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No. 352072-III

**COURT OF APPEALS, DIVISION III,  
FOR THE STATE OF WASHINGTON**

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**Cathrine Roe (Marchesseault), Appellant**

v.

**Chad Marchesseault, Respondent**

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**RESPONSIVE BRIEF OF  
CHAD MARCHESSEAULT**

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## **I. SYNOPSIS OF ARGUMENT**

Cathrine Marchesseault's Opening Brief, in which she appeals the denial of her Motion to Vacate the parenting plan signed on 2/1/16, and which sanctioned her and her attorney for intercepting and submitting attorney-client emails: (a) fails to challenge any of the trial court's factual findings, (b) fails to indicate the standard of review or explicate how the court abused its discretion, (c) fails to cite properly to the record, (d) seeks to use electronic intercepts in violation of RCW 9.73.030 and .050, and seeks to submit attorney-client privileged information contrary to law and contrary to the Rules of Professional Conduct, and (e) raises many issues that were only appropriate for a direct appeal of the final orders, but which are improper to raise on an appeal of a motion to vacate. The appeal is frivolous and displays intransigence, and fees are requested on appeal under RAP 18.9.

## **II. STATEMENT OF THE CASE**

This was a dissolution between Cathrine Marchesseault, recently retired from the Air Force, and Lt. Col. Chad Marchesseault, involving financial issues, not relevant here, and their three young boys. (First names will be used hereafter for ease of reference, and no disrespect is intended.)

The final separation of the parties began with the Appellant, Cathrine Marchesseault, calling the police on Chad Marchesseault after a family argument the evening of July 15, 2014. No arrests were made.

After a hotly contested temporary order hearing on 7/29/14, Commissioner Chavez gave Chad every other weekend, and every Wednesday, with the boys. The Order of 7/29/14 is at CP: 2432-2433, and the transcript of the hearing is at 2434-2465, at which time Julie Twyford was Cathrine's counsel.

*NOTE:* On 7/29/14, the court gave Cathrine "the Kindle," which she later claimed was the source of her reading attorney-client emails from July of 2014 through March of 2015, and the court gave Chad "the laptop," a difference which becomes significant, below. Chad had Global Compusearch make a copy of the hard-drive in early August of 2014, but when no discovery requests were forthcoming, after the trial and parenting plan ruling of 12/22/15, on 1/15/16, Chad quit paying for its storage. CP: 1200-01. The attorney-client emails that Cathrine submitted to the court, the sanction for which she appeals, never came from "the laptop," only from "the Kindle," as is presented in detail, below.

Matthew Dudley replaced Ms. Twyford as Cathrine's counsel, and Cathrine brought a revision of the 7/29/14 Order before Judge Maryann

Moreno on 8/29/14, which was denied as to the temporary parenting plan and denied as to most other matters, including “the laptop.” CP: 2466.

Unverified emails which Cathrine alleged to be emails among “the Marchesseault family” were filed by Cathrine on 10/13/14 (over objection). CP: 2467-2471. Only after Cathrine filed her 4/29/16 Motion to Vacate did Chad learn that Cathrine had been reading his emails from July of 2014 through March of 2015. See CP: 1081-1156, Cathrine’s Motion to Vacate, and see CP: 1069-1080, Declarations of Carol Peden, Cathrine’s Computer Expert. The sanctions against Cathrine and Lea Conner (of the Dudley-Conner firm) for filing those privileged emails and the denial of Cathrine’s motion to vacate are a subject of Cathrine’s appeal in this matter.

*NOTE:* Chad was served with the Motion to Vacate that is subject of this appeal on 4/29/16, which is the date of Cathrine signing it (CP:1081), but Cathrine later got a show cause order on 5/13/16, CP: 1068. Subsequently, Cathrine re-served her amended Motion to Vacate, found at CP: 1081-1156, filed 5/25/16, and she filed it again on 6/17/16, CP: 1240-1342.

To return to the fall of 2014, Cathrine actively misled the court on many issues, which set a pattern relevant to the current appeal. See, e.g., CP: 2481-84, and CP: 2485-89. For example, in CP: 2485-89 the court can see that Cathrine falsely alleged that Chad’s counsel, Craig A. Mason,

had snuck Chad's management of the Colorado rental home into the court orders of 7/29/14 and 8/29/14. Contrary to Cathrine's allegation, the Orders and transcripts are clear that the written order reflected the court's ruling. CP: 2433, and see CP: 2485-89. Unfounded attacks on Chad and his counsel are ongoing in this case, as is shown, below.

Although the police arrested neither party on the evening of 7/15/14, Cathrine was eventually able to get a municipal DV case started against Mr. Marchesseault. See CP: 2472-75, filed on 10/16/14 in this case, filed by Cathrine, which only provided the case number, as Cathrine's filings were blank pages. Id.

Cathrine's municipal DV case against Chad was dismissed on 11/20/15. CP: 3080-82.

By mid-October of 2014, Child Protective Services cleared Chad of abuse charges, also incited by Cathrine. The CPS investigator, Paul Haupt, filed a declaration on 10/23/14 that there would be no finding of abuse. CP: 2478-80. The formal CPS "Unfounded letter" issued on 11/13/14. CP: 2495-98.

In her relentless attack on Chad, Cathrine was able to get a court martial initiated for domestic violence against Chad in the fall of 2014. These charges against Chad were dismissed on 11/3/15. CP: 2940-41.

In the fall of 2015, Cathrine was determined by the military prosecutor to have been dishonest and to have tampered with witnesses in the court martial case, and the court martial was dismissed after these “Brady disclosures.” CP: 3070-74, CP: 3075-79, CP: 3096-3100. Cathrine’s credibility was undermined by her own behavior in many ways. For example, see the file of General Armacost on Cathrine’s lack of honesty regarding her attempt to get a witness to change testimony and other matters of credibility. CP: 3035-69. For instance, see the Declaration of Hannah Pahlen-Seeger at CP: 2724-26. And see CP: 3032-34 for Cathrine getting caught trying to manipulate her adult daughter, Devon, as a witness against Chad. For example, Devon, refused to lie for Cathrine against Chad, and recanted her testimony against Chad. Cathrine then claimed that Devon recanted because Chad contacted Devon and threatened suicide. Cathrine was contradicted during the military re-interview of Devon. See CP: 3096-3100, for military prosecutor’s account, signed 11/30/15.

To return the narrative to the fall of 2014, under Cathrine’s relentless allegations, Chad’s visits were reduced by order of 10/28/14, and a Guardian-ad-Litem was appointed. CP: 2490-91.

After feedback from counselors and from the GAL, Chad’s visitation was restored on 12/23/14. CP: 2499-2500.

To digress back to the laptop (which becomes part of the story) an order was also issued on 12/23/14 that Cathrine could appear in Mr. Mason's office to copy files she might wish that were on the laptop that was awarded to Chad by the Order of 7/29/14. CP: 2501-02. (To reiterate, no discovery requests of any kind were ever made by Cathrine, just ad hoc "motions" in the flurry of court hearings focused on parenting issues.)

In January of 2015, Cathrine responded to the 12/23/14 restoration of Chad's visitation by her serving on Chad a Notice of Intended Relocation of the children to Florida, filed 1/20/15. CP: 2504-2507.

Chad filed an Objection to the Relocation on 2/3/15. CP: 2514-20. Judge Moreno restrained relocation on temporary orders on 6/22/15. CP: 2936. Ultimately, relocation was restrained in the final parenting plan, as well. CP: 298-307 (Final PP, filed 2/1/16) and the 12/23/15 Oral Ruling on the parenting plan is at CP: 234-78.

On 1/27/15, Chad filed a motion to expand his visitation time, and Chad asked the court to follow the children's counselor's (Joan Chase's) recommendation that Cathrine have a psychological evaluation. Joan Chase found Cathrine to have been trying to coach the boys against Chad, and Cathrine appeared unstable when confronted about the matter. Chad's Motion is at CP: 2508-2510, and the Joan Chase records regarding

Cathrine coaching the boys and regarding Cathrine showing mental instability are at CP: 2323-25.

At the temporary order hearing on 2/24/15, Commissioner Chavez gave Chad 50/50 parenting time. CP:2642-43. (Hearing and ruling transcripts are at CP: 2646-2682.)

On revision of that order heard on 3/27/15, Judge Moreno revised Chad's time to six of fourteen days over a two-week period of rotation. CP: 2686-87. Also, Commissioner Chavez had reserved the laptop issue for trial, but Judge Moreno, on revision brought by Cathrine, ordered that Chad produce the laptop to Cathrine for 48 hours. CP: 2686-87.

Chad brought a motion on reconsideration to protect his attorney-client privileged materials on the laptop. CP: 2683-85 and CP: 2688-2704. Chad had previously changed the configuration of the computer, and Chad again raised privilege and issues of reliance on prior orders in defense against the immediate contempt that Cathrine brought against him after Cathrine took the laptop for forensic analysis, once she gained possession of it. CP: 2705-10, and CP: 2711-19. Among Chad's arguments were that Cathrine made no proper discovery requests, by which an *in camera* review could have been sought under protective order to protect Chad's attorney-client privileges. Id.

