d 1174 (1993). Moreover, in a civil contempt proceeding the contemnor is not entitled to a jury trial to determine whether she is in contempt. *See Keller v. Keller*, 52 Wn.2d 84, 87, 323 P.2d 231 (1958).

A trial court abuses its discretion when its orders- to pay sanctions, for example- are manifestly unreasonable or based on untenable grounds. *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d 271 (1992). Here, the trial court did not abuse its discretion by imposing remedial civil sanctions against Hadaller. Hadaller argues that the trial court's contempt sanctions amount to improper punitive sanctions and that punitive sanctions invoke further due process considerations.

Yet, the trial court's sanctions bear characteristics common to remedial sanctions, rather than the punitive sanctions, which would require further due process procedures. **First**, the purpose of the sanctions was to coerce Hadaller's compliance with the trial court order to provide the funds required to close the transaction and sign the closing documents by the August 13 deadline. **Second**, at the time of the June 18 court order, Hadaller had the ability to perform on the order. **Third**, the \$10,000 sanction did not exceed the \$2,000/day contempt sanction allowed under law. See RCW 7.21.030(2)(b). And **fourth**, the trial court included in the contempt order a purge clause under which Hadaller could have avoided the sanctions altogether had he simply complied with the court order. Because the trial court did not impose an

inevitable punishment but rather one within Hadaller's power to control, the trial court imposed remedial sanctions. *See Bralley*, 70 Wn. App. at 652.

The trial court's primary goal was to coerce Hadaller's compliance with the court order and complete the sale to the Rockwoods by August 13. And, because remedial sanctions are civil, rather than criminal, Hadaller's remedial sanctions do not invoke additional due process procedures. *See State v. Boren*, 42 Wn.2d 155, 157-59, 253 P.2d 939 (1953).

The trial court validly levied its \$10,000 sanction against Hadaller.

Applying this Court's "sanction litmus test" to the facts of the present matter, this Court will find that the minimal, supplemental sanctions imposed against Yarbrough and his attorneys, Mr. Ghiorso and Mr. McAleer for willfully refusing to produce documents within their control were remedial and proper:

- First, the purpose of the sanctions was to coerce Yarbrough's compliance with the trial court order to provide copies of his cancelled checks prior to the date originally set for trial;
- Second, at the time of the February 16, 2018 trial court order on contempt, Yarbrough, and then Mr. Ghiorso, had the ability to perform on the order as the evidence before the trial court confirmed that Yarbrough had come into possession of his cancelled checks on or about February 9, 2018 and then turned them over to Mr. Ghiorso;

- Third, the \$100/day sanction imposed by the trial court in this matter was far below the \$2,000/day contempt sanction allowed under law. See RCW 7.21.030(2)(b); and
- Fourth, Yarbrough and Mr. Ghiorso could have avoided the sanctions altogether had they simply complied with the court's order and turned over cancelled checks.

Because the trial court did not impose an inevitable punishment but rather one within Yarbrough and Mr. Ghiorso's power to control, the trial court imposed remedial sanctions and Mr. Ghiorso's appeal must fail.

b. RCW 7.21.030 Does Not Require A Showing Of Damages

Contrary to Mr. Ghiorso's misinterpretation of the law, the contempt statute, RCW 7.21.030, does not require a showing of damages to support the court's contempt sanctions³². While the Court may assess damages *in addition* to remedial sanctions imposed, under RCW 7.21.030(3), no showing of damages is required³³.

³² See Chapter 7.21 RCW.

³³ In its unpublished opinion, this Court addressed Mr. Ghiorso's very contention in stating, "First, the Manzas were not required to show damages to support the court's contempt sanctions. The contempt statute, Chapter 7.21 RCW, contains no such requirement. Accordingly, we do not reach Kovanen's argument that the sanctions are impermissible punitive damages. Second, under RCW 7.21.030, the court has authority to impose a variety of sanctions, including a remedial "order designed to ensure compliance with a prior order of the court." RCW 7.21.030(2)(c). Here, the trial court imposed daily cumulative sanctions in an attempt to force Kovanen to restore the hedge he had mangled.

c. Sanctions Were Properly Imposed For Discovery Violations

Under CR. 37, sanctions may be imposed on a party or its attorney for failure to comply with a discovery order. In upholding a similar discovery violation, the Washington Court of Appeals iterated the following³⁴:

A spirit of cooperation and forthrightness during the discovery process is mandatory for the efficient functioning of modern trials. Rule 37 is the enforcement section for the discovery process. It authorizes sanctions to be imposed on a party or its attorney for (1) failure to comply with a discovery order or (2) failure to respond to a discovery request or to appear for a deposition. Sanctions are permitted for unjustified or unexplained resistance to discovery and serve the purposes of deterring, punishing, compensating, and educating a party or its attorney for engaging in discovery abuses. We apply an abuse of discretion test to review a trial court's decision to impose sanctions for discovery violations. A court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.

In *Johnson*, the Court of Appeals not only upheld the discovery sanction imposed by the trial court, but also found that an appeal by the willful contemnor was frivolous pursuant to RAP 18.9³⁵. In so finding, the Court held, “[a]pplying this standard, we hold that Jones's appeal is so devoid of merit that it is frivolous. Reasonable minds could not differ that

That the sanctions grew to \$ 210,000 was a product of Kovanen's choice not to restore the hedge...” *Manza, supra*, 2004 Wash. App. LEXIS at *17-18 (2004).

