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Division III  
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No. 37037-2-III

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**COURT OF APPEALS, DIVISION NO. III  
OF THE STATE OF WASHINGTON**

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ALEXANDER THOMASON, *et al.*

v.

MIKE STENNES and DONNA STENNES.

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**APPELLANT'S REPLY BRIEF**

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**A. INTRODUCTION**

COME NOW Appellants Alexander and Katy Thomason (the “Thomasons”), by and through their undersigned attorneys of record, and Submit this Reply Brief. For clarity, we organize this Reply similarly to the Response:

**B. ARGUMENT & AUTHORITY**

**1. Standard of Review**

The parties agree that the Standard of Review here is abuse of discretion. The disagreement is in application of this standard. Both parties have cited the untenable grounds/untenable reasons articulation of this standard. *See, e.g., Mega v. Whitworth College*, 138 Wn.App. 661, 671, 158 P.3d 1211 (2007) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)<sup>1</sup>). But there are other ways a trial court may abuse its discretion, including misapplication of the law or the use of an incorrect standard. *See, e.g. Muridan v. Redl*, 3 Wn.App.2d 44, 54, 413 P.3d 1072 (2018); *Marriage of Kim*, 179 Wn.App. 232, 240, 317 P.3d 555 (2014).

Here, what the Thomasons argue is that the Trial Court misapplied the five-factor test for motions for a new trial and manifestly abused its discretion.

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<sup>1</sup> Partially superseded by statute on other grounds. *Carroll* remains a primary source for the cited proposition.

## 2. The New Evidence Cannot Change the Result

As the Response acknowledges, Mr. Stennes admitted playing loud music and calling his dog a “goofball.” *Response Brief* at 24. At the hearing, Mr. Stennes also admitted driving by on the four-wheeler. *RP* at 213:20-215:11. Ms. Stennes admitted driving by in her Raptor. *RP* at 232:23-235:8.

Mr. Thomason cannot offer testimony as to their subjective intent or mental state. He can only offer testimony as to the facts and circumstances surrounding the commission of the Stennes’ acts. Though speaking of *criminal* intent, the Court has said: “Criminal intent may be inferred from all the facts and circumstances surrounding the commission of an act. Although intent may not be inferred from conduct that is patently equivocal, it may be inferred from conduct that plainly indicates such intent as a matter of logical probability.” *State v. Brooks*, 107 Wn.App. 925, 929, 29 P.3d 45 (2001) (internal citations/quotations omitted).

While this issue was not explored below, the requisite mental state poses a question as to willfulness or intent. The Response argues that the requisite mental state is intent, citing RCW 7.21.010(1). *Resp. Brief* at 24; *but see Id.* at 26 (willful). On the other hand, the mental state for violation of the antiharassment order itself is willfulness. RCW 10.14.120; WPIC 36.51.04. It seems incongruous that the mental state would be *lower* in the criminal

proceeding than in the civil. The distinction may be moot, depending on how this Court addresses the issues. Where it may be of import is balancing the effect of the Speidel Bentsen notes against the Trial Court's inference of mental state.

However, Mr. Thomason's credibility had nothing to do with the Trial Court's inference that Mr. Stennes intentionally contacted the Thomasons via the music; the Trial Court said:

But, what I found – what I found most interesting about this is that [Mr. Stennes] and Mr. Thomason kind of identified the music in the same way. In other words he didn't say this was Neil Diamond or classical music or something like that. He identified it as music just the same as you. And so, that means he could hear it... I think the reality is, you had to have had your music cranked pretty good for him to hear it outside and I think that you knew that he had or they had, I'm sorry, they had a group of people at their house. You may or may not have been aware that it was Easter. My guess is that you were and even if you weren't, your intent was to harass them, make them go inside, make them change their plan in a way that you weren't entitled to.

*RP* at 282:20-283:11. Here, the Trial Court inferred intent from the facts and circumstances surrounding this event. The Stenneses sought a new trial arguing that the new evidence showed Mr. Thomason's motive to *fabricate* allegations. *Id.* at 191:10-16 ("fake"). Mr. Thomson's credibility is not at issue where the Stenneses admit the conduct and deny only the harassing intent. New evidence of an alleged motive to fabricate accusations is

immaterial if credibility is not at issue. Such evidence is far from *likely* to change the outcome of the proceeding.