As Chad had changed the hard drive, as he had to do to prevent forensic intrusion upon privileged communications, contempt on the laptop issue was reserved for trial by Judge Moreno's 4/24/15 Order. CP: 2720.

The transcript of the 4/24/15 laptop contempt hearing before Judge Moreno is at CP: 2838-55, with Judge Moreno saying that she did not order the forensics attempted by Cathrine, and she had not authorized forensic analysis of the computer. See, esp. Judge Moreno at CP: 2843 and Mr. Mason at CP: 2846. NOTE: There are three very significant issues here: (a) Judge Moreno never intended to order that Cathrine could breach Chad's attorney-client privilege; (b) Cathrine never did get any of Chad's attorney-client emails from "the laptop" – Cathrine only got them from the Kindle awarded to her on 7/29/14. (c) When Judge Moreno found Chad in contempt of this order and required Chad to produce the August 2014 hard-drive image, that image did not have the privileged emails on it that Cathrine later sought to submit. (d) Judge Moreno never authorized Cathrine's access to Chad's attorney-client communications, as the Judge made clear in her 10/31/16 Letter Ruling sanctioning Cathrine and Ms. Conner for breaching the privilege. CP: 2196-99. (e) This trial court finding was not challenged by Cathrine in this appeal under any assignment of factual error.

On 4/24/15 Judge Moreno again noted that Chad was given full control of his laptop by prior orders. CP: 2849-50. Judge Moreno noted: “If [Chad] had said a month ago that ‘I wiped it all clean,’ we wouldn’t be going around and around in circles, would we?” CP: 2849. And while Judge Moreno was correct on that point, she failed to appreciate the danger that computer forensics are to attorney-client privileged materials.

Obviously, from the documents cited, above, Chad saw Cathrine’s grab for his laptop as Cathrine’s attempt to breach his attorney-client privilege, especially since Cathrine’s motions only referenced teaching materials (which had been produced in her December of 2014 copying of files under Mr. Mason’s supervision). Chad had been emailing three different sets of counsel, who were working with Chad in the three-front legal war that Cathrine had launched against him (see municipal and military dismissals, above); Chad protected his privileged emails.

No proper discovery motions were ever made by Cathrine for the laptop, as she had not served Chad with any discovery requests, including any regarding the laptop. Cathrine, however, continued to resist answering Chad’s discovery requests to her, despite multiple Orders Compelling Discovery, issued on 5/1/15 (CP: 2722), on 10/2/15 (CP: 2938) and on 10/16/15 (CP: 2939).

Chad learned, in late April of 2015, that the GAL had failed to disclose her close relationship to Mr. Dudley, and Chad brought a motion to remove the GAL. CP: 2797-2800. Ethics expert, Robert Aronson filed declarations. CP: 2770-96 and CP: 2801-04. Other supporting documents were filed, e.g., CP: 2727-46.

Judge Moreno removed the GAL by Order of 6/22/15. CP: 2937. As this order removing the GAL was not appealed, no more details will be presented in this Response Brief regarding the GAL removal.

As the parties headed to trial in December of 2015, the other allegations Cathrine had made or incited against Chad in other forums were dismissed. Based upon Cathrine's behavior (presented, above) when Chad's court martial was dismissed, Chad refreshed his motion that the court order a psychological evaluation of Cathrine based upon her misbehavior in the court-martial case. CP: 3032-34, and related filings.

Judge Moreno had kept the door open for reconsideration of the psychological evaluation upon more authentication of the evidence of Cathrine's misbehavior when she denied this motion, and so Chad filed a reconsideration of this motion on 11/30/15. CP: 3085-3100. However, despite the Declaration of Prosecutor Major Brent Jones being filed on 11/30/15 (CP: 3096-3100), no evaluation of Cathrine was ordered.

At trial in December of 2015, Cathrine tried to admit Joan Chase emails between and from Chad and his counsel (Exhibit P-13), and they were admitted at trial by Judge Moreno over objection. CP: 600-02. (NOTE: Chad had no idea at trial how Cathrine had been intercepting his emails; that only became clear after Cathrine served her 4/29/16 motion to vacate.) Also, Cathrine tried to admit at trial Exhibit P-10, largely the same “family emails” that Cathrine had submitted in the fall of 2014 (CP: 2467-2471). Judge Moreno denied that admission provisionally, pending Cathrine stating how she got them, or Cathrine authenticating the emails. As Cathrine did not provide this information to the court, and did not move to admit these emails subsequently, Exhibit P-10 was not admitted at trial. See Designation of Exhibits, to which the Exhibit Log is attached.

To recapitulate the trial result in this case as to the parenting plan: (a) the children were restrained from relocation to Florida, (b) if Cathrine moved to Florida, Chad would be primary parent with the children in Spokane, and (c) if Cathrine remained in Spokane, then the plan would be a 50/50 plan. CP: 298-307 (Final PP, filed 2/1/16) and 12/23/15 Oral Ruling on Parenting Plan at CP: 234-78.

It was into this context that Cathrine made her Motion to Vacate, filed on 5/13/16. At this time, five months after Cathrine failed to admit her Exhibit P-10 emails at trial, Cathrine decided to reveal to the court

where she had gotten the alleged “Marchesseault family emails.” CP: 2467-2471, and Exhibit P-10. And with this motion, Cathrine flooded the court with Chad’s emails that Cathrine had electronically intercepted, including many that were under attorney-client privilege. CP: 1081-1156, filed 5/25/16 and CP: 1240-1342, filed 6/17/16.

Chad had changed his email password in July of 2014 and again in November of 2014 (CP: 1003-05). Despite Chad’s reasonable steps to protect his email privacy, Cathrine had continued to read Chad’s emails on the Kindle in her possession. CP: 998-1014, esp. CP: 1003-05.

In further support of her Motion to Vacate, Cathrine chose to fully reveal, and submit to the court, all of the electronic interceptions of Chad’s emails that she had been reading during the first eight months of the case. Cathrine’s email-dump of intercepted emails, and of intercepted attorney-client emails, can be found at CP: 1081-1156.

Chad asked the court to strike the electronically-intercepted emails under RCW 9.73.030 and .050, under the analogous case law in discovery matters, and under the case law governing confidential attorney-client information (RCW 5.60.060(2)(a)), and under the RPCs. Also, Chad asked the court to disqualify the firm of Lea Conner and Matthew Dudley for violating the Rules of Professional Conduct. CP: 954, 955-76, 977-83, 998-1014, 1172-76, 1177-88, and 1227-37.

Judge Moreno denied Cathrine's motion to vacate the parenting plan, CP: 2328-29, which incorporated the letter ruling of 10/31/16 at CP: 2196-99. Judge Moreno denied Chad's motion to disqualify counsel, but Judge Moreno did grant Chad's motion for sanctions for the email interception and submission, as the "lesser sanction" under case law. CP: 2324-27, also incorporating CP: 2196-99.

These are the issues on Cathrine's appeal, per the Notice of Appeal (CP:2340-2350) – the denial of the motion to vacate and the sanctions.

*NOTE:* Cathrine's opening brief, at page 1, states. "The trial was bifurcated with the financial issues being finalized first." In fact, the financial trial was held subsequent to the December 2015 parenting plan trial, on 2/22/16 - 2/24/2016, with the final decree entered on 7/1/16 (CP: 1460-1470). No direct appeal was taken after the final parenting plan was signed on 2/1/16, nor within 30 days of 7/1/16.

### **III. LEGAL STANDARDS OF REVIEW**

#### **A. Standard on CR 60 Motions: Manifest Abuse of Discretion**

Cathrine Marchesseault did not present the standard of review in her Opening Brief, and it is rational to infer she wished to evade it.

A trial court's decision to deny a motion to vacate an order of dismissal is reviewed for manifest abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). Discretion is abused

when a court bases its decision on untenable grounds or untenable reasons. *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007).

As the court said in *Haller v. Wallis*:

A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should be overturned on appeal only if it plainly appears that it has abused that discretion. *Martin v. Pickering*, 85 Wash.2d 241, 533 P.2d 380 (1975).

*Haller v. Wallis*, 89 Wash. 2d 539, 543, 573 P.2d 1302, 1305 (1978).

## **B. CR 60(b)(3) New Evidence Standard**

Cathrine's Motion to Vacate did not specify the elements of CR 60(b)(3) or (b)(4), and her motion was frivolous, and her appeal is frivolous under RAP 18.9.

