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**JUN 29 2016**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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In re the Guardianship of:

JAMES D. CUDMORE

No. 322068

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RESPONDENT'S BRIEF

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## I. INTRODUCTION

The Court should affirm that the trial court did not abuse its discretion when it imposed CR 11 sanctions against appellant John Bolliger (Bolliger). This appeal raises a straight-forward issue: Is an attorney allowed to ignore court orders with which he disagrees and ask the court *ad nauseum* to reconsider its previous rulings?

In this matter, Bolliger petitioned to be appointed as the attorney for James Cudmore (Cudmore), an alleged incapacitated person. The trial court denied Bolliger's petition. In willful violation of this order, Bolliger continued to purport to be the attorney for Cudmore. He filed motions, declarations and subpoenaed records purportedly on Cudmore's behalf. Bolliger's actions were not well grounded in fact or in law. As a result, the trial court did not abuse its discretion in imposing sanctions against Bolliger.

## II. STATEMENT OF THE ISSUES

1. Whether The Trial Court Properly Exercised Its Discretion In Imposing Sanctions Against Bolliger Under CR 11.
2. Whether The Court Should Award Lamberson His Attorney's Fees On Appeal.

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### III. STATEMENT OF THE CASE

On July 12, 2013, respondent Timothy Lamberson (Lamberson) filed a petition in Benton County Superior Court for guardianship of James Cudmore, Lamberson's long-time step-father. *CP 541-49*. On July 12, 2013, the court appointed Curtis Wayne May (May) as the guardian ad litem for Cudmore in the guardianship. *CP 550-56*. On July 18, 2013, May petitioned the trial court to have attorney Rachel Woodard (Woodard) appointed as attorney for Cudmore. *CP 1-2*. Also on July 18, 2013, attorney Bolliger petitioned the trial court to be appointed as attorney for Cudmore. *CP 17-19*. A lengthy declaration in which Bolliger personally attested to Cudmore's mental capacity accompanied Bolliger's petition. *CP 3-9*.

The court granted the petition appointing Woodard as Cudmore's attorney and denied the petition by Bolliger because Bolliger was going to be a witness in the case. *CP 934*. On July 22, 2014, Bolliger moved for reconsideration of the order appointing Woodard and denying his petition. *CP 23-33*. In doing so, Bolliger also sought certification of the matter for appeal. *CP 32*. On July 24, 2013, the court denied the motion. *CP 935*. On August 7, 2013, Bolliger, purportedly acting as attorney for Cudmore, filed a note for motion docket scheduling a hearing for September 6, 2013. *CP 935*. Bolliger knew at the time of this action that his petition to be

appointed Mr. Cudmore's attorney and his motion for reconsideration had been denied. *CP 935*.

On August 15, 2013, Woodard sent a letter signed by Cudmore to Bolliger requesting that he send a copy of Cudmore's file to Woodard. *Id.* Bolliger refused to provide Woodard with a copy of Cudmore's file. *Id.* On August 29, 2013, Bolliger filed a motion and memorandum seeking to have Cudmore testify, to strike the appointment of Woodard as Cudmore's attorney, or to certify the matter for appeal. *Id.* The motion once again asked the trial court to grant the petition appointing Bolliger as the attorney for Cudmore. *CP 64*. Bolliger knew at the time that his petition to be appointed Cudmore's attorney and his motion for reconsideration had been denied. *CP 935*. Bolliger knew that the court had already denied his request to certify the matter for appeal. *Id.* Bolliger was put on notice that this filing was sanctionable. *Id.*

On September 6, 2013, Bolliger re-noted a hearing on the same motions for September 13, 2013. *Id.* Bolliger knew at this time that the court had denied his petition to be appointed Cudmore's attorney and his motion for reconsideration. *Id.* Bolliger knew that the court had denied his request to certify the matter for appeal. *Id.* Bolliger was put on notice that this filing was sanctionable. *CP 935-36*.

On September 9, 2013, Bolliger issued subpoena duces tecums to HAPO Community Credit Union and Edward Jones seeking Cudmore's account records. *CP 936*. Bolliger knew at the time of this action that his petition to be appointed Cudmore's attorney and his motion for reconsideration had been denied. *Id.*

On December 27, 2013, the court entered an order of guardianship over the person and estate of Cudmore, appointing Lamberson as the guardian. *CP 720-31*. The trial court also ordered Bolliger to appear and show cause why he should not be sanctioned for his conduct in the case. *CP 732-33*.

On January 10, 2014, the court heard argument on the order to show cause. *RP 1/10/14, pg. 8*.<sup>1</sup> After thoroughly reviewing the pleadings and hearing the arguments of counsel, the court ruled as follows:

Mr. Bolliger's initial efforts to be appointed as the attorney for Mr. Cudmore, while legally questionable, were nevertheless in good faith. I say legally questionable because he had conflicts of interest from a couple of different directions. He was a potential witness in the case. He was representing the Belts, against whom there were accusations made of exploitation of Mr. Cudmore.