### **3. The New Evidence was not Material**

Materiality is the heart of this inquiry and the Response glosses over this issue. Instead, the Response attempts to reframe the issue and divorce the logical connection requirement from the realities of the case. The Response concludes by arguing that the evidence was material because it showed that Mr. Thomason was “working towards [a] goal” that the Stenneses previously argued to the Court he could not achieve through Court action. *See Resp. Brief* at 27.

The Response flagrantly misrepresents<sup>2</sup> the Appellant’s argument. The issue is as clearly stated in the initial Brief. Did the Stenneses intentionally violate a provision of the stipulated antiharassment orders? The Stenneses

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<sup>2</sup> The cherry-picked quotes from p.28-29 of the Brief are presented completely out of context. The Response speaks of a “finding of harassment”; “whether Thomason ever actually had the power to get the Stenneses evicted”; “whether he could convince the PR or the Trustee to sell him the Stennes home” and “whether Thomason even actually wanted to acquire the Stennes home.” *See Resp. Brief* at 26-27. These are not the Thomason’s arguments – these are the issues that the *Stenneses* argued to the Trial Court. *See RP* at 98:22-99:1 & 266:20-267:8 (finding of harassment); *CP* at 429:20-23 (Thomasons trying to have the Stenneses evicted); *RP* at 191:10-16; 192:8-13 (Mike’s testimony RE acquiring home). The Appellant’s Brief at these same two pages cited in the Response (p.28-29) also contains two very clear articulations of the issue: “In this contempt proceeding, the issue was whether the Respondent committed “intentional disobedience of any lawful judgment, decree, order, or process of the court.” RCW 7.21.010(1)(b)” and “Obtaining a finding of harassment was neither at issue nor was this an available form of relief in the contempt proceeding. The issue was not whether the incidents described by the Thomasons met the criteria under RCW 10.14.020; the issue was whether any one of those incidents constituted a violation of the stipulated antiharassment orders.”

advance the argument that the new evidence was material because it shows that Mr. Thomason believed he could get the Stenneses evicted and was trying to do so. The pertinent question for materiality purposes is whether this theory shares a logical connection to the issues in the case.

Even if one assumes, *arguendo*, that the Stenneses' eviction theory is true, this neither precludes a finding that they intentionally violated the antiharassment orders; nor makes it less likely that they did so where they admit the alleged conduct. In other words, for the issues where the Stenneses admit the conduct but deny harassing intent, Mr. Thomason's desire to evict them has no logical connection to their subjective intent.

Finally, as noted in the initial Brief, the Stenneses' argument to the Trial Court as to why the new evidence was material was that Mr. Thomason could "deny [Mike's theory] without further contradiction." *CP* at 429:20-23. But the Stenneses never created this factual issue before the Trial Court by asking Mr. Thomason to make this denial.

This new evidence cannot be material where the party offering it failed to create the necessary logical nexus before the Trial Court. Moreover, for the Stenneses' admitted acts that do not present any issue of credibility, new evidence that attacks credibility cannot be material.

#### 4. The New Evidence was Merely Cumulative

##### a. *Roe v. Snyder*

The Thomasons argue that the Stenneses misread this case. The Response states that *Roe* is useful in understanding the type of new evidence which supports the grant of a new trial. *Resp. Brief* at 27-28.

In *Roe v. Snyder*, 100 Wn. 311, 170 P. 1027 (1918), the “sole question was as to what was the contract under which [legal] services were performed.” Testimony of the witnesses was just as positive for the appellant and respondent. *Id.* at 312. The substance of the dispute was that the attorneys claimed a contingent fee agreement, while the clients claimed a flat fee agreement<sup>3</sup>. *Id.* The matter was tried to a jury verdict for the clients. *Id.* Following trial, the attorneys filed a motion for new trial based on affidavits of disinterested persons to the effect that the client had stated to them that there was a contingent representation agreement. *Id.* One of the attorneys filed his own affidavit stating that the information had been volunteered by the affiants after verdict. *Id.* at 312-13. Counter-affidavits were filed, controverting these issues. *Id.* at 313. On appeal, the clients