To address the elements of a CR 60(b)(3) motion, the court summarized these succinctly in *Jones v. City of Seattle*:

### *II. The Trial Court Did Not Err in Denying the City's Motion To Vacate the Judgment*

A motion to vacate is addressed to the sound discretion of the trial court.<sup>19</sup> Under CR 60(b)(3), a trial court may vacate a judgment where there is “[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b).”<sup>20</sup> To justify vacating a judgment on the ground of newly discovered evidence, the moving party must establish that the evidence (1) would probably change the result if a new trial were granted, (2) was discovered since trial, (3) could not have been discovered before the trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *Praytor v. King County*, 69 Wash.2d 637, 639, 419 P.2d 797 (1966) (citing *Nelson v. Placanica*, 33 Wash.2d 523, 526, 206 P.2d 296 (1949)).<sup>21</sup>

*Jones v. City of Seattle*, 179 Wash. 2d 322, 360, 314 P.3d 380, 399 (2013), *as corrected* (Feb. 5, 2014) (footnotes omitted).

Judge Moreno's Letter Ruling of 10/31/16, CP: 2196-99 shows that she considered the evidence that could have supported Cathrine's motion, and that even if Cathrine's motion had been properly formulated, that it would not have changed the outcome of the trial (a decision that was made in the best interests of the boys).

Judge Moreno errs on CP: 2199 to say that "the emails from the Kindle were not attempted to be utilized by trial," as they were in Exhibit P-13 (admitted) and in Exhibit P-10 (not admitted), but Judge Moreno's error prejudiced Chad, not Cathrine, and does not change the outcome.

Cathrine admits on page 22 of her Opening Brief:

It is true that one or two of these emails were at least partially located and read prior to trial on the parenting plan...

In fact, Exhibits P-10 (not admitted), Exhibit P-13 (admitted) and CP: 2467-2471 (intercepted emails Cathrine filed on 10/13/14) show that Cathrine had access to Chad's emails from July of 2014 to March of 2015, after Chad had twice changed his password, CP: 1003-05. Chad's computer expert, Aaron Niemi, said that Cathrine could not have been receiving his emails without having somehow hacked Chad's account. CP: 1164-1171. See also RCW 9.73.030 for the definition of electronic

interception, and RCW 9.73.050 for the rules of exclusion; and note that RCW 9.73 applies even if Cathrine’s account of “the Kindle” as the source of her access to the emails is accepted – that they simply downloaded to her Kindle from the ether, versus Chad’s view that he was hacked. It is worth noting that in Cathrine’s Opening Brief, at page 1, she acknowledges her skills as an investigator, which states that Cathrine: “...is now a civilian who has her own investigation service.”

In any event, Judge Moreno was correct, and certainly within her discretion, to strike the privileged emails from consideration. CP: 2196-99. Judge Moreno’s striking of the emails should alternatively be upheld under RCW 9.73.050, which was pled by Chad:

...an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *Wendle v. Farrow*, 102 Wash.2d 380, 382, 686 P.2d 480 (1984).

*LaMon v. Butler*, 112 Wash. 2d 193, 200–01, 770 P.2d 1027, 1031 (1989).

(NOTE: All emails are excluded under RCW 9.73.050, not just the attorney-client privileged emails.)

#### **C. CR 60(b)(4) – Misconduct Standard**

Cathrine relies heavily on the *Taylor v. Cessna Aircraft Co.* case in her brief; however, the case does not apply. Cessna withheld discovery answers that were directly relevant to the lawsuit, that included tests of

components that could have caused the crash at issue. Division III reversed the trial court and remanded for another trial, finding that the trial court's decision was not supported by substantial evidence that testing evidence, requested in discovery, did not need to be produced.

The trial court's finding Cessna's conduct was reasonable is not supported by the evidence. We emphasize in particular the subpoenas duces tecum which requested any and all information in Cessna's possession relating to fuel system modification or alteration in the 210 aircraft, and made no mention of the Sedco valve. If, as Cessna claims, the test was of a 210 model and not the 200 series in general, information regarding it clearly fell within Taylor's request. Whether a 206 model or a Sedco fuel selector valve was involved is immaterial; all information reasonably calculated to lead to admissible evidence is discoverable. CR 26(b)(1). Under any fair reading of Taylor's discovery requests, we are constrained to disagree with the trial court's finding of reasonableness.

It is not for the defense to unilaterally decide what is relevant. *Gammon v. Clark Equip. Co., supra*. Cessna's remedy was to seek a protective order, not to withhold discoverable material based upon its interpretation of what Taylor's theories were. CR 26(c); *Gammon v. Clark Equip. Co., supra*. *Accord Rozier v. Ford Motor Co., 573 F.2d 1332, 50 A.L.R.Fed. 914 (5th Cir.1978)*.

*Taylor v. Cessna Aircraft Co., 39 Wash. App. 828, 835–36, 696 P.2d 28, 32–33 (1985)*.

**Application of Taylor v. Cessna:** Cathrine propounded *no discovery requests* to Chad, and Chad would have welcomed the discovery process instead of repeated ambushing by oral motions at hearing by Cathrine, as she tried to obtain forensic access to the laptop ordered into Chad's

possession on 7/29/14. It is rational to infer from Cathrine's Motion to Vacate that Cathrine wanted the laptop so that she would have an excuse to enter the "Kindle-intercepted" emails at trial, with forensic analysis of the laptop as her excuse for breaching attorney-client privilege.

Only after Cathrine lost at the parenting plan trial, Cathrine finally could not contain herself from filing Chad's emails, already in her possession, as "new evidence, in her Motion to Vacate. It is rational to infer that this is why Cathrine did not directly appeal the final order on parenting plan of 2/1/16, as she wanted to instead have an excuse to put privileged emails into the court file.

However, Cathrine had gotten to fully and fairly litigate her case at trial, and her motion to vacate was properly denied by Judge Moreno.

#### **D. A Motion to Vacate Does Not Substitute for an Appeal**

Many of Cathrine's issues in her Opening Brief are actually issues for appeal, and not for a motion to vacate.

As the court said in *Bjurstrom v. Campbell* (emphasis added):

The threshold issue is whether the Campbells' appeal from probable judicial error is properly taken. An appeal from denial of a CR 60(b) motion is limited to the propriety of the denial not the impropriety of the underlying judgment.<sup>2</sup> The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion. *De Filippis v. United States*, 567 F.2d 341, 342 (7th Cir. 1977).

Washington has long recognized the principle that a mistake of law will not support vacation of a judgment. In re Estate of LeRoux, 55 Wash.2d 889, 890, 350 P.2d 1001 (1960). In State ex rel. Green v. Superior Court, 58 Wash.2d 162, 164-65, 361 P.2d 643 (1961), the court stated:

If ... the court decided the issue wrongly, the error, if any, may be corrected by that court itself ... or by this court on appeal, but the motion to vacate the judgment is not a substitute.

Very early in the history of this court in Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182, it was decided that errors of law could not be corrected on a motion to vacate a judgment.... More recently, in Kern v. Kern, 28 Wn.(2d) 617, 183 P. (2d) 811, the following statement of the rule in 1 Black on Judgments (2d ed.) 506, s 329, was approved:

“ ‘The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari according to the case, but it is no ground for setting aside the judgment on motion.’ ”<sup>3</sup>

*Bjurstrom v. Campbell*, 27 Wash. App. 449, 450–51, 618 P.2d 533, 534–35 (1980)(footnotes omitted).

**Application of *Bjurstrom v. Campbell*:** An example of a direct appeal issue is Cathrine’s extensive complaints that the children’s counselor, Joan Chase, was allowed to testify as an expert for the court. See Opening Brief at pages 3-7, especially page 4, when the matter is entirely raised as

a legal and appeal issue, including in the footnote 4. These issues from Joan Chase's testimony (CP: 542-626) were thoroughly explored at trial, and in the court's ruling (CP: 238-248).

#### **E. Judge Moreno and Credibility Determinations**

On page 5 of her Opening Brief, in footnote 5, Cathrine admits that Judge Moreno weighed this evidence about Joan Chase, but did not come to Cathrine's preferred conclusions. Cathrine writes, in her footnote 5:

The court did recognize this bias, but did not seem to consider it in its ruling. CP 234-278.

First, Cathrine's Opening Brief consistently violates RAP 10.3(a)(5) which reads, in relevant part: "Reference to the record must be made for each factual statement." The court is asked to ignore sweeping negative allegations made without proper citation to the record.

Second, Cathrine got to fully and fairly present her case. For example, the first 10 pages of the 12/22/15 ruling show Judge Moreno reviewing Cathrine's domestic violence allegations and Judge Moreno reviewed Cathrine's witnesses and their testimony in detail (CP: 238-248). And Judge Moreno made the finding that the parties probably abused each other:

I think both of you probably know how to push each other's buttons, and when you drink, those buttons are right there and you probably both physically assault each other.

CP: 264 at lines 19-21. While Chad does not agree with the finding against him, he appealed nothing, as he wants the case to end, and he understands the abuse of discretion standard. The point is that allegations of domestic violence were considered in detail by Judge Moreno at trial; no direct appeal was taken, and no findings of fact were challenged. There is a substantial basis in the record for Judge Moreno to have denied Cathrine's motion to vacate the final parenting plan of 2/1/16.