He really – on the merits, Mr. Bolliger, you really should never have asked to be involved in representing Mr. Cudmore, but this is an unusual fact pattern and so I cannot, as Mr. Meehan cannot or has not criticized you for attempting that.

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<sup>1</sup> The Verbatim Report of Proceedings filed with the Court on October 7, 2014 are transcriptions of the three separate hearings. For clarity, Lamberson's citation will reference the date of the hearing and the page number at the bottom of the transcription.

But there became a point in which you became an officious intermeddler. I think that's the term Mr. Meehan used, and I think it's quite accurate, and that is after Judge Mendoza signed an order appointing Ms. Woodward to the case and signed – and then denied your motion for reconsideration, that should have been the end of it.

*RP 1/10/14, pg. 45.* The trial court proceeded to address which actions it believed were the result of Bolliger's actions which were not well grounded in fact or law. *RP 1/10/14, pgs. 46-56.* The court directed the parties to craft findings and conclusions and to note a new hearing if agreement could not be reached. *RP 1/10/14, pgs. 54-55.* The parties were unable to come to an agreed order. *See CP 479-86; CP 852-58.* Upon hearing, the court entered the proposed order submitted by Lamberson. *RP 3/24/14 pg. 77; CP 934-38.* Lamberson's reasonable attorney's fees related to Bolliger's sanctionable conduct amounted to \$3,725.75. *Id.* Woodard's fees reasonably related to the sanctionable conduct of Bolliger amounted to \$3,445.50. *Id.* May's fees reasonably related to the sanctionable conduct of Bolliger amounted to \$2,550.00. *Id.*

On January 24, 2014, Bolliger purported to appeal on behalf of Cudmore the following orders: (1) the order appointing May as guardian ad litem; (2) the order appointing Woodard as the attorney for Cudmore; (3) the order denying reconsideration of the previous order; and (4) the order appointing a full guardian for Cudmore's person and estate. *CP 360-61.* As

Bolliger was not the attorney for Cudmore, this Court dismissed the appeal for lack of standing. *Comm'r Ruling, December 16, 2014*. On April 9, 2015, Bolliger filed a petition the Washington State Supreme Court seeking review of the Commissioner's ruling. *Pet. for Rev., April 9, 2015*. On August 5, 2015, the Washington Supreme Court denied the petition for review. *Order Denying Pet. for Rev., August 5, 2015*.

#### **IV. ARGUMENT**

The Court should affirm the trial court's imposition of sanctions against Bolliger. The record establishes that Bolliger habitually and willfully ignored orders of the trial court throughout the litigation. Primarily, Bolliger disregarded the order of the court appointing an attorney other than himself to act as counsel for Cudmore. The trial court did not abuse its discretion in finding that Bolliger's pleadings were not warranted in fact. The trial court did not err in concluding that Bolliger's pleadings were not well-grounded in law. While Bolliger dedicates a large portion of his brief alleging a conspiracy perpetrated by Lamberson's attorney and asserting that he acted in bad faith, Bolliger largely avoids this narrow issue of this appeal.

##### **A. The Standard Of Review.**

The standard of appellate review for CR 11 sanctions is abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448, 451 (1994)

(citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993)). A trial court abuses its discretion if its decision is manifestly unreasonable based on untenable grounds or untenable reasons. *Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

“A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.” RAP 10.3(g). Unchallenged findings of fact are treated as verities on appeal. *In re Disciplinary Proceeding Against Jackson*, 180 Wn.2d 201, 219, 322 P.3d 795, 805 (2014). The court does not consider material that is not properly before the court when deciding a case. RAP 9.1; *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 730, 309 P.3d 711, 727 (2013), *aff'd* 181 Wn.2d 186.

The Court reviews properly challenged findings of fact to determine whether substantial evidence supports the findings. *Scott v. Trans-Sys, Inc.*, 148 Wn.2d 701, 707–08, 64 P.3d 1 (2003); *Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P.3d 560, 566 (2008). “In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party.” *Endicott*, 142 Wn. App. at 909 (citing *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963)). In evaluating the persuasiveness of the evidence, and the credibility of witnesses, the Court, in review, must

defer to the trier of fact. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994). “We defer to the fact finder and ‘consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.’” *Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 814, 225 P.3d 280, 285 (2009) (quoting *Cingular Wireless, L.L.C. v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006)).

In this case, the trial court did not abuse its discretion in imposing sanctions against Bolliger. Bolliger did not assign error to the findings of fact in the trial court’s order and each finding of fact is supported by substantial evidence. Therefore, the Court should affirm the order of sanctions against Bolliger.

In considering this appeal, the Court should decline to consider the material appended to Bolliger’s brief in violation of RAP 10.3(8).

**B. The Trial Court Did Not Abuse Its Discretion In Imposing Sanctions And Finding Of Fact No. 1 Is Supported By Substantial Evidence.<sup>2</sup>**

The Court should affirm the trial court in this matter because the order imposing sanctions, including Finding of Fact No. 1, is supported by substantial evidence. Finding of Fact No. 1 reads as follows:

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<sup>2</sup> While Lamberson contends that none of Bolliger’s challenges to findings of fact on appeal are properly set forth as required by RAP 10.3(g), Lamberson addresses the findings addressed by Bolliger in turn.