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<sup>3</sup> The reason that this is of significance is that the contingent case at issue was *State ex rel Roe v. City of Seattle*, 88 Wn. 589, 153 P. 336 (1915), wherein the trial court awarded Mr. Roe a \$620 judgment against the City (estimated to be about \$15,800 in 2020 dollars). *See Id.* at 592.

argued that the attorneys could have discovered the evidence with diligence (not at issue here); and that the evidence was purely cumulative. *Id.*

A more expanded version of the quote offered in the Response is illuminating:

At the trial the main issue was as to what were the terms of the contract. Appellants, and certain of their relatives who claimed to have been present when the contract was made, gave their version of it. Respondents gave a version which was wholly different. **The issue thus rested in a direct conflict of evidence.** At the trial there was **no evidence of any extrajudicial admission by either party as to what the contract was.** The offered new evidence was of such an admission by one of the parties to the contract against the interest which he asserted thereunder at the trial. It was evidence of an **admission to the effect that the contract was just what respondents claimed that it was. This was substantive evidence directed to the same point as that in issue at the trial,** but it was not evidence of the same kind as that adduced at the trial. It was evidence of an **independent fact, not touched by any evidence at the trial,** but bearing directly and vitally upon the main issue. Such evidence is not cumulative in the objectionable sense.

*Id.* at 314-15 (em. added). But here, there were admissions from the Stenneses on the stand at the hearing as to the central issue – their own conduct. That the Trial Court here found a violation based on the Stennes’ own admissions places this case leagues apart from *Roe*.

In a later case, *Merk v. Murtinger*, 146 Wn. 59, 261 P. 642 (1927), the Court briefly examined *Roe* and stated:

In [*Roe*], where the trial court had granted a new trial on the ground of newly discovered evidence, there had been **no**

**evidence on the part of either party as to what the contract was**, and the losing party had no knowledge of any admissions made to the affiants making the affidavits.

*Id.* at 60 (em. added). In *Merk*, there arose a dispute between employer and employee as to the wage for making concrete blocks. *Id.* at 59. The employer contended the employee was paid by the piece; the employee sought \$4 per day as a reasonable wage for a judgment of \$476. *Id.* On appeal the issue was:

Under the issues formed by the complaint and answer, appellant contended that respondent worked for him by the piece; that is, to be paid so much each for making concrete blocks. **While there is a conflict in the evidence, respondent introduced evidence to sustain his allegations and sufficient to sustain the verdict.**

At the trial, appellant made a statement that, if plaintiff was entitled to recover at all, he would be entitled to recover \$4 a day as a reasonable wage. The only contention of appellant was that respondent was not entitled to recover at all, in that the contract was to pay him so much per piece for making concrete blocks. The evidence being sufficient, the only other question is **whether or not the court should have granted a new trial upon an affidavit submitted by appellant, tending to show that respondent had made an admission to the affiant that he was to be paid by the piece.**

*Id.* at 59-60 (em. added). The Court concluded the opinion, stating: “The newly discovered evidence disclosed by the affidavit was, under such circumstances as appear here, merely cumulative.” *Id.* at 61.

In *Roe*, the Court properly granted a new trial because the newly discovered evidence was disinterested testimony that touched on a critical

gap in the parties' testimony at trial. In *Merk*, the Court properly denied a new trial because the newly discovered evidence did nothing more than bolster an argument developed and rejected at trial.

Here, the Stenneses' new evidence was of the type in *Merk*. At the hearing, the Stenneses argued and developed a line of inquiry on the theory that "[Thomason] has a motivation to have – to have a finding of harassment because he knows that under the Will and under the lease if there's a finding of harassment he can demand the trustees kick Mike and Donna out of their house." *RP* at 98:22-99:1. The Trial Court considered and rejected this argument. *Id.* at 283:21-284:3. The Stenneses argument that the Speidel Bentsen notes are material because "Thomason *believed at the time* that he could get the Stenneses evicted and that he was *working toward that goal*" (*Resp. Brief* at 27, italics original) reveals that this is exactly like *Merk*. The Stenneses developed and argued this theory at trial and now merely seek to bolster it with new evidence. *Merk* concluded this is cumulative.