Third, Judge Moreno considered in detail Cathrine's allegations that Joan Chase was biased. For example, CP: 248, lines 24-25, Judge Moreno says, "Ms. Marchesseault believes that Ms. Chase is biased..."

At CP: 249, lines 14-23, Judge Moreno points out how Cathrine lost credibility by denying that she could recognize two greeting cards that she had given Chad. Judge Moreno also pointed out, on CP: 250, that General Armacost had appeared to challenge Cathrine's truthfulness. Then Judge Moreno reviewed some of Chad's testimony and his witnesses, CP: 250-58. The alcohol issue Chad raised at trial was discussed at CP: 264, but the judge down-played the facts that can be found at CP: 2947-52.

At CP: 258, Judge Moreno returned to review of the evidence about Joan Chase, and Judge Moreno continued to discuss Joan Chase and the trial court's findings until page 261. And the "one-way stream of emails" was discussed at CP: 260 (and these were the emails admitted

over objection at Exhibit P-13). Then, at CP: 272, line 24 to CP: 273, line 3, Judge Moreno points out that Cathrine did not deny saying to Joan Chase the concerning things that Ms. Chase reported to the court.

Judge Moreno actually factually erred regarding Joan Chase, to the prejudice of Chad, which will be shown below, but Cathrine is the one appealing the denial of her Motion to Vacate. Cathrine filed no appeal after trial, and the issues Cathrine is raising are (a) procedurally appropriate for appeal, but (b) substantively still not an abuse of discretion and therefore an appeal would have been substantively frivolous.

As for Joan Chase and other facts at trial, Judge Moreno thoroughly considered the credibility of the parties and witnesses.

Cathrine's appeal is without legal foundation:

Judges understand that the GAL presents one source of information among many, that credibility is the province of the judge, and can without difficulty separate and differentiate the evidence they hear. In other words, the judge can cast a skeptical eye when called for.

*In re Guardianship of Stamm v. Crowley*, 121 Wash. App. 830, 841, 91 P.3d 126, 132 (2004).

**Application of *In re Guardianship of Stamm*:** Judge Moreno exercised her discretion appropriately, and she made credibility determinations, as Cathrine's Opening Brief, at page 5, concedes. Hence, there are two

profound errors with Cathrine’s position on appeal. First, as the appellate courts have long held:

Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Casbeer*, 48 Wash.App. 539, 542, 740 P.2d 335, *review denied*, 109 Wash.2d 1008 (1987).

*State v. Camarillo*, 115 Wash. 2d 60, 71, 794 P.2d 850, 855 (1990).

Second, Cathrine’s complaints are issues for appeal and not for a Motion to Vacate.

Judge Moreno also addressed Cathrine’s allegations of abuse in detail again at CP: 262-63, including stating that Cathrine was focused on “beating the drum” against Chad, rather than fixing relationships:

But, what happened here was that Ms. Marchesseault just kept, you know, beating the same drum.

CP: 263 at lines 19-20. Cathrine’s motion to vacate and this appeal is an intransigent “beating [of the] same drum.”

No abuse of discretion is clearly pled or argued with specificity by Cathrine. This appeal is legally frivolous under RAP 18.9.

#### **F. Additional Note on Joan Chase**

The transcript of Joan Chase’s trial testimony is at CP: 542-626. There was a discussion of the other counselor involved, Eunice Huang (CP: 549-50), who was later dismissed as unnecessary after Chad’s visits were restored, and then, at trial, Judge Moreno ruled that she intended to

rely on the prior temporary orders designating Joan Chase as an expert, after a long discussion and argument. CP: 548-53, with Judge Moreno's decision that Joan Chase was an expert at CP: 553.

Cathrine did not appeal this ruling, as to fact or law, after the final orders were entered. Cathrine's complaints about the role of Joan Chase, as found by Judge Moreno, are frivolous in a Motion to Vacate.

Next, Joan Chase indicates in trial testimony that her first contacts were with Cathrine, not Chad. Cathrine had indicated to Joan Chase that the goal of therapy was:

Stop the cycle of physical and emotional abuse derived from the past day-to-day actions of the father.

CP: 561 at lines 20-22. Then, Cathrine added to Joan Chase's negative first impression of Chad by stating that the abuse had been "escalating for approximately eight years." Id. at lines 22-23. Joan Chase then testified that she had reserved judgment about whether or not Chad was actually abusive. CP: 562. Cathrine had actively lobbied Joan Chase at the outset.

Joan Chase had brought *Cathrine's emails to her* to trial (and they had not been "cced" to Chad or to Chad's counsel), and in many of them Cathrine was clearly "lobbying" Joan against Chad and trying to provide child hearsay to Ms. Chase. An exemplary email from Cathrine to Joan

Chase was read into the record at CP: 598, lines 13-20, in which Cathrine tried to convince Ms. Chase that the boys were afraid of Chad.

During her testimony Joan Chase provided her conclusions that Chad had not abused the boys. For example, see CP: 563-66.

Joan Chase also provided her testimony that Cathrine had coached the boys against Chad. CP: 566-68. Cathrine mainly spoke negatively about Chad, and Ms. Chase said that Chad refused to say anything negative about Cathrine. CP: 568. Ms. Chase continued to provide the substantial evidence underlying Judge Moreno's decision when she testified that she had not seen Chad erode Cathrine's relationship with the boys, but that Cathrine had impeded the boys' relationship with Chad. CP: 571-72. See also Judge Moreno's findings after trial at CP: 272, line 19, through CP: 273, line 7, which begins with Judge Moreno's finding that Cathrine would not facilitate the boys' relationship with Chad:

I will say also that I have some serious concerns that Ms. Marchesseault would not foster the relationship between the boys and their father.

As was noted, above, Joan Chase had brought to trial the emails she had with Cathrine that had not been "cced" to Chad or to Mr. Mason. CP: 580-81, and Ms. Chase said on CP: 582 that if Cathrine emails her, Ms. Chase emails back. It was clear from the testimony that Ms. Chase had one-sided communications with any party who wished to contact her.

Cathrine's counsel (Lea Conner) consistently challenged Ms. Chase at trial, and a good example is on CP: 595 in which Ms. Conner says: "So after December 23<sup>rd</sup>, you became an advocate for Chad, isn't that right?" and Joan Chase replied, "No. I'm an advocate for the children. They're my clients, not Chad." Ms. Chase concluded her testimony with a statement of her independence. CP: 624 at lines 6-7.

In short, Judge Moreno had substantial evidence from which to draw her conclusions across the board in this case, including conclusions about Joan Chase. Judge Moreno has substantial evidence to conclude that nothing in Cathrine's motion to vacate would change the trial outcome. (And Chad reiterates that Cathrine is presenting direct appeal issues, masquerading as "motion to vacate" issues.)

#### **IV. Cathrine Marchesseault's Assignments of Error**

##### **A. No Findings of Fact Are Challenged**

Cathrine challenges none of Judge Moreno's findings of fact. On review, unchallenged findings of fact are considered verities. *In re Interest of J.F.*, 109 Wn. App. 718, 722, 37 P.3d 1227 (2001).

##### **B. Cathrine's "Statements of Error by Judge" Are Not Abuses of Discretion – It is Merely a List of Cathrine's Disagreements**

None of the "Statements of Error" in the Opening Brief at pages 9-10 are formulated as abuses of discretion. The appeal appears to be a

mere disagreement with the judge's rulings, and at most a matter for appeal after final orders (not taken by Cathrine). The issues are not formulated properly as an appeal of a denial of a motion to vacate, are not formulated on the abuse of discretion standards, and they are legally frivolous under RAP 18.9.

Another problem is that Cathrine's presentation in her Opening Brief is chaotic, making organization of the Response Brief difficult. Chad has addressed the *Cessna* case, and CR 60 standards, above. Next, Chad will review the "Statement of Errors," and then address remaining legal questions thereafter.

### **C. Responses to Cathrine's Listed "Statement of Errors"**

**Alleged Error No. 1 re: "Law of the Case":** Cathrine states that Judge Moreno did not follow the "law of the case." However, the "law of the case" applies to appellate decisions limiting the trial court's subsequent behavior. The "law of the case" means that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *State v. Clark*, 143 Wn.2d 731, 745, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000 (2001).

By contrast, all trial orders are interlocutory (see RAP 2.3), and the trial court can modify them any time before entry of final orders.

An interlocutory order is “ ‘one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.’ ” *Alwood v. Aukeen Dist. Court Comm'r Harper*, 94 Wash.App. 396, 400, 973 P.2d 12 (1999) (quoting Black's Law Dictionary 815 (6th ed. 1990)). Interlocutory orders are not appealable, as “permitting a trial court to correct any mistakes prior to entry of final judgment serves the interests of judicial economy.” *Alwood*, 94 Wash.App. at 400-01, 973 P.2d 12. Indeed, the authority of trial courts to revisit interlocutory orders “allows them to correct not only simple mistakes, but also decisions based on shifting precedent, rather than waiting for the time-consuming, costly process of appeal.” *United States v. Martin*, 226 F.3d 1042, 1049 (9th Cir. 2000).