James Cudmore, at that point an allegedly incapacitated person, initially hired attorney John C. Bolliger to represent him in the guardianship proceedings after previously hiring Mr. Bolliger to prepare estate planning documents.

*CP 934.* According to Bolliger’s motion/memorandum/declaration, Cudmore sought to hire Bolliger for the guardianship action on July 18, 2013. *CP 114.* The petition for guardianship regarding Cudmore’s person and estate was filed July 12, 2013 which alleged Cudmore was an incapacitated person. *CP 541.* Cudmore had previously signed a fee agreement with Bolliger on July 4, 2013 to prepare estate planning documents. *CP 112.*

“[O]n appeal we are concerned with the burden of production—the substantial evidence test.” *Nw. Pipeline Corp. v. Adams Cty.*, 132 Wn. App. 470, 475, 131 P.3d 958, 960 (2006) (citing *State v. Dolan*, 118 Wn. App. 323, 331, 73 P.3d 1011 (2003)). “Whether the burden of persuasion has been met is for the finder of fact.” *Id.* The Court does not strike findings due to assertions that a finding which is supported by the substantial evidence is “misleading.” *Mitchell*, 153 Wn. App. at 815 (“[Appellant] argues that finding of fact 9 is misleading and requests that it be stricken...[w]e hold that substantial evidence supports finding of fact 9.”). Therefore, the Court should conclude Finding of Fact No. 1 is supported by substantial evidence.

**C. Substantial Evidence Supports Finding Of Fact No. 2.**

The Court did not abuse its discretion in imposing sanctions against Bolliger because substantial evidence supports Finding of Fact No. 2. The finding reads as follows:

On July 19, 2013, this Court granted the petition of the Guardian ad Litem to appoint attorney Rachel M. Woodard as Mr. Cudmore's attorney in the guardianship and denied Mr. Bolliger's petition to be appointed attorney for Mr. Cudmore because Mr. Bolliger was going to be a witness in the case.

*CP 934.* The trial court did in fact grant the petition appointing Woodard and explicitly denied the petition made by Bolliger. *CP 21.* Prior to the hearing, Bolliger submitted a lengthy declaration personally testifying to Cudmore's capacity based on his interactions with Cudmore. *CP 3-9* ("At no time during my aforementioned 3 visits with Jim, spanning a cumulative 5½ hours, did I get any sense that he wasn't mentally capable of understanding the subject of his estate planning documents...").

At the hearing, Judge Mendoza asked Bolliger to address:

[T]he argument that you have now become a witness and, therefore, by the – by virtue of your declaration [and] by virtue of some of the comments you've made today that perhaps that would be [in]appropriate given the rules of professional ethics?

*RP 7/19/13, pg. 11.* The court was not satisfied with Bolliger's explanation and appointed Woodard to represent Cudmore in the guardianship. *RP*

7/19/13, pg. 20. Notably, Judge Spanner also agreed those concerns existed reviewing the record as well. *RP 1/10/14, pg. 45.*

The question whether the trial court abused its discretion in denying Bolliger's petition is not before the Court. Instead, the question is whether the trial court abused its discretion in imposing sanctions against Bolliger based on his disregard for the order denying his petition. There is no reasonable dispute that Bolliger chose to ignore the order of the court appointing Woodard as the attorney for Cudmore. Bolliger has identified no authority which privileges him to willfully ignore orders of the court. The finding that Bolliger's petition was denied and the reasoning why is well supported by substantial evidence. Therefore, the Court should conclude the trial court did not abuse its discretion in imposing sanctions against Bolliger.

**D. Findings of Fact 12, 13, 14, And 15 Are Supported By Substantial Evidence.**

The Court should affirm the sanctions imposed against Bolliger because the findings of fact are supported by substantial evidence.

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**1. The Court Did Not Abuse Its Discretion By Imposing Sanctions Against Bolliger For Issuing Subpoenas Duces Tecums To Cudmore's Financial Institutions When He Was Neither A Party Nor An Attorney For A Party.**

Finding of Fact No. 12 relates to the actions of Bolliger in issuing subpoena duces tecums to Cudmore's financial institutions despite not being a party or an attorney for a party in the case. Findings of Fact Nos. 10-12 state as follows:

10. On September 9, 2013, Mr. Bolliger issued subpoena duces tecums to HAPO Community Credit Union and Edward Jones seeking Mr. Cudmore's account records. Mr. Bolliger knew at the time of this action that his petition to be appointed Mr. Cudmore's attorney and his motion for reconsideration had been denied.

11. Mr. Bolliger was on notice that his issuance of subpoenas was potentially sanctionable by the declaration of Mr. Lamberson's attorney submitted in support of the motion seeking to quash the subpoenas which requested the Court award terms against Mr. Bolliger for the frivolous issuance of invalid subpoenas.