*Roe* is inapposite for another reason. In *Roe*, the Court said:

There are many decisions which hold that newly discovered evidence of contradictory statements of witnesses made before the trial is not ground for a new trial. Obviously such evidence would be merely impeaching in character. But that was not the nature of the evidence here offered. Though it tended to contradict Ed Roe as a witness, that was a mere incident. Its force lay in the fact that it was evidence of an **admission against the interest** of the person making it at the time it was made. It would have been **competent evidence of**

**the fact admitted even had Roe not been a witness.** The distinction is plain. That newly discovered evidence of such admissions bearing upon the main issue, **when nothing of the kind was adduced at the trial, is not cumulative but independent** evidence, is, we think, clear both on reason and authority.

100 Wn. at 315-16 (em. added). The Stenneses argue that the new evidence is from a disinterested witness and bears directly on the main issue. *Resp. Brief* at 29. But whether Mr. Thomason had a motive to evict the Stenneses or was trying to do so was not the “main issue.” The Response admits that “whether Thomason ever actually had the power to get the Stenneses evicted... or whether he could convince the PR or the Trustee to sell him the Stennes home, or whether Thomason even actually wanted to acquire the Stennes home” are not the issues. *Id.* at 26-27. If these are not the issues, they are certainly not the “main issue.” *Roe*, 100 Wn. at 316. The holdings in *Roe* and *Merk* are not helpful to the Stenneses – they are inapposite and support the Thomasons’ arguments.

**b. *Praytor v. King Co.***

The Thomasons argue that the Stenneses are also misreading *Praytor*. In that case, like *Roe*, the Court properly granted a new trial because the newly discovered evidence was of an objective nature and went to the very heart of the dispute between the parties. *Praytor v. King Co.*, 69 Wn.2d 637, 640 419 P.2d 797 (1966).

In *Praytor*, the dispute concerned flooding of the Plaintiff's crawl space, which she alleged was a result of improperly maintained and defective storm sewers maintained by the County. *Id.* at 638. The County contended that the flooding was a result of poor drainage and natural accumulation. *Id.* At trial, both parties presented substantial evidence in support of their theories; the jury returned a verdict for the County. *Id.* Following trial, a preparatory survey for a storm drain revealed that the Plaintiff's theory was correct after all:

A vital and crucial issue in the case was the condition of a cement catch basin in the storm sewer system located across the street from appellant's premises. According to the evidence and the unrefuted affidavits of appellant's experts, this catch basin was some 5 feet in depth, had been in place for several years, and had an accumulation of mud, sand, and other materials in the bottom which concealed its underlying structure from ordinary inspection. It was appellant's theory, supported by dye tests and the testimony of her witnesses, that leaks in this catch basin constituted the precipitating source of the water flooding her premises. In response to this theory, respondent's employees in charge of operating and maintaining the storm sewer system testified, without equivocation, that the catch basin in question was of standard precast cement construction and at all times concerned possessed a solid and sealed concrete bottom, thereby precluding undue infiltration of water into adjacent areas. Appellant's expert witness did not undertake to dispute this positive testimony as to the nature of the basin's construction, and, except for appellant's testimony that her attempt at inspection of the basin led her to believe it was bottomless, respondent's evidence on this issue stood unrefuted.

Immediately following trial, and pursuant to a stipulation by respondent that appellant could construct a drain from her

property to the catch basin, appellant's engineer, in conducting a survey preparatory to running such a drain line, pumped the mud and sand out of the catch basin and discovered that the basin was not a sealed unit and had no concrete bottom, thus permitting water accumulating therein to easily drain away and saturate the surrounding soil. The post trial affidavits of appellant's witnesses in this respect stand undisputed in the record.

*Id.* at 638-39. The County asserted that this newly discovered evidence was merely cumulative and would not change the outcome of trial. *Id.* at 640.

The Court disagreed:

Likewise, we are unable to agree with respondent's contention that the newly discovered evidence is merely cumulative, or impeaching and probably would not change the result of the trial. **The condition of the catch basin went to the very heart of the dispute** between the parties-the cause of the flooding of appellant's premises. Appellant's own testimony as to her inexpert observations of the catch basin is weak and easily subject to discredit when cast against the unequivocal assertions of respondent's agents. **The objective nature** of the newly discovered evidence and its **singular importance in fairly determining the issue** between the parties renders it substantially more than cumulative and readily elevates it out of the realm of being simple impeachment.