*Chaffee v. Keller Rohrback LLP*, 200 Wash. App. 66, 76–77, 401 P.3d 418, 423–24 (2017). Cathrine’s argument is without legal foundation.

**Alleged Error No. 2 re: “Clear and Convincing Evidence of**

**Misconduct**”: Judge Moreno had found evidence of Chad’s misconduct in her letter ruling denying Cathrine’s motion to vacate, and she said that it was immaterial. CP: 2197. Harmless error will not support a motion to vacate. 4 Karl B. Tegland, *Washington Practice: Rules Practice* § 8, at 613 (6th ed.2013). Cathrine did not meet her burden under the law:

The party requesting the relief must show misconduct that prevented a full and fair presentation of its case.

*Dalton v. State*, 130 Wash. App. 653, 665, 124 P.3d 305, 311 (2005).

Chad acknowledged that he removed the hard drive from the laptop, and Chad preserved the early August 2014 copy of the hard-drive

until after parenting plan trial and ruling of 12/22/15, at which time (on January 15, 2016), Chad quit paying for storage. CP: 1200-01. The discovery cut-off had long passed, and no discovery requests had been made.

To reiterate, Judge Moreno also had previously said that Chad was given full control of his laptop by prior orders. CP: 2849-50. And Judge Moreno noted: “If [Chad] had said a month ago that ‘I wiped it all clean,’ we wouldn’t be going around and around in circles, would we?” CP: 2849. Also, as was summarized, above, Judge Moreno’s oral ruling on the parenting plan extensive summarized Cathrine’s ability to present her allegations at trial. CP: 234-78. Cathrine’s motion was properly denied. **Alleged Error No. 3 re: “Failing to Vacate the Final Parenting Plan, etc.” and No. 8 Against Joan Chase as Expert at Trial:** There was no appeal of the findings that supported the final parenting plan, and there was no appeal of the court finding Joan Chase to be a proper expert.

Judge Moreno properly struck the intercepted emails, and Chad pled, and again pleads, RCW 9.73.030 and .050 as an independent basis for the intercepted emails to have been stricken from consideration.

Next, Cathrine’s attorney, Matthew Dudley, deposed Ms. Chase on 2/6/15. The full text is at CP: 2550-2616. Mr. Dudley was very antagonistic toward Ms. Chase, and the deposition shows a searching

inquiry into how and why Ms. Chase determined that Cathrine was trying to coach the boys against Chad. See, e.g, CP: 55-56.

Chad's attorney, Craig Mason, also deposed Ms. Chase on 2/6/15, and excerpts of the deposition are at CP: 2617-41. Ms. Chase said that receiving the information about Cathrine assaulting her former husband, the Hannah Seeger incident, and Cathrine's prior child neglect finding would be useful, but her focus was on the children. CP: 2619-20. (This was a basis to send her such information.)

Joan Chase then said that she began the case having been biased against Chad by Cathrine, because of Cathrine's allegations of abuse. CP: 2622, lines 11-24. Ms. Chase's own conclusions were that the children had not been abused by Chad. CP: 2622-23.

This 2/6/15 deposition testimony was entirely consistent with what Ms. Chase testified at trial ten months later. CP: 542-626. The deposition testimony of Joan Chase includes the facts that Cathrine lobbied Ms. Chase against Chad, while Chad had not said negative things about Cathrine to her. CP: 2623, lines 10 to 16.

Ms. Chase was also very clear that she knew how to maintain her independence in litigation. CP: 2624, lines 16-24.

Q: Do you ever feel...someone is trying to use you as a tool in divorce litigation.

A: And if that happens I'm very aware of my role. I'm not for sale, in other words.

Joan Chase again reiterated that Cathrine's early contacts with her led Chad to start out with Ms. Chase's view of him initially being negative. CP: 2625. It was important to Ms. Chase that not only was she not seeing abuse of the boys by Chad, but the other counselor, Eunice Huang was also not seeing any such signs. CP: 2626-27. In short, Cathrine was highly supportive of Joan Chase until Ms. Chase's professional protocols led her to conclude that Chad had not abused the boys and led Ms. Chase to conclude that Cathrine was coaching them. See CP: 2522-25 and the testimony cited, above.

When the trial transcript was explored, above, it was clear that Judge Moreno ruled that she intended to rely on the prior temporary orders designating Joan Chase as an expert. E.g., CP: 553, line 19.

Cathrine's "Statement of Error No. 8" is clearly a legally frivolous attempt to re-try the case on an issue that should have been directly appealed, if Cathrine wished to challenge this expert designation.

Ms. Chase will not be further explored in this Response Brief as her depositions and testimony at trial, cited above, and Judge Moreno's findings after trial, show that (a) any complaints were issues for direct appeal, and (b) any direct appeal would have failed.

**Alleged Errors No. 4-6 Pertain to Sanctions Against Cathrine (and Ms. Conner) for Filing Privileged Emails and Exclusion of the Intercepted**

**Emails:** To make sense of these alleged errors, Chad Marchesseault will consolidate these three topics, and first address the evidentiary ruling, and then the sanctions ruling.

**1. Evidentiary Ruling: Reviewed for Abuse of Discretion**

Judge Moreno was clear in her Letter Ruling of 10/31/16 that she never waived Chad's attorney-client privilege, and that the award of the Kindle to Cathrine did not justify her accessing and submitting privileged emails to the court. CP: 2196-99, esp. 2198-99. *NOTE:* Please recall the distinctions between (a) "the laptop," (b) the August 2014 hard-drive image of the laptop, and (c) "the Kindle" by which Cathrine intercepted Chad's attorney-client emails.

Judge Moreno focused her privilege analysis on whether or not the Dudley-Conner firm should be disqualified, and settled on the lesser sanction (\$2500) against Cathrine and Ms. Conner, but Judge Moreno clearly found that privilege had not been waived, and that the intercepted emails should be stricken from consideration. CP: 2199.

Cathrine's argument, relying upon *Sitterson v. Evergreen Sch. Dist. No. 114*, 147 Wash. App. 576 (2008), proceeds as if she is

submitting a brief to the trial court. However, this is an appeal of an evidentiary decision. Her argument evades the standard of review.

An appellate court reviews a trial court's evidentiary decisions for an abuse of discretion. *State v. Demery*, 144 Wash.2d 753, 758, 30 P.3d 1278 (2001), cited in *Farah v. Hertz Transporting, Inc.*, 196 Wash. App. 171, 181 (2016)(full citation below). Cathrine has not shown an abuse of discretion.

Judge Moreno had shown surprise that Cathrine had tried to do forensic analysis of Chad's laptop, as was shown above. The transcript of the 4/24/15 laptop contempt hearing before Judge Moreno is at CP: 2838-55, with Judge Moreno saying that she did not order the forensics attempted by Cathrine, and she had not authorized forensic analysis of the computer. See, esp. Judge Moreno at CP: 2843 and Mr. Mason at CP: 2846. Cathrine is attempting to merely re-argue to Division III the argument that she lost with Judge Moreno, and she is not showing any abuse of discretion in Judge Moreno's Ruling of 10/31/16.

Cathrine got to fully and freely attack Joan Chase at trial. CP: 542-626. Given that Cathrine had been reading Chad's emails, Cathrine got the use of them, when she strategically submitted a portion of them at trial (Exhibit P-13). Intercepted emails were properly excluded from consideration on the Motion to Vacate, and, Cathrine had the use of them

(by stealth) until she divulged that she possessed them and how she got them in her Motion to Vacate.

Even an error in excluding evidence is not reversible when the issues got to be fully litigated, as the court stated in *Farah v. Hertz*

*Transporting, Inc* (emphasis added):

Although it was error to exclude exhibit 1929, that error does not require reversal because it was not prejudicial. *Diaz v. State*, 175 Wash.2d 457, 472, 285 P.3d 873 (2012). “An error is not prejudicial unless it affects, or presumptively affects, the outcome of the trial.” *Diaz*, 175 Wash.2d at 472, 285 P.3d 873. There is no prejudicial error in the exclusion of an exhibit when the substance of the exhibit comes out in trial. *Moore v. Smith*, 89 Wash.2d 932, 941–42, 578 P.2d 26 (1978). “The exclusion of evidence which is cumulative ... is not reversible error.” *Havens v. C & D Plastics, Inc.*, 124 Wash.2d 158, 169–70, 876 P.2d 435 (1994).

*Farah v. Hertz Transporting, Inc.*, 196 Wash. App. 171, 183–84, 383 P.3d 552, 560 (2016), review denied sub nom. *Farah v. Hertz Transportation, Inc.*, 187 Wash. 2d 1023, 390 P.3d 332 (2017).