12. On September 20, 2013, The Court quashed the subpoenas issued by Mr. Bolliger as invalid.

*CP 935.* All three of these findings are supported by substantial evidence. *CP 616-22; CP 612-14; RP 9/20/13, pg. 6.* The gravamen of Bolliger's claim of error regarding Finding of Fact No. 12 is that he should not be sanctioned for issuing the invalid subpoenas because he later offered to withdraw the subpoenas. *Appellant's Brief pg. 34.* However, Bolliger's

communication regarding the technical violation of the subpoenas did not address the underlying problem: Bolliger issued subpoenas to Cudmore's financial institutions when he was not an attorney for a party in the case. *CP 612-13*. Nowhere in Bolliger's communications did he agree he would not re-issue subpoenas with proper notice and the proper format. This necessitated the hearing, and the court agreed:

I have signed the order quashing subpoenas, specifically, the subpoenas directed to Edward Jones and HAPO, and I'm doing so on the merits. Mr. Bolliger – I think you called it an intermeddler. He is not an attorney of record for any party in this case, and the rules are clear only attorneys of record have subpoena power in such cases.

*RP 9/20/13, pg. 6*. CR 11 sanctions are available on any claim even after it has been voluntarily dismissed. *See Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 193, 69 P.3d 895 (2003). Therefore, the Court should conclude that Finding of Fact No. 12 is supported by substantial evidence.

**2. Findings Of Fact Nos. 13-15 Are Supported By Substantial Evidence And The Court Did Not Abuse Its Discretion In Determining The Reasonableness Of The Fees Related To Bolliger's Sanctionable Conduct.**

The Court should affirm the sanctions imposed against Bolliger because the trial court properly exercised its discretion in determining the amount of fees related to Bolliger's sanctionable conduct. "Should a court

decide that the appropriate sanction under CR 11 is an award of attorney fees, it must limit those fees to the amounts reasonably expended in responding to the sanctionable filings.” *Biggs*, 124 Wn.2d at 201. When ordering fees, the court should have an objective basis in determining the amount of the fees imposed. *See Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 316, 202 P.3d 1024, 1028 (2009) (citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 599, 675 P.2d 193 (1983)).

In this case, after reviewing the pleadings and hearing the arguments of counsel, the trial court determined that sanctions were appropriate. *RP 1/10/14*, pg. 46. In doing so, the court specifically delineated which pleadings by Bolliger were not warranted in law or fact. *See RP 1/10/14*, pgs. 46-54. The court also sought questions from the parties for clarification to ensure that it had properly articulated which pleadings were sanctionable. *Id.* After the hearing, Lamberson, Woodard and May submitted declarations limiting the fees requested to the time expended to the pleadings the trial court identified as sanctionable. *CP 786-90; CP 791-95; 848-51*. At the hearing on the entry of the order, Bolliger was not able to identify any fees requested which were duplicative or did not relate to the pleadings identified by the court as violating CR 11. *RP 3/24/14*, pgs. 64-68. As the trial court had a factual basis for determining the fees related to

the sanctionable pleadings, Findings of Fact Nos. 13-15 are supported by substantial evidence.

**E. Finding Of Fact No. 5 Is Supported By Substantial Evidence And The Trial Court Did Not Err In Making Conclusion Of Law No. 5.**

The trial court did not abuse its discretion in sanctioning Bolliger because Finding of Fact No. 5 is supported by substantial evidence and the court did not err in making Conclusion of Law No. 5. Finding of Fact No. 5 reads as follows:

On August 15, 2013, Ms. Woodward sent a letter signed by Mr. Cudmore to Mr. Bolliger requesting that he send a copy of Mr. Cudmore's file to Ms. Woodward. Mr. Bolliger refused to provide Ms. Woodward a copy of Mr. Cudmore's file. On October 15, 2013, Mr. Bolliger provided Ms. Woodward with a copy of Mr. Cudmore's will after being provided with a second written request from Mr. Cudmore.

*CP 935.* The court concluded that this refusal was not warranted in law or in fact. *CP 937.* Bolliger admitted to receiving the letter from Cudmore requesting a copy of the file. *CP 48-49.* Bolliger did not produce the records and did not produce the records when ordered to do so by the court. *CP 597; see also 659-62; CP 663.* This necessitated a second letter from Cudmore to Bolliger requesting the file. *CP 350.* Bolliger provided a copy of the estate planning documents on October 15, 2013. *CP 352.* He did not produce his billing documentation as he had not kept billing records "throughout the case." *CP 359.*

The trial court's finding is supported by substantial evidence and Bolliger's actions were not warranted in fact or in law. In his appellant's brief, Bolliger frames the issue as though he were sanctioned for contesting the motion to compel production of Cudmore's will to Lamberson. *Appellant's Brief pg. 36*. This is not the case. Lamberson argued that the will was not protected based on the presence of a third-party and that the billing records were not protected by attorney-client privilege. *CP 587-90*. However, the trial court agreed with Bolliger that Lamberson was not entitled to production of the documents. *CP 592*. Instead, the court ordered production of the documents to Woodard and May. *CP 597*.