*Id.* at 640 (em. added). Contrary to the Stenneses argument, this is quite inapposite.

The “main issue” in dispute here was whether the Stenneses intentionally violated the stipulated antiharassment order, thus being in contempt. Whether Mr. Thomason believed at the time that he could get the Stenneses evicted and that he was working toward that goal is not the “very

heart of the dispute.” As discussed above, this was an immaterial, collateral issue. The very heart of the dispute was really whether or not the Stennes’ admitted acts were done to contact or surveil the Thomasons – something the Speidel Bentsen notes cannot assist the trier of fact in determining. Such evidence has neither an “objective nature” nor a “singular importance in fairly determining the issue.”

In *Praytor*, the evidence went beyond cumulative because it was objective evidence that resolved a factual dispute present at trial that centered on the main issue in litigation. So did the evidence in *Roe*. But here, the Stenneses never created the record to appropriately place their collateral theory at issue and the Trial Court found them in contempt based on conduct they admitted and the Court’s own inference of their harassing intent. The intent finding did not come, as the Stenneses suggest, from Mr. Thomason’s testimony.

**c. This Evidence is Merely Impeaching**

Here, the Stenneses argue that the evidence is beyond impeaching for the same reasons that the *Roe* court concluded the evidence in that case was beyond *cumulative*. Their reliance on *Roe* as to *impeaching* evidence is misplaced because that evidence (an admission against interest) was “competent evidence...even had Roe not been a witness.” *Roe*, 100 Wn. at 315-16.

In *O'Brien v. City of Seattle*, 161 Wn. 2d 25, 296 P. 152 (1931), the trial court granted a new trial on the basis of newly discovered evidence. At trial, the Plaintiff testified she had been stepping from a streetcar when the vehicle started, throwing her to the ground. *Id.* at 26. The City responded that due to the operation of the compressed air system (shared by the brakes and the door), it was impossible to move the vehicle while the door was open. *Id.* After trial, the Plaintiff obtained affidavits from former city employees who stated that in fact the vehicle could be started and moved with the door ajar. *Id.*

The Stenneses attempt to use *O'Brien* to support the argument that there is a different analysis for orders granting vs. orders denying a new trial. The abuse of discretion *analysis* is the same, but the requisite *showing* is different. *McUne v. Fuqua*, 42 Wn.2d 65, 78, 253 P.2d 632 (1953) (“A much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying a new trial.”). The *O'Brien* opinion did not address whether the analysis differs – it merely reaffirms the longstanding principle that discretionary grants and denials of new trials are reviewed only where discretion has been abused. *O'Brien*, 161 Wn. at 27. In short, the *O'Brien* holding stands for the proposition that absent a showing of abuse of discretion, the Court of Appeals will not pass

on the issue, even if they may reach a different conclusion from that of the trial court were they considering the issue *de novo*. *See Id.* at 28.

The Stennes' analysis of *Donovick* is misplaced as well. They argue that the evidence in *Donovick* was "nothing more than disputed testimony that a material witness (Anthony) had contradicted himself outside the courtroom after trial, which the witness denied under oath." *See Resp. Brief* at 33-34. But the Speidel Bentsen notes fail to rise to even this. There is no testimony for these notes to contradict because the Stenneses failed to create a factual issue as to whether Mr. Thomason was actually trying to evict them.

What the Stenneses miss is that a trial court may grant a hearing if all five of the factors in the test therefor are met. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn.App. 73, 88, 60 P.3d 1245 (2003) (citing *Holaday v. Merceri*, 49 Wn.App. 321, 329, 742 P.2d 127 (1987)). Failure to satisfy any one of these factors is grounds for denial of the motion. *Id.*

In the Trial Court, the Stenneses sought to introduce this evidence *only* for its impeaching effect. *CP* at 430. But there was nothing to impeach because Mr. Thomason was never asked if he had motivations to evict the Stenneses. Rather, all the evidence in the record indicates that no such eviction was pending and that the parties agree Mr. Thomason has no judicial mechanism to force an eviction. The Stenneses are seeking a new

trial on the grounds that newly discovered evidence could impeach Mr. Thomason on an issue they failed to appropriately create in the trial court so they can argue a hypothetical circumstance that the parties agree is not occurring and cannot occur via the courts and that the Trial Court stated (*RP* at 279-80) was created by the Stenneses own stipulation in October of 2018... *if* such jeopardy exists.