**Application of *Farah v. Hertz Transporting, Inc.*** The depositions and trial testimony of Joan Chase show that Cathrine’s complaints were fully explored at trial, and in the ruling. Cathrine’s appeal remains a legally frivolous lamentation that does not address the proper standard of review.

## **2. Monetary Sanctions as a Lesser Sanction Than**

**Disqualification: Abuse of Discretion Standard of Review**

Once again, Cathrine failed to formulate her “Statement of Error” under the proper standard of review, which is abuse of discretion. A trial court may impose sanctions according to court rules or under its own inherent equitable powers. *State v. Gassman*, 175 Wn.2d 208, 210–11, 283 P.3d 1113 (2012). A decision to impose sanctions is reviewed for an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Fisons*, 122 Wn.2d at 339.

Judge Moreno’s Letter Ruling of 10/31/16 cites the *Brandewiede* case (CP: 2199), to the effect that the court should consider “lesser sanctions than disqualification.” The financial sanction of \$2500 was such a lesser sanction:

We conclude the trial court's order of disqualification does not satisfy the principles and guidelines of *Fisons* and *Firestorm*. We therefore reverse the trial court's order of disqualification. On remand, any order of disqualification will require the consideration and analysis of (1) prejudice, (2) counsel's fault, (3) counsel's knowledge of privileged information, and (4) possible lesser sanctions.

*Foss Mar. Co. v. Brandewiede*, 190 Wash. App. 186, 201, 359 P.3d 905, 912 (2015) (entire firm was disqualified for using attorney-client privileged materials in litigation, citing *Richards v. Jain*, 168 F. Supp. 2d

1195 (W.D. Wash. 2001)). *Richards* and *Brandewiede* apply precisely to Cathrine Marchesseault's interception of privileged communications.

**Application of *Brandewiede*:** Chad's motion was to disqualify the Dudley-Conner firm for the egregious violations of the case law, RPCS, and on the basis of RCW 9.73.030/.050. CP: 954, 955-76, 977-83, 998-1014, 1172-76, 1177-88, and 1227-37. No abuse of discretion is shown.

At no point in her Opening Brief does Cathrine address *Foss Mar. Co. v. Brandewiede*, the case explicitly relied upon by Judge Moreno (CP: 1296-99), nor does Cathrine address the other legal authorities presented to the trial court as alternative bases for Judge Moreno's ruling. CP: 954, 955-76, 977-83, 998-1014, 1172-76, 1177-88, and 1227-37.

Chad had explicated *Richards v. Jain*, referenced in *Brandewiede*, among many other authorities. *Id.* The *Richards v. Jain* court explicated the difference between possession of the privileged material, and the greater evil of review of privileged materials:

In any event, Plaintiffs' failure to explicitly notify Defendants of the disclosure of privileged information weighs in favor of disqualification. Moreover, simply informing Defendants that they were in possession of privileged material would not excuse or lessen the impact of the review of large numbers of privileged documents. The prejudice suffered by Defendants due to the loss of the protection of the attorney-client privilege is not assuaged by knowledge of that loss.

*Richards v. Jain*, 168 F. Supp. 2d 1195, 1206 (W.D. Wash. 2001).

Cathrine and her counsel engaged in the greater evil of extensive review of privileged communications, and then she submitted them to the court.

Judge Moreno explicitly relied upon *Brandewiede*, 190 Wash. App. 186 (2015), and its authorities cited therein, and applied the “lesser sanctions” (\$2500). (Judge Moreno also referenced attorney obligations under RPC 4.4(b) which Cathrine elides on p. 8 of her brief.)

Cathrine’s Opening Brief does not address this *Richards v. Jain/ Foss v. Brandewiede*, line of legal authority at all. Cathrine simply argues with Judge Moreno’s ruling and order without explicating any violation of the abuse of discretion standard that addresses the case law underlying Judge Moreno’s decision.

**Alleged Errors No. 7 & 9, re: Emails Again, Under CR 60(b)(4):** Chad has already presented his CR 60(b)(4) argument, above, and it was explicitly addressed by Judge Moreno in her Letter Ruling of 10/31/16 (CP: 1296-99), as reduced to written orders on 12/14/16 (CP: 2324-29).

It is also implausible that these emails were “new” to Cathrine given that she had submitted some of them to the court on 10/13/14. CP: 2467-2471. And others were presented at trial (Exhibits P-13, admitted, and P-10, not admitted). Also, the “Kindle sources,” was confusingly discussed regarding P-13 at trial, at which time neither Chad nor Judge Moreno knew the real source of these emails. E.g., CP: 600.

The only rational inference is that Cathrine had these emails, and was wondering how to submit them. They are not “newly discovered evidence.” Only after Cathrine submitted her Motion to Vacate did Chad learn that despite Chad changing his password twice, Cathrine had read his emails from July of 2014 through March of 2015.

In other words, Chad won 50/50 time with his children on 2/24/15, despite Cathrine having had access to his emails with his attorney, access to drafts of his declarations that went back and forth with his attorney, as well as communications with counsel and witnesses on trial strategy.

These electronic communications were clearly illegally intercepted under RCW 9.73.030, but Judge Moreno chose to tip-toe around that criminal legal analysis on CP: 1299, and the judge found sufficient basis for exclusion under law analogous to CR 26 and RPC requirements, and under *Foss v. Brandewiede*, and authorities cited therein.

**Alleged Errors Nos. 10 and 11: Alleged Errors of Law Regarding Rules of Professional Conduct and Analogies to CR 26 Case Law:** It is obviously difficult to coherently respond to the Opening Brief that does not formulate the issues in terms of the standard of review, and that does not tie the legal arguments to the Statements of Error.

That noted, certainly CR 26 case law is appropriate authority by analogy for Judge Moreno to cite, in that the case law puts clear

obligations on attorneys and parties regarding privileged material that has been “inadvertently” disclosed -- usually after the party seeking to assert the privilege accidentally provided material to the opposing party.

In this case, Chad had changed his password, twice (CP: 1003-05), and had no reason to believe that Cathrine was reading his emails. Chad did not provide anything to Cathrine that allowed for the disclosure of his privileged emails, and so Chad is much more innocent of the “unknowing disclosure” than is the usual victim of an inadvertent discovery disclosure.

As the *Brandewiede* court said (emphasis added):

Further, CR 26(b)(6) provides that once a party has been notified that it has access to an opposing party's privileged information, that party “must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified.”

*Foss Mar. Co. v. Brandewiede*, 190 Wash. App. 186, 198, 359 P.3d 905, 911 (2015), *review denied*, 367 P.3d 1083 (Wash. 2016).

CR 26 law is a proper analogy for the court to use in exploring privilege issues and remedies, given the court’s inherent powers. *State v. Gassman*, 175 Wn.2d 208, 210–11, 283 P.3d 1113 (2012).

Attorney-client privilege is taken so seriously that Washington courts have held that a contempt ruling can be overturned if it requires breaching attorney-client privilege in a way that essentially deprived the

trial court of the jurisdiction to have entered the order. *Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.*, 61 Wash.App. 725, 731-36, 812 P.2d 488 (1991). See also *State v. Perrow*, 156 Wash.App. 322, 231 P.3d 853 (2010) (case dismissed because the State intercepted attorney-client communications). And see *Harris v. Pierce County*, 84 Wash.App. 222, 928 P.2d 1111 (1996) (in-camera review not needed when communications are clearly privileged).

Chad was found in contempt in 2016 for having replaced his hard drive, and Cathrine got her remedy (dollar sanctions). Chad did not appeal the contempt, out of desire for the litigation to end; and he accepted his financial sanction for protecting his confidential communications.

Judge Moreno clearly erred to say that Chad had waived privilege on the August 2014 hard drive image that Chad had given to Global Compusearch in that the agents of a client or attorney in litigation are also protected by the privilege:

The attorney-client privilege exists in order to allow the client to communicate freely with the attorney without fear of compulsory discovery. *State ex rel. Sowers v. Olwell*, 64 Wash.2d 828, 394 P.2d 681 (1964); *Pappas v. Holloway*, 114 Wash.2d 198, 203, 787 P.2d 30 (1990) (privilege encourages free and open communications by assuring that communications will not be disclosed to others directly or indirectly). The attorney-client privilege extends to the agents of an attorney. *State v. Jones*, 99 Wash.2d 735, 749, 664 P.2d 1216 (1983) (psychiatrist); *United States v. Kovel*, 296 F.2d 918, 920-23 (2d Cir.1961) (accountant); *Brown v. State*, 448 N.E.2d 10, 14

(Ind.1983); 8 J. Wigmore, *Evidence* § 2301, at 583 (1961). A defense psychiatrist is an agent of the attorney. *Jones*, 99 Wash.2d at 749–50, 664 P.2d 1216. *Accord, Miller v. District Court*, 737 P.2d 834, 838 (Colo.1987); *People v. Lines*, 13 Cal.3d 500, 510, 531 P.2d 793, 119 Cal.Rptr. 225 (1975); *Houston v. State*, 602 P.2d 784, 789–90 (Alaska 1979); *State v. Pratt*, 284 Md. 516, 520–21, 398 A.2d 421 (1979). If it did not extend to an attorney's agent, an attorney could not adequately advise clients where expert assistance was needed.