Instead, the sanctionable conduct of Bolliger in this matter was willfully violating the court order and Cudmore's own request that he provide a copy of his file to Woodard. The record amply supports the finding and it does not appear that Bolliger challenges the factual basis other than to state he believed his subsequent communication with Cudmore countermanded Cudmore's request to produce the file to Woodard. However, nothing privileged Bolliger to "temporarily" ignore the order of the trial court. *See Appellant's Brief pg. 37*. Therefore, the Court should conclude the trial court did not abuse its discretion in making Finding of Fact No. 5 or err in making Conclusion of Law No. 5.

**F. The Court Did Not Abuse Its Discretion In Making Findings Of Fact Nos. 3, 4, 6, 8, And 10 And The Court Did Not Err In Making Conclusion Of Law No. 6.**

The Court should affirm the sanctions against Bolliger because Findings of Fact Nos. 3, 4, 6, 8, and 10 are supported by the substantial evidence. Finding of Fact No. 3 reads as follows:

On July 24, 2013, the Court denied Mr. Bolliger's motion for reconsideration to be appointed Mr. Cudmore's attorney for the guardianship.

*CP 935.* Bolliger's assertions of error regarding Findings of Fact Nos. 4, 6, 8 and 10 are reiterative of Finding of Fact No. 3. *See Appellant's Brief pg. 37.* However, Finding of Fact No. 3. is supported by the record as Judge Mendoza did indeed deny Bolliger's motion for reconsideration to be appointed as attorney for Cudmore. *CP 45-46.*

Further, this assertion of error on Bolliger's part is a perfect example of why sanctions were imposed against him: Bolliger lacks the ability to acknowledge the legitimacy of a court order with which he disagrees. Bolliger petitioned to be appointed as counsel for Cudmore on July 18, 2013. *CP 17-18.* This motion was denied by the court. *CP 21.* On July 22, 2013, Bolliger sought reconsideration of the order. *CP 23-33.* This included a request for certification of appeal. *CP 32.* The court denied this

motion in its totality. CP 45-46. On August 29, 2013, Bolliger again asked for the exact same relief previously denied by the court:

Mr. Cudmore also moves the Court for an order granting his petition to appoint Mr. Bolliger as his attorney for this case. Again, Mr. Cudmore filed his petition on July 18, 2013.

CP 64 (emphasis omitted); CP 68. As articulated by the trial court in imposing sanctions against Bolliger:

[Y]ou have to comply with court orders, and the court order was to appoint someone else as an attorney, and you had to respect that regardless of what you thought the law is, and your remedy is to go appeal and we're all glad the Court of Appeals is there because sometimes we make mistakes, but you ignored that avenue and instead injected yourself into the case.

RP 1/10/2014, pg. 53. Substantial evidence supports Finding of Fact No. 3. As Bolliger was aware of the order denying his petition and motion for reconsideration, he was aware that he was not the attorney for Cudmore in his subsequent filings. Therefore, the Court should affirm the sanctions imposed against Bolliger as well within the trial court's discretion.

**G. Substantial Evidence Supports Finding Of Fact No. 9.**

Substantial evidence supports Finding of Fact No. 9. As Bolliger acknowledges in his memorandum, the hearing noted for September 13, 2013, was stricken. *Appellant's Brief* pg. 39. Therefore, Finding of Fact No. 9 is supported by substantial evidence.

**H. The Trial Court Did Not Err In Conclusions Of Law Nos. 4, 6, 7, And 8.**

The Court should affirm the trial court did not abuse its discretion by imposing sanctions against Bolliger because the court properly concluded that his pleadings were not warranted by law or fact. As discussed *supra*, the record supports the finding that Bolliger knew he was not the attorney for Cudmore in the action. *CP 21*. “The court applies an objective standard to determine ‘whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.’” *Eller v. E. Sprague Motors & R.V.’s, Inc.*, 159 Wn. App. 180, 190, 244 P.3d 447, 452 (2010) (quoting *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992)).

In *Eller*, plaintiffs Gale and Hollie Eller brought an action against East Sprague Motors & R.V.’s, Inc. after discovering that the “additional paperwork” they signed was different than the original contract they originally executed. *Eller*, 159 Wn. App. at 184-85. In addition to suing the automotive dealer, the Ellers’ attorney also named B.L. DeWitt who had made copies of requested materials but was not employed at the automotive dealer at the time of sale or when the “additional paperwork” was completed. *Id.* at 185. Eller’s theory regarding DeWitt as described in discovery was that his notarial certification of the copies meant he was

“vouching that the allegedly forged and altered documents were identical to the documents as originally signed by the Ellers.” *Id.* at 186. The trial court agreed that this theory was not warranted in law or fact, but that it could not conclude it was brought for an improper purpose. *Id.* at 187. DeWitt appealed asserting that it was an error of law to require both unwarranted in law or fact and brought for an improper purpose. *Id.* at 188. Eller cross-appealed on the finding of fact that the pleadings were not well grounded in fact or in law. *Id.*

On appeal, Eller argued that the pleadings were well-grounded in fact and supported by law. *Id.* at 190. The court rejected this argument, noting that the court applies an objective standard in determining whether an attorney could believe his actions to be factually and legally justified. *Id.* The court agreed that claims against DeWitt were unsupported by the facts or law. *Id.* The record supported the findings that DeWitt was not an employee of defendant at the time of the transaction and that there was no evidence that the copies he made did not match the file. *Id.* The court further agreed that the argument that the notary statute “impose[s] a duty to ascertain the history and authenticity of a document before certifying a copy” was not warranted by law. *Id.* Based on this, the court affirmed the findings that Eller’s claims against DeWitt were not well-grounded in fact or in law. *Id.* at 190-91.