**5. The Providence of Appeal is not at Issue**

The Stenneses argue that this appeal was improvidently granted. This is a frivolous argument on an issue not before the Court. This Court has already ruled: “The appeal is a matter of right under RAP 2.2(a)(9).” *See Order Granting Motion to Modify Commissioner’s Ruling*. Under RAP 2.2, review is not “granted” – it is as of right. Review is only “granted” under RAP 2.3, discretionary review. This argument is likely an artifact of misunderstanding the Court’s Order on May 16, reduced to writing on June 20, 2019.

The Stenneses argue that “the trial court never ordered sanctions or revisions to the Order for Protection.” *Resp. Brief* at 35. This is flatly incorrect. The Trial Court ordered sanctions *as* revisions to the Orders for Protection. Just as the Court may order transfer of property by decree of dissolution, the lack of a deed does not mean the Decree is not final.

An “order designed to ensure compliance” (*see Resp. Brief* at 35) *is itself* a remedial sanction. RCW 7.21.030(2) (“...impose one or more of the **following remedial sanctions**:... (c) An **order designed to ensure compliance** with a prior order of the court.”). The Trial Court recognized this, stating:

...RCW 7.21.030 talks about **remedial sanctions** and paragraphs or sub two, it says that if the Court finds the person, the Stenneses have failed or refused to perform an act that is within their power, and here we’re talking about they’ve refused to comply by having contact... under 2(c) the Court can consider an order designed to ensure compliance with a prior court order and then under 2(d) any **other remedial sanction** if the Court finds the initial sanctions would be ineffectual.

And so, counsel, this brings us back then to the order that’s currently in place. The Court hereby amends the order as allowed under (2)(c) where it says respondents are restrained from making any attempts to contact. **The word contact will now include direct or indirect. It will expressly prohibit Mr. or Ms. Stennes from discharging a firearm on their property...**

[I]f we look on page two of the current order, the box that says stay away. **That’s not checked and I’m going to... check that box that orders the Stenneses to stay away** and they will be restrained from entering or being upon... the property of the petitioner’s residence or place of employment... And then, down below from entering the residence or workplace. The key difference to me has to do with **expanding the definition of no contact and expressly prohibiting the discharge of firearms.**

*RP* at 284:15-287:3 (em. added). There is no question whatsoever that the Court ordered these terms as a sanction:

MR CHASE: Just so that the record is clear, Your Honor, the only **sanction** that the Court is taking is the **modification of the existing order**. There is no **other sanction** that the Court is ordering or considering today?

THE COURT: **That's right**. Although, I'm taking under advisement the issue of fees and awarding of those. There was one other issue you asked that this be made permanent. Ms. Garella, kind of in closing, suggested that the order that's in place now should be terminated. I'm not going to terminate it. I'm am considering making it effective on a more permanent basis, because the Court finds<sup>4</sup> that without an order, a portion of the behavior is likely to either to start up or continue and **so right now the order is effective until October 18 of 2020. I'm making it effective now until October 18 of 2025.**

*Id.* at 290:5-19 (em. added).

The reason that the Stenneses are arguing that the June 20, 2019 order (*CP* at 514-18) was not final is because the updated antiharassment orders that the Court directed in that order were never signed by the Stenneses. Instead, they moved to vacate the order. Nevertheless, the June 20 order clearly held them in contempt (Conclusions 4-5) and clearly ordered remedial sanctions (Conclusion 6), just as the Court did orally on May 16, 2019.

The Stenneses are also wrong about the potential posture on remand. Reliance on CR 54(b) is misplaced – the language they quote near the end of this subsection applies where the Court has issued a decision “which

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<sup>4</sup> This finding should be construed to make the extension of the order a remedial sanction under RCW 7.21.030(2)(d), rather than (2)(c).

adjudicates **fewer than all the claims or the rights and liabilities of fewer than all the parties...**” CR 54(b) (em. added). CR 54(d) notes that claims for fees and expenses may be done *after* entry of judgment. Here, the Court determined all rights and claims and reserved only on fees.