*State v. Pawlyk*, 115 Wash. 2d 457, 488–89, 800 P.2d 338, 354–55 (1990).

Chad never surrendered any privileged attorney-client communications from his laptop to anyone.

Despite Cathrine's attempt to use digressive discussions about Chad's laptop to direct attention away from Cathrine's interception of Chad's emails with the Kindle, this point cannot be obscured: Cathrine never got Chad's emails from Chad's laptop. Instead: *Cathrine got Chad's emails from her electronic interception of his emails on the Kindle in her possession, and she violated RCW 9.73.030, she violated the law of privileged communication, and Cathrine and her attorney submitted these privileged communications in violation of the RPCs and related case law.*

Judge Moreno was clear that awarding Cathrine the Kindle was not awarding Cathrine the right to intercept Chad's privileged communications. CP: 2196-99. In sum, Cathrine's Opening Brief persistently tries to conflate myriad laptop issues (resolved by Chad's contempt and production of the August 2014 hard-drive image) with the

fact that the Kindle was Cathrine's source for intercepting Chad's emails, and her computer expert's, Carol Peden's, declarations about Cathrine receiving those intercepted emails pertain to the Kindle in Cathrine's possession. CP: 1069-1080.

Chad had no means or reason to know that Cathrine received the privileged emails through the Kindle. Nor could Chad know that Cathrine was reading them from Chad's online, email account, and that Cathrine was intercepting his attorney-client communications. (Note: All electronic intercepts, not just attorney-client emails, should be excluded under RCW 9.73.050.)

On page 8 of her Opening Brief, Cathrine says that she:

...could not access [the attorney-client emails] until the court ruled that the father waived privilege and they had to be accessed by special software that the Petitioner did not have.

Cathrine's problems are: (a) the court never waived Chad's attorney-client privilege; (b) to "mine" the Kindle was to explicitly seek privileged materials, and (c) it is not plausible that Cathrine did not have privileged emails until April of 2016, as she filed some "Kindle-intercepted" emails on 10/13/14, and submitted them as trial Exhibits P-10 (not admitted) and P-13 (admitted). Finally, no such privileged emails were available to her on the August 2014 hard drive image of the laptop, nor on the laptop. All her submitted emails were "Kindle-intercepts."

#### **D. Standard of Review Revisited: Burden on Cathrine**

Chad asks this court not to allow Cathrine to suddenly formulate her appeal properly on Reply, as that would obviously give Chad no opportunity to actually Respond.

The burden was on Cathrine to show an abuse of discretion by Judge Moreno, and Cathrine instead chose to formulate her Opening Brief as a character assassination of Chad, of Craig Mason, of Joan Chase, and, with her request to change judges, of Judge Moreno, as well.

To restate Cathrine's burden on appeal (emphasis added):

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Finch*, 137 Wash.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Downing*, 151 Wash.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)).

The burden is on the appellant to prove an abuse of discretion. *State v. Hentz*, 32 Wash.App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wash.2d 538, 663 P.2d 476 (1983). We may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds the record supports. *State v. Powell*, 126 Wash.2d 244, 259, 893 P.2d 615 (1995).

*State v. Williams*, 137 Wash. App. 736, 743, 154 P.3d 322, 326 (2007).

#### **V. Remaining Legal "Topics" in Cathrine's Opening Brief**

Cathrine's brief was not organized around its "Statements of Error, and the presentation was scattered. Chad believes that he has largely

addressed the arguments presented, but herein Chad presents the law on two more matters: (A) Witness Tampering, and (B) Email Interception.

**A. Catherine's Allegation of "Witness Tampering."**

First, it is breath-taking for Cathrine to accuse Chad of "witness tampering" when Cathrine's witness tampering is why the court-martial Cathrine initiated against Chad was dismissed (CP: 3032-34 & CP: 3096-3100), and Cathrine attempted to prevent Hannah Seeger-Pahlen from testifying (compare RCW 9A.72.120(1)(b)) and/or to get Hannah to change her testimony (compare RCW 9A.72.120(1)(a)). CP: 2724-26.

Cathrine's allegations about Chad (or his counsel) regarding Joan Chase were thoroughly explored in Joan Chase's trial testimony (CP: 542-626, and in the Court's Ruling after Trial, CP: 234-78). It is no accident that Cathrine's most inflammatory sentences have no citation to the record.

**1. RCW 9A.72.120: Tampering with a Witness**

Cathrine Marchesseault presented several cases in her accusations of witness tampering, and these are discussed, below.

**(a) State v. Skuza:** Cathrine cited this case without any particular page. Her citation was, on Opening Brief, p. 17: "*State v. Skuza*, 156 Wn.App. 886, 235 P.3d 842 (Div.2 2010)." With no pages cited as reference, Chad's counsel had to read the case, and note that the published portion of

the case dealt with an ER 615 exclusion order, and any discussion of “tampering” came in the unpublished portion.

Division III has this position on citation to unpublished cases:

We also grant Ms. Crosswhite's motion to strike a statement of additional authorities that cites to an unpublished decision of this court without including what we hold is a needed caveat. We take this opportunity to announce that when citing to unpublished opinions under GR 14.1, either in this court or in the trial court, a party must do more than simply identify the opinion as unpublished. The party must point out that the decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. The party should also cite GR 14.1.

*Crosswhite v. Washington State Dep't of Soc. & Health Servs.*, 197 Wash. App. 539, 544, 389 P.3d 731, 733, *review denied*, 188 Wash. 2d 1009, 394 P.3d 1016 (2017). This inapt case should not be considered.

**(b) State v. Thomas:** Another cited by Cathrine is one in which Thomas made 29 phone calls to a witness (Montgomery) attempting to get Montgomery to change her testimony and recant by stating another party had put a gun to her head to make her lie to police; the appellate court reduced the eight convictions to one conviction. *State v. Thomas*, 158 Wash. App. 797, 798–99, 243 P.3d 941, 942 (2010). Cathrine cites to the “concurring opinion” (Opening Brief, p.17) which states that there could be facts on which these offenses should be considered separate offenses. *State v. Thomas*, 158 Wash. App. 797, 802, 243 P.3d 941, 943–44 (2010)

(concurring opinion). The precedent that limited such multiple witness contacts to just once incident, *State v. Hall*, 168 Wash.2d 726, 230 P.3d 1048 (2010), cited in *State v. Thomas*, 158 Wash. App. at 798 was superseded by subsequent legislation. Nothing in *State v. Thomas* is applicable to the Marchesseault case.

**(c) State v. Carter:** In *State v. Carter* the defendant had explicitly tried to get the witness to change her testimony, and Carter did not appeal the tampering conviction, and so it was not a subject of the case. It was merely addressed in a footnote. The case is inapt. *State v. Carter*, 154 Wash. 2d 71, 75, 109 P.3d 823, 825 (2005).

**(d) State v. Sarasaud: A Bribery Case under 9A.72.090:** The defendant in *Sarasaud* argued that offering leniency to a witness who testified against him was “bribery” by the State:

Thus, in the context of the bribery statute, to intend to influence a witness's testimony connotes an intention to alter the truthful nature of that testimony or to thwart the ends of justice. The State commits no violation under the statute when it offers a witness leniency in exchange for truthful testimony.

*Sarasaud v. State*, 109 Wash. App. 824, 847, 39 P.3d 308, 320–21 (2001).

It was certainly not “bribery” for Chad to send to Joan Chase the police report of Cathrine trying to witness tamper with Hannah Seeger-Pahlen about Cathrine leaving her children from a prior marriage home alone, nor to send Ms. Chase the police report and restraining order of

Jesse Sharrock (Cathrine's former husband) against Cathrine, nor to send Ms. Chase the military documents regarding Cathrine being caught neglecting her child in Colorado. As was noted above, this information was covered in Ms. Chase's deposition and in her trial testimony. CP: 2617-41, 2550-2616, and 542-626. And see CP: 3035-69.

## **2. Conclusion: Cathrine's Tampering Allegation is Frivolous**

To begin with case law that tracks the statute:

The witness tampering statute requires that Lubers induce a "witness" or a person "about to be called as a witness" to give false testimony or withhold testimony. *See State v. Henshaw*, 62 Wash.App. 135, 813 P.2d 146 (1991).

*State v. Lubers*, 81 Wash. App. 614, 622, 915 P.2d 1157, 1161 (1996).