Here, as in *Eller*, the Court reviews an attorney's actions under the objective standard in determining whether the action was warranted by law. In this case, an attorney could not reasonably believe he was factually or legally justified in ignoring the trial court's order appointing Woodard as the attorney for Cudmore. See *Jomar Packaging Corp. v. Kobel Int'l, Inc.*, 229 F.3d 1133 (1st Cir. 2000) ("a litigant has no free pass to violate one court order."). Therefore, the Court should affirm the trial court's conclusions of law and conclude the pleadings in question were not warranted by law or fact.

**I. The Court Should Award Lamberson His Costs And Attorney Fees On Appeal.**

This Court should award respondent Lamberson costs and attorney fees against attorney Bolliger under CR 11 and RAP 18.9. According to the Rules of Appellate Procedure, a party seeking an award of costs and attorney fees must comply with RAP 18.1. RAP 18.1(b) provides that a party must devote a section of its opening brief to the request for fees and expenses or in the case of a motion on the merits, a section of motion or response. RAP 18.1(b). While RAP 18.1 provides the procedure for requesting costs and attorney fees, the Court must have basis grounded in statute or rule, agreement of the parties, or some other recognized equitable

ground before awarding a party its attorney fees. *MacKenzie v. Barthol*, 142 Wn. App. 235, 242, 173 P.3d 980, 983 (2007).

RAP 18.9 authorizes an award of terms or compensatory damages against a party who “uses these rules for the purposes of delay, files a frivolous appeal, or fails to comply with these rules....” In addition, CR 11 discourages filings that are not “well grounded in fact and ... warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that [are] not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” The rule permits a court to award sanctions, including expenses and attorney fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation.

*Delany v. Canning*, 84 Wn. App. 498, 509-10, 929 P.2d 475, 481 (1997).

When a party or attorney fails to meet these standards in its appellate pleadings, sanctions under CR 11 and RAP 18.9 are proper. *Id.* at 510.

This appeal arose on January 24, 2014, when Bolliger purported to appeal on behalf of Cudmore: (1) the order appointing May as guardian ad litem; (2) the order appointing Woodard as the attorney for Cudmore; (3) the order denying reconsideration of the previous order; and (4) the order appointing a full guardian for Cudmore’s person and estate. *CP 360-61*. Aware that he was not the attorney of record for Cudmore, Mr. Bolliger presented himself in a variety of fashions on appeal. Sometimes he was “the former attorney for the appellant in the instant Guardianship appeal.” *Motion to Stay Present Appeal Until Appeal is Filed in a Companion*

*Superior Court Case, pg. 2.* Other times Bolliger declared that he was “the former attorney for the alleged incapacitated person, [and also] an appellant herein.” *Motion for Permission to Receive Copies of Sealed Documents from the Clerk’s File, pg. 2.*

This led to the Court inquiring on its own motion whether Bolliger qualified as an aggrieved party for the purposes of RAP 3.1. *Ltr. from Court of Appeals, September 24, 2014.* Bolliger then changed his position in the matter and claimed that he was still in fact the attorney for Cudmore and represented Cudmore in this appeal. *Appellant’s Reply Brief Addressing Appealability Under Guardianship of Lasky, pg. 25.* Bolliger claimed that the declarations identifying himself as the “former counsel” for Cudmore were “merely inadvertent scrivener’s errors” and that in fact he had always been counsel for Cudmore on appeal. *Id. at pg. 8.*

After issuing a briefing schedule and hearing argument on the issue, this Court determined that Bolliger did not qualify as an aggrieved party under RAP 3.1 and dismissed the appeal. *Comm’r Ruling, December 16, 2014.* On April 9, 2015, Bolliger filed a petition the Washington State Supreme Court seeking review of the Commissioner’s ruling. *Pet. for Rev., April 9, 2015.* On August 5, 2015, the Washington Supreme Court denied the petition for review. *Order Denying Pet. for Rev., August 5, 2015.*

**1. Bolliger Violated CR 11 And RAP 3.1 In Bringing This Appeal As The Purported Counsel For Cudmore When He Is Not The Counsel Of Record.**

This Court should award fees against attorney Bolliger for purporting to bring this appeal on behalf of Cudmore when he is not counsel of record for Cudmore and is not an aggrieved party pursuant to RAP 3.1. “Only an aggrieved party may seek review by the appellate court.” RAP 3.1. The Court on its own motion or upon the motion of another party may order a party of counsel to pay terms or compensatory damages for failure to comply with the Rules of Appellate Procedure. RAP 18.9(a). Where a party clearly lacks standing or where the party has been alerted to insurmountable defects in their case but continues forward, sanctions under RAP 18.9 are appropriate. *Reid v. Dalton*, 124 Wn. App. 113, 128, 100 P.3d 349, 357 (2004).