As a more practical matter, the Stenneses fail to explain how the June 20 order is not final where it clearly delineates the finding of contempt and the remedial sanction to be imposed. Supposing that the June 20 order is left in place, the only remaining action is for the Stenneses to sign the updated Antiharassment Orders containing the numerous orders designed to effectuate compliance (remedial sanctions) ordered by the Trial Court immediately following the hearing. The Stenneses did not move for reconsideration of the May 16 oral ruling; they did not appeal the finding of contempt in the June 20 order; they did not seek reconsideration of that order. There is no mechanism by which they may attack the June 20 order on remand. Even if somehow reversing the order vacating the June 20 order had the effect of leaving the parties with *no order* in place rather than reinstating the June 20 order, the next step would *still* be to draft and present what the Court ordered in May of 2019. On remand, this case returns either to the pre-hearing landscape or the post-June 20 order landscape.

Here, there is no dispute that the June 20, 2019 order found the Stenneses in contempt. As for sanctions, the Court expanded the definition

of contact, prohibited firearm discharges on the Stennes property, added a stay-away provision, and increased the duration of the order by five years, all explicitly as remedial sanctions designed to effectuate compliance with the original antiharassment orders. The Trial Court's decision to issue an updated order *is itself the sanction*. RCW 7.21.030(2)(c). The record is clear as to what the sanction would entail, and in fact, the Stennes' signature on the updated order was the purge condition for contempt. *CP* at 518. The Stenneses argue that the Trial Court did not issue sanctions, but the record is crystal clear as to exactly what those sanctions entailed.

#### **6. Attorney's Fees**

The Thomason's argument is that the statutory language "**as a result of the contempt and any costs incurred in connection with the contempt proceeding**" is the "applicable law grant[ing] to [the Thomasons] the right to recover reasonable attorney fees or expenses on review..." RCW 7.21.030(3) (em. added); RAP 18.1(a).

As both parties point out, caselaw recognizes the ability to obtain fees defending an appeal of a contempt order. But actions under Chapter 10.14 RCW are actions in equity. *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003). It is not equitable for the fee mechanism on review to be so one-sided. To the extent the Thomasons' argument is not encompassed in the statute, they make a good faith argument that RCW 7.21.030(3)

permits fees on appeal where the result on remand is that the other party is in contempt.

Fundamentally, what the Thomasons are doing *is* defending a finding of contempt on appeal. It is unusual that they do so as the *appellant*, but this is because the appeal arises from an order granting new trial, rather than a contempt order. Had the Stenneses appealed the June 20, 2019 order, the Thomasons would be entitled to fees on appeal under the cases cited by both parties. What the Thomasons propose is consistent with the *application* of caselaw providing fees to a party defending an appeal of a contempt order. If the result of the appeal is a finding of contempt, the prevailing party should be allowed those costs “as a result of” and “incurred in connection with” the contempt action. RCW 7.21.030(3).

**7. Other Replies:**

The Response begins by objecting to the long-winded recitation of facts in the Appellant’s Brief. In the Motion for New Trial, the Stenneses placed Mr. Thomason’s motivations for filing the Antiharassment and Contempt proceedings at issue. Giving this Court a complete picture of the record on this issue is not a “clumsy and misleading attempt to prejudice the Court.” *Resp. Brief* at 5. To the contrary, the ongoing harassment of the Thomason family speaks volumes to the issue the Stenneses themselves raised. Their

motivation for bringing these proceedings was to stop the Stennes' harassing behavior and protect their children.

Moreover, motions for a new trial under CR 59 may be done, as was done here, upon affidavit. CR 59(c). The Thomasons had already submitted several declarations to the Court and were not required to re-submit these materials and needlessly clog the court file with duplicate material. In the Response to the Stennes' Second Motion for a New Trial before the Trial Court, the Thomasons called the Court's attention to Mr. Thomason and Mr. Upegui's declarations that were already in the Court's record. *CP* at 574. This Court may properly consider evidence in the record called to the Trial Court's attention in relation to the issues on appeal.