There is no evidence of "witness tampering" by Chad. Joan Chase allowed each party to contact her independently. Cathrine "spun" Joan Chase hard against Chad in the early part of the case. After Joan Chase had the experiences of Chad, of the boys, and of the feedback from Eunice Huang, Joan Chase understood Chad was not abusive. On the facts, Ms. Chase drew her honest conclusions, especially after Cathrine revealed herself to be coaching the boys against Chad (without success). CP: 2522-25. Additionally, Cathrine was falsely reporting to Joan Chase what "the boys" were "saying." CP: 598.

Cathrine was the one trying to “tamper” with Joan Chase while Chad said nothing negative about Cathrine. Chad let the facts accumulate, and Chad provided supplemental information, all of which was explored at trial.

### **B. Interception, Privilege, and Exclusion**

First, Judge Moreno’s decision to exclude the privileged attorney-client emails was not an abuse of discretion, and Cathrine has not formulated her appeal to carrying burden of showing that Judge Moreno abused her discretion. Second, RCW 9.73.050 compels exclusion of the intercepted emails as an alternative basis to uphold Judge Moreno.

#### **1. RCW 9.73.030/.050 Exclusion**

RCW 9.73.030(1)(a) reads (emphasis added):

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

RCW 9.73.050 requires exclusion of such intercepted material.

*State v. Salinas*, 121 Wash. 2d 689, 693, 853 P.2d 439, 441 (1993), citing *State v. Fjermestad*, 114 Wash.2d 828, 836, 791 P.2d 897 (1990). While

Chad had presented these authorities to the trial court, Judge Moreno delicately chose other bases for her decision, to avoid finding that Cathrine and Lea Conner had committed a crime (CP: 1296-99). Chad asks this court to find RCW 9.73.050 as an independent basis to uphold Judge Moreno's orders.

## **2. Cathrine's RPC 3.3 Argument**

Without Cathrine detailing how RPC 1.6 limits the reach of RPC 3.3, it is impossible to respond. Cathrine simply does not address the RPC 1.6 limitation on RPC 3.3. It is well-established that:

RPC 3.3 also does not mandate disclosure when RPC 1.6 is implicated.

*In re Disciplinary Proceeding Against Schafer*, 149 Wash. 2d 148, 165, 66 P.3d 1036, 1044 (2003). Regarding such improperly formed appellate briefs the court has said:

We are not required to search the record for applicable portions thereof in support of the plaintiffs' arguments.

*Mills v. Park*, 67 Wash. 2d 717, 721, 409 P.2d 646, 649 (1966). Applying *Mills*, Chad would ask that he not have to speculate regarding how Cathrine might have gotten around the RPC 1.6 limitations on RPC 3.3.

Cathrine's other cited cases are inapt. For example, *In re Disciplinary Proceeding Against Carmick*, 146 Wash. 2d 582, 595, 48 P.3d 311, 317 (2002), (amended July 30, 2002), was a case in which the

attorney made a misrepresentation to the court in an ex parte hearing that the other party knew of the order and had approved it. *Id.* at 597. The *Tasker* case cited by Cathrine also does not apply to her appeal as in *Tasker* the attorney misrepresented to the court that he had experience in class action litigation. *In re Disciplinary Proceeding Against Tasker*, 141 Wash. 2d 557, 563, 9 P.3d 822, 825 (2000). Next, Cathrine cites the *Poole* case, and directs the court to the footnotes (Opening Brief at p.20). But, the *Poole* case only addresses the following RPCs: RPC 3.4(b) and/or RPC 8.4(c) (Count 1); 1.14(a) (Count 4); RPC 1.14(b)(3) (Count 5); and RPC 1.14(b)(4) (Count 6). *In re Disciplinary Proceeding Against Poole*, 156 Wash. 2d 196, 207, 125 P.3d 954, 958–59 (2006). The footnote discussion largely consists of the court rejecting the appellant’s arguments to recast the counts against him into different RPCs.

Regarding the *Jackson* case cited by Cathrine (again, generally cited, with no particular page references), *Jackson* is a conflict of interest case with conflicting concurrent representation, personal financial conflicts of interest, and the intentional withholding of discovery answers that would show this conflict of interest. *In re Disciplinary Proceeding Against Jackson*, 180 Wash. 2d 201, 207, 322 P.3d 795, 799 (2014).

In sum, it is very easy for Cathrine to throw accusations and vaguely-cited case law, but it is very hard, time-consuming, work for Chad to dig through these poorly-presented generalities in order to Respond.

## **VI. MOTIONS**

### **A. Motion to Strike Privileged Emails**

Chad asks the court to strike (and to protect) his privileged communications, and his intercepted communications, on this appeal on the same terms as they were ordered protected by Judge Moreno, on the basis of the facts and authorities cited above. This motion is made part of the brief, as granting the motion to strike would likely preclude any other review. RAP 17.4(d).

### **B. RAP 18.9 Request for Fees and Costs**

Chad Marchessault requests that the court award him his fees and costs of this appeal as Cathrine Marchesseault's appeal was so devoid of merit as to be frivolous. *Wagner v. Wheatley*, 111 Wash. App. 9, 19, 44 P.3d 860, 865 (2002). Chad was also harmed and suffered additional costs due to Cathrine's failure to follow the rules, as she did not properly cite to the record, nor properly present the standard of review, *supra*, and RAP 18.9(a). As the court said in *State ex rel. Quick-Ruben v. Verharen*:

We have repeatedly noted:

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so

totally devoid of merit that there [is] no reasonable possibility of reversal.

*Presidential Estates Apartment Assocs. v. Barrett*, 129 Wash.2d 320, 330, 917 P.2d 100 (1996) (quoting *Fay v. Northwest Airlines, Inc.*, 115 Wash.2d 194, 200–01, 796 P.2d 412 (1990)); *State v. Rolax*, 104 Wash.2d 129, 136, 702 P.2d 1185 (1985).

*State ex rel. Quick-Ruben v. Verharen*, 136 Wash. 2d 888, 905, 969 P.2d 64, 73 (1998).

Cathrine’s briefing presented no reasonable possibility of reversal of Judge Moreno’s decisions to strike the privileged emails, to sanction Ms. Conner and Cathrine, and to deny her motion to vacate the parenting plan. Fees and costs under RAP 18.9 are requested.

## VII. CONCLUSION

It is well-established that:

As noted above, RCW 5.60.060 prohibits disclosure of communication between an attorney and a client given in the course of professional employment. This privilege also extends to written communications from an attorney to the attorney's client. *Kammerer v. Western Gear Corp.*, 96 Wash.2d 416, 421, 635 P.2d 708 (1981) (citing *Victor*, 4 Wash.App. at 920, 486 P.2d 323).

*Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.*, 61 Wash.App. 725, 731-36, 812 P.2d 488 (1991). The analogous discovery case law, the Rules of Professional Conduct, and RCW 9.73.030/.050 make this clear. Chad never waived his privilege in any way.

Cathrine Marchesseault trespassed upon Chad Marchesseault's electronic transmissions for the first eight months of the case, and she then concocted a variety of pretexts for trying to find ways to admit these electronically-intercepted and privileged communications. Sanctions and exclusion were proper in the trial court, and in this court.

Cathrine's arguments about Joan Chase's bias, and about Joan Chase's contacts with Chad and his counsel were fully considered at trial, and it was fully documented at trial that Cathrine's initial ex parte contacts with Joan Chase had biased the counselor against Chad. Additionally, Ms. Chase said that Chad had not spoken negatively of Cathrine, but Cathrine had spoken negatively of Chad. Ms. Chase was comfortable with each side contacting her.

The credibility of both parties, and of Joan Chase, and of all witnesses, was all thoroughly considered by Judge Moreno during trial, as can be seen from her oral ruling of 12/22/15. (CP: 234-278, and the trial transcript of Joan Chase's testimony at CP: 542-626.)

Cathrine did not formulate her appeal in terms of the standard of review (abuse of discretion) and Cathrine did not properly cite to the record, and her legal citations were casual and inapt. Chad has responded as best as he could to this largely ad hominem appeal.

This court is asked to deny the appeal and to award fees and costs.

Respectfully submitted on 2/25/18,



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**Case No. 352072**

**COURT OF APPEALS, DIVISION III,  
FOR THE STATE OF WASHINGTON**

Cathrine Roe (Marchesseault),	)	
	)	CERTIFICATE OF SERVICE
Appellant,	)	RE: Responsive Brief of
	)	Chad Marchesseault
v.	)	
	)	
Chad Marchesseault,	)	
	)	
Respondent.	)	

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I certify that on the 5<sup>th</sup> day of March, 2018, I caused a true and correct copy of Respondent's Brief to be served on the following in the manner indicated below:

Counsel for Appellant:  
Gary R. Stenzel, PS  
1304 W. College Ave.  
Spokane, WA 99201-2006

Via Court of Appeals Portal to: [stenz2193@comcast.net](mailto:stenz2193@comcast.net)

Signed and Sworn on the date above.

  
Lori Mason, paralegal for Craig Mason

CERTIFICATE OF SERVICE

**MASON LAW**

**March 05, 2018 - 10:27 AM**

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