³⁴ *Johnson v. Mermis*, 91 Wn. App. 127, 132-133, 955 P.2d 826, 830 (1998).

³⁵ *Id.* at 137.

sanctions were properly imposed. Jones engaged in multiple discovery abuses and violated the court's express order compelling discovery. Because there was no reasonable basis to argue that the trial court abused its discretion, we hold that the appeal is frivolous and impose sanctions.”³⁶

Weathers respectfully requests this Court of Appeals affirm the lower court's imposition of sanctions and make an award of attorney's fees incurred in defending yet another unsuccessful appeal.

E. Weathers' Request for Attorneys' Fees on Appeal Under RCW 7.21.030(3), RAP 18.1, or RAP 18.9

RCW 7.21.030(3) permits the award of attorney fees incurred by a party in defending an appeal of a contempt order.³⁷ Mr. Ghiorso and Yarbrough have not played by the rules and their ongoing, contemptuous conduct has cost Weathers in excess of \$75,000 throughout the lower court proceedings, and on appeal- Weathers has recovered almost none of those funds to-date.

In the alternate, RAP 18.1 allows a party the right to recover reasonable attorney fees or expenses on review before this Court, so long as the party requests the fees.

³⁶ *Id.* at 137-38.

³⁷ *Johnston v. Beneficial Mgmt. Corp. of Am.*, 26 Wn. App. 671, 677, 614 P.2d 661 (1980), rev'd on other grounds, 96 Wn.2d 708, 638 P.2d 1201 (1982).

Finally, RAP 18.9 allows the appellate court to award compensatory damages when a party files a frivolous appeal³⁸. An appeal is frivolous when there are no debatable issues over which reasonable minds could differ, and there is so little merit that the chance of reversal is slim³⁹.

Weathers requests an award of fees under in this case because Mr. Ghiorso presents no debatable issues over which reasonable minds could differ; based on the law, this appeal has no merit and the chances for reversal are slim.

Mr. Ghiorso's Opening Brief is a disguised attempt at re-litigating his former client's unlawful detainer matter. The trial court's decision imposing remedial sanctions was inarguably supported by the law, and there was no error in the trial court's decision. Despite these truths, Mr. Ghiorso has again forced Weathers to incur additional costs and fees, far in excess of those already suffered⁴⁰.

For example, the first forty (40) pages of Mr. Ghiorso's Opening Brief are dedicated to arguing that the trial lacked subject matter jurisdiction over the unlawful detainer action between Weathers and Yarbrough and

³⁸ *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, 878 (1999).

³⁹ *Id.* at 418 (internal citations omitted).

⁴⁰ In addition to the outstanding sanctions imposed on Mr. Ghiorso and Yarbrough for their misconduct, Weathers also holds a Judgment and a Supplemental Judgment against Yarbrough ordered in the Superior Court in the amounts of \$7,150.00 and \$133,694.55, respectively, which are wholly uncollectible. CP 289, 312.

based on misrepresentations of fact, contrary to the record; Mr. Ghiorso was not a party to that action, was no longer permitted to practice law in Washington by the time Yarbrough was evicted and went to trial, and even if this Court of Appeals had not already addressed those substantive arguments⁴¹, they would not be Mr. Ghiorso's arguments to make.

Weathers respectfully requests an award of fees and costs under either RCW 7.21.030, RAP 18.1, or RAP 18.9 for expenses incurred defending this appeal.

V. CONCLUSION

Mr. Ghiorso's Opening Brief bears little relationship to the evidence before the trial court at the evidentiary hearing, nor the evidence upon which a jury found Yarbrough guilty of unlawful detainer; it is instead a creative, misrepresentation of fact which Mr. Ghiorso has no standing to assert on a former client's behalf.

Mr. Ghiorso may only properly set forth his own arguments which are limited to the trial court's proper imposition of sanctions for Mr. Ghiorso's willful misconduct in refusing to turn over records that he was ordered to produce. As declared by the lower court, the sanctions imposed

⁴¹ CP 206.

were minimal, remedial and proper as compared to the havoc wreaked by the intentional disobedience of Mr. Ghiorso and his former client.

The Opening Brief is frivolous and filed with the dual purposes of delaying the payment of sanctions imposed upon him for an ongoing violation of a trial court order, and improperly re-litigating his former-client's issues which are not properly before this court. In large part, Mr. Ghiorso's Opening Brief mirrors the March 5, 2018 Motion for Discretionary Review filed on behalf of his former client, Yarbrough, and rejected by the Commissioner.

The trial court properly set forth the facts, with which it was very familiar by the time it issued its ruling imposing remedial sanctions for a continuing contempt, and applied the law in reaching its well-reasoned ruling. Weathers urges this Court to disregard Mr. Ghiorso's improper, first issue on review and to affirm the trial court's September 26, 2018 imposition of remedial sanctions for the willful violation of a trial court order.

Respectfully submitted this 15th day of July, 2019.

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