The Response suggests, broadly, that Mr. Thomason's credibility was a central issue in the proceeding. The Stenneses argued to the Trial Court that Bert Stennes' Will says that Mr. Thomason could force an eviction. *RP* at 378:24-379:2. But the Will is quite clear that the choice of whether or not to institute eviction proceedings lies with the Trustee or the Personal Representative, not the Okanogan County Superior Court, and not Mr. Thomason. *CP* at 95, 99-101. Moreover, the discretion of the Trustee/PR is hinged on acts that "constitute[] **harassment**" of or "**harasses** or harms" an adjoining landowner. *Id.* (em. added). As the Trial Court pointed out, any jeopardy arises from the original order in October, 2018; a court could

conclude that “there’s already been in effect, practically speaking, a finding of behavior which gets them in trouble under the Will.” *RP* at 279:8-11; 19-24. But, yet, no eviction.

This is the central problem with the Stennes’ argument. Nothing that happened in Okanogan County Superior Court would bind the Trustee’s or Personal Representative’s “sole discretion” under the will. And a finding of *contempt* for violating an antiharassment order is different from acts that constitute *harassment*. Whether or not Mr. Thomason was trying to get the Stenneses evicted has nothing to do with the Trial Court’s inference as to Mike Stennes’ intent when he was playing “80’s hair metal” on Easter Sunday loud enough for the Thomasons and their guests to hear the music through the orchard separating their properties. *RP* at 74, 206-07; *CP* at 218 (diagram showing distance). Finally, where the contempt issue is whether there has been *contact* or *surveillance*, the inference made is of intent to contact or surveil – not intent to harass. The Stenneses have repeatedly confused this central issue, even Responding: “Here, the new evidence strikes to the heart of the factual matter before the trial court, which is whether the Stenneses willfully violated a court order by *harassing* the Thomasons.” *Resp. Brief* at 26 (italics added). This is flatly incorrect. The Thomasons did not need to show unlawful harassment or a course of conduct; they needed to show *one act*, not a pattern of conduct composed

of a *series of acts* over a period of time evidencing continuity of purpose, that violated the antiharassment orders. *See* RCW 10.14.020.

The final broad problem with the Stenneses argument returns to the issue of impeachment and cumulative evidence. Suppose, *arguendo*, that the Stenneses' eviction theory is true. The Stenneses only ever offered this material for its impeaching effect. *CP* at 430. The argument they advance is, boiled down, a civil version of the devastating effect proviso in *State v. Savaria*, 82 Wn.App. 832, 919 P.2d 1263 (1996). They draw support for this from cases like *Roe* and *Praytor*. But in both of those cases, the new evidence filled a gap for testimony that was not and could not be explored at the trial court level. Here, both parties' Counsel and the *Court itself* explored this issue. The Trial Court considered and rejected the Stenneses argument at the hearing in May of 2019. Cumulative evidence on this same theory that is merely impeaching is not grounds for a new trial.

### **C. CONCLUSION**

The new evidence here does not share a logical nexus to the facts and circumstances of the conduct the Stenneses admitted and which the Trial Court found were violations of the antiharassment orders. Even if the evidence has a sufficient such nexus, it does nothing more than bolster their trial argument that Mr. Thomason's real purpose in court was working towards their eviction - a goal that the Stenneses argue he cannot achieve

through the courts and that they admit has not occurred. The Stenneses claim that the Speidel Bentsen notes are impeaching, but given the record of this case and the original Antiharassment Petition (*CP* at 521, noting the fear for the well-being of a minor child, RCW 10.14.020(2)), there is nothing inconsistent about wanting to evict the Stenneses *and* fearing for the safety of the Thomason family. The new evidence does no work to impeach Mr. Thomason's testimony about fearing for his and his family's safety. The argument that Mr. Thomason's real motivation in bringing these proceedings was to evict the Stenneses and somehow take their home is absurd. This proceeding was first brought because the Stenneses placed the Thomason children in danger with golf balls, jet skis, and their dogs. The contempt proceeding was brought because after the Stenneses agreed to stipulated antiharassment orders, they continued to contact and surveil the Thomasons and their children.

The Thomasons thus respectfully request that this Court reverse the Superior Court's decision granting a new hearing and remand the matter for consistent proceedings and the issue of fees.

Respectfully Submitted this 10<sup>th</sup> of August, 2020,

  
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