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No. 37037-2-III

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

ALEXANDER THOMASON, *et al.*

v.

MIKE STENNES and DONNA STENNES.

APPELLANT'S 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 appeal the trial Court’s decision granting the Stenneses a new trial.

At issue in this Appeal is whether the Stenneses met their burden in the trial Court under CR 59(a)(4) to show that newly discovered evidence was material; beyond cumulative or impeaching; and would likely change the outcome of trial. The Thomasons contend that they did not meet their burden because the newly discovered evidence lacked the necessary nexus to the issues; was cumulative *and* impeaching; and could not have changed the outcome where the trial Court had independent grounds for the decision that were not undermined by the new evidence.

B. ISSUES FOR REVIEW

Assignments of Error:

- (1) The Superior Court erred in denying the Thomason’s Motion to Reconsider the Superior Court’s Order Granting the Stennes’ Motion for a New Hearing;
- (2) The Superior Court erred in granting the Stennes’ Motion for a New Hearing for newly discovered evidence under CR 59(a)(4), newly discovered evidence.

- (a) The Superior Court erred in deciding the newly discovered evidence was material;
- (b) The Superior Court erred in deciding the newly discovered evidence was beyond merely cumulative or impeaching evidence; and
- (c) The Superior Court erred in deciding that the newly discovered evidence would likely change the outcome of the trial (if the trial Court indeed so decided).

Issues Pertaining Thereto:

- (1) Whether newly discovered evidence passes materiality muster where the evidence and the purpose of its use was unrelated to the legal and factual issues before the trial court;
- (2) Whether newly discovered evidence is merely cumulative where it merely adds support to facts and argument developed in the trial court;
- (3) Whether newly discovered evidence is merely impeaching where (i) credibility is the only purpose for which the evidence was offered; (ii) credibility is the only purpose to which the evidence could be used; and (iii) the Respondent, despite opportunity, failed to elicit the to-be-impeached testimony in the trial court; and

- (4) Whether newly discovered evidence would likely change the outcome of a contempt proceeding where the trial Court found contempt based on at least four incidents that are not undermined by the newly discovered evidence.

C. STATEMENT OF THE CASE

The Thomasons and the Stenneses are next-door neighbors; both reside along the Columbia river a few minutes South of Pateros. *See Clerk's Papers ("CP")* at 218 (overhead image¹). Referencing this overhead image oriented with the text upright (90 degrees clockwise), the Columbia River is at the top of the image; Highway 97 is off the image to the bottom. *See Id.* Near the bottom-right corner, a spur runs from Starr Road to the railroad tracks, where it intersects and merges with Stennes Point Drive.

When this road crosses to the river side of the railroad tracks, it splits into three separate driveways. The leftmost split is a long driveway that serves the White residence (uninvolved) at the far left and the Thomason property in the middle of the image. *See Id.* The second split is a driveway that runs at a sharper angle to the railroad and serves Mike & Donna Stennes' residence. *Id.* The third split is a driveway serving another house

¹ The image at CP 218 has certain identifying markings on it; a similar image was admitted at the hearing. *See VRP* at 47:5-48:3. Here, the image is used for illustrative, rather than substantive, purposes. With apologies to the court, this description is somewhat cumbersome, but nonetheless necessary – particularly regarding surveillance issues.

that is owned by the Estates of Bert & Evelyn Stennes². In the very bottom-right corner, the parked vehicles are on a portion of the property owned by Mike's son, Marcus Stennes. *Id.*; *See also Verbatim Report of Proceedings ("VRP")* at 118:21-119:20; 197:4-6.

The Thomason and Stennes properties are separated by an orchard and, as discussed further below, a privacy fence. While it is difficult to see in the image at *CP* 218, the Thomason property includes a "dog leg" that runs from the orchard down the driveway to the intersection on the river side of the railroad tracks. This dog-leg section is where the surveillance allegations concerning the children arise.