CR 11 provides that every pleading, motion, or legal memorandum, to the best of the attorney’s knowledge and after reasonable inquiry be: (1) well-grounded in fact; (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. CR 11 requires that every motion or legal memorandum

submitted be well grounded in fact and warranted by law. *See Bryant*, 119 Wn.2d 210. If an attorney signs a motion or legal memorandum in violation of this rule, the court may impose upon the person who signed it, a represented party, or both, as an appropriate sanction. CR 11(a).

In this case, the overarching sanctionable conduct perpetrated by Bolliger is that he brought an appeal on behalf of Cudmore who he did not represent. And yet, Bolliger did everything in his power to evade, disguise and obfuscate his role in the appeal. The trial court denied Bolliger's motion to be appointed as counsel for Cudmore. *CP 21*. Bolliger then moved for reconsideration of the appointment which was denied by the trial court. *CP 45-46*. Even then, Bolliger continued to file motions and memorandums on Cudmore's behalf. The trial court concluded that Bolliger's filings "on behalf" of Cudmore were not warranted in fact or law and sanctioned him pursuant to CR 11. *CP 934-938*.

This should have made it abundantly clear to Bolliger that he could not appeal on behalf of Cudmore. In an attempt to avoid these orders, however, Bolliger adopted an unusual strategy. Instead of acting as the attorney for Cudmore on appeal, Bolliger identified himself as "the former attorney for the appellant in the instant Guardianship appeal". *Motion to Stay Present Appeal Until Appeal is Filed in a Companion Superior Court Case*, pg. 2. Bolliger would then identify Cudmore as an "appellant" and

move the Court on behalf of the “appellants” while at the same time disclaiming that he represented Cudmore on appeal. *See e.g. Motion for 30-Day Extension of Time to File Appellants’ Brief; Motion for Permission to Receive Copies of Sealed Documents from the Clerk’s File.*

Bolliger was forced to abandon this strategy when this Court questioned his standing as an aggrieved party. *Ltr. from Court of Appeals, September 24, 2014.* Realizing that the denial of his petition to be appointed counsel for Cudmore and his claimed status as “former attorney” for Cudmore was not sufficient under RAP 3.1, Bolliger began identifying himself as “an attorney for [Cudmore].” *Appellant’s Reply Brief Addressing Appealability Under Guardianship of Lasky*, pg. 25. Bolliger claimed that the declarations identifying himself as the “former counsel” for Cudmore were “merely inadvertent scrivener’s errors” and that in fact he had always been counsel for Cudmore on appeal. *Id. at pg. 8.*

Regardless of Bolliger’s ever-changing status and declarations to his position in this appeal, none of it changes the fact that Bolliger was not the attorney of record for Cudmore. Bolliger petitioned the trial court to be appointed attorney for Cudmore. The petition was denied. Bolliger moved the trial court for reconsideration. The motion was denied. Bolliger was sanctioned under CR 11 by the trial court for continuing to file pleadings on behalf of Cudmore.

Everyone in this matter aside from Bolliger himself, up to and including this Court, recognized that Bolliger was not the attorney for Cudmore. Bolliger's continued failure to recognize this, which was abundantly clear to everyone else, has resulted in substantial attorney fees incurred by Lamberson and Cudmore. Had Bolliger complied with RAP 3.1, these fees would not have been incurred. Further, Bolliger was sanctioned by the trial court because his purported representation of Cudmore was not warranted in law or fact. *CP 934-938*. Engaging in the same conduct on appeal is no more warranted than it was at the trial court. Therefore, this Court should award Lamberson his costs and attorney fees on appeal as a sanction against Bolliger under CR 11 and for his failure to comply with RAP 3.1.

**2. In Addition To Failing To Comply With RAP 3.1, The Court Should Sanction Bolliger Under RAP 18.9 For His Continued Failure To Comply With The Rules Of Appellate Procedure And His Attempt To Use The Rules To Hinder And Cause Delay.**

The Court should sanction Bolliger in regard to the appeal because Bolliger habitually violated the Rules of Appellate Procedure and further attempted to use the Rules of Appellate Procedure for the purposes of delay and disruption. RAP 18.9 authorizes sanctions against counsel when they fail to comply with the Rules of Appellate Procedure or uses them "for the

purpose of delay.” RAP 18.9(a). Sanctions may include an award of attorney fees to the opposing party in the appeal. *Reid*, 124 Wn. App. at 128.

Bolliger’s first violation of the rules in this matter began innocuously enough by failing to include a statement of issues in his statement of arrangements as required by RAP 9.2(c). *Statement of Arrangements, June 24, 2014*. However, the designation of clerk’s papers submitted by Bolliger gives the first inclination of his attempt to use the Rules of Appellate Procedure for the purposes of delay. In original designation of clerk’s papers, Bolliger only designated his own pleadings and did not designate any of Lamberson’s pleadings as part of the appellate record. This led to Bolliger expressly and implicitly violating RAP 9.6. The express violation occurred by failing to include the “initiating petition in a civil case” as required by RAP 9.6(b)(1)(C). The implicit violation occurred because no fair reading of the rule could allow Bolliger to claim that he designated the clerk’s papers “needed to review the issues presented to the appellate court.” *See* RAP 9.6(a). This systematic selection of the record on appeal could only have been done for the purpose of delay in violation of RAP 18.9.

This pattern of action by Bolliger extended to the submittal of the verbatim report of proceedings as well. In the original statement of

arrangements, Bolliger sought “only the first session” of the December 27, 2013 guardianship hearing. *Statement of Arrangements, June 24, 2014*. This submittal omitted the hearing at which the trial court entered the “Order Appointing Attorney for Alleged Incapacitated Person,” an order Bolliger expressly identified for review in his notice of appeal. *CP 360-61*. This attempt to hide unfavorable proceedings violated RAP 9.2(b)’s command that the party should arrange for “all those portions of the verbatim report of proceedings necessary to present the issues raised on review.” Once again, this failure can only be explained by an intent to delay and hinder in violation of RAP 18.9.

Other actions of Bolliger during the course of this appeal can only be described as bizarre. Bolliger filed three separate motions to modify the commissioner’s rulings, including a commissioner’s ruling which was favorable to his position. *See Mtn. to Modify Comm’r Ruling, January 15, 2015; Mtn. to Modify Comm’r Ruling, December 24, 2015; Mtn. to Modify Comm’r Ruling, March 9, 2016*. Bolliger filed a designation of clerk’s papers composed almost entirely of declarations of mailing. *Supplemental Designation of Clerk’s Papers, February 12, 2016; see also RAP 9.6(a)* (“Each party is encouraged to designate only clerk’s papers and exhibits needed to review the issues presented to the appellate court.”). Bolliger sought to direct the Court on how to manage its docket. *Mtn. for this Appeal*

*and its 2 Other “Linked” Appeals to be Analyzed and Decided at the Same Time – and in the Most Logical and Illuminating Sequence, January 26, 2016.* Bolliger filed an appellant’s brief which sought to address matters in which this Court already ruled Bolliger did not have standing to address. *See Ltr. from Court of Appeals, May 13, 2016.*

With virtually every submission to the appellate court, Bolliger violated another Rule of Appellate Procedure. However, the best illustration of these violations occurred in Bolliger’s submissions in regard to the Court’s motion to determine appealability. On September 24, 2014, the Court on its own motion set a hearing to determine appealability. *Ltr. from Court of Appeals, September 24, 2014.* The letter from the Court set October 15, 2014 as the deadline for any memoranda to be filed by either party relative to the motion. *Id.* The deadline was thereafter changed to October 30, 2014. *Ltr. from Court of Appeals, October 30, 2014.* On October 30, Bolliger submitted a seventy-four-page memorandum (eighty-six pages including exhibits) in response to the Court’s motion.

Despite the October 30, 2014 deadline set by the Court, Bolliger proceeded to submit a “reply brief” on December 4, 2014. The reply brief submission was twenty-six pages in length. As noted by the Court in e-mail correspondence dated December 9, 2014, a motion and answer should not exceed twenty pages and a reply brief should not exceed ten pages. RAP

17.4(g)(1). Additionally, even assuming that Bolliger was allowed to submit a reply, RAP 17.4(e) sets the deadline for submission of a reply brief as “no later than 3 days after the answer is served.” Bolliger’s reply brief was not submitted until over a month after he received Lamberson’s answer to the Court’s motion.

Based on these submissions, the Court should conclude that Bolliger both: (1) failed to comply with the Rules of Appellate Procedure; and (2) used the Rules of Appellate Procedure to delay and hinder the proceedings. Both the frequency and the severity of these violations show an intent on the part of Bolliger to prejudice the administration of justice in this matter and impose unnecessary fees and expenses on the Respondent.

This Court should award respondent Lamberson his costs and attorney fees in this matter as a sanction against attorney Bolliger. Bolliger improperly instituted a large portion of this appeal when he was not counsel for Cudmore. Bolliger continued to purport to act as counsel for Cudmore after being sanctioned by the trial court for the exact same conduct. In addition to this overarching misconduct by Bolliger, he also routinely and systematically flaunted the Rules of Appellate Procedure in this matter for the purpose of delay and prejudice. Therefore, this Court should sanction Bolliger for his violation of CR 11, RAP 3.1, RAP 9.2, RAP 9.6, RAP 10.3, RAP 17.4 and RAP 18.9 in the course of this appeal.

## V. CONCLUSION

The Court should affirm the trial court's order imposing sanctions against Bolliger. Substantial evidence supports the findings of fact made by the court and the actions of Bolliger both before the trial court and on appeal were not warranted by fact or law. As a result, the trial court did not abuse its discretion. Furthermore, this Court should award Lamberson his costs and attorney fees on appeal.

DATED this 27<sup>th</sup> day of June, 2016



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