1. Issues with the Stennes Begin, Persist, and get Worse:

The Thomasons began having problems with the Stenneses in 2016. During that summer, there were multiple instances involving the Stennes dogs. Their dogs attacked contractors working at the Thomason property, biting two people. *CP* at 185:9-12³; their dogs tried to attack and bite three of the Thomason children right in front of Ms. Thomason, but were foiled by the Thomasons' own dog; *Id.* at 186:20-23; and finally, Donna Stennes deliberately called the Thomasons' dog out of their garage toward the

² The information as to the ownership of **this** house does not seem to be in the Court's record, but it is likely of no import here.

³ Many citations to the Clerk's papers herein are to pleadings on lined paper, and so a pincite is provided where available or appropriate.

shared driveway and then released her three dogs, which attacked and severely injured the Thomasons' Great Dane puppy. *Id.* at 187:12-19.

In the summer of 2017, the Thomasons discovered many golf balls on and around their beach where the Thomason children play. When the Thomasons confronted the Stennes, Mike and his son Brit admitted to Mr. Thomason that people were hitting golf balls off their back porch. *Id.* at 185:14-23). In June of 2017, Mr. Thomason observed one of the Stennes' dogs trying to get into his chicken coop. As he was headed towards the coop, one of the Thomason children opened the door and called his father. The Stennes' dog turned and begin to run towards his son, barking. Mr. Thomason was able to scare it off. *Id.* at 186:1-7.

In the spring of 2018, more golf balls were discovered, and so the Thomasons planted some trees and built a fence to try to block the projectiles. While the fence was under construction, Mike Stennes approached the workers, exposed himself, and urinated on the fence posts. *Id.* at 185:1-3; 378, ¶4 (Declaration of Jose Maldonado).

On April 27, 2018, the Thomasons discovered their irrigation line was broken. Upon inspection, Mr. Thomason could tell that the pipe had been cut and did not just come apart. *Id.* at 184:10-20. After the repair, the Thomasons' irrigation water was mysteriously turned off on multiple occasions between May and June. *Id.* Mr. Thomason's irrigation contractor

did not turn the system off in the middle of the night; but the Stennes know where the controls are. *Id.*

The Thomasons have experienced constant problems with surveillance by the Stenneses, primarily Donna. On April 30, 2018, while Mr. Thomason was walking through his orchard, Donna screamed, “What the [unintelligible]. Mike! Are you getting this on camera?!” *Id.* at 184:1-9. In May, Mr. Thomason was driving past the orchard portion of his property when Donna ran out to within 50 feet of him, began filming, and began yelling about sprinkler spray drifting onto their property; Mr. Thomason installed sprinkler guards. *Id.* at 183:19-23. On June 9, 2018, Donna filed Mr. Thomason and two of his children riding bikes along their access road. *Id.* at 183:13-17. On July 27, 2018, Donna came out to the road on a 4-wheeler to film Mr. Thomason and an irrigation contractor. *Id.* at 183:17-19. Donna also filmed the Thomasons contractors on multiple occasions. *Id.* at 378-79, ¶5, ¶11. Mike Stennes also set up a camera pointed at the Thomason’s house; Mr. Maldonado observed him doing this. *Id.* at 378, ¶8. Mike showed Mr. Thomason a picture from the cameras, showing the Thomason’s bathroom. *Id.* at 186:8-19.

Through the summer of 2018, the Thomasons had problems with vandalism of their bushes. On multiple occasions, the Thomasons

discovered damaged blossoms, cut stems, and other damage to their bushes. *Id.* at 183:1-6.

From June 30 to July 2, 2018, the Thomasons were out of town. Upon their return, they discovered that their well had been turned off; the chicken coop water valve was shut; and the key for the irrigation box on the side of their house had been bent by 90 degrees. *Id.* at 183:7-12.

The next day, July 3, 2018, Mike Stennes dug a ditch across the Thomason property, ostensibly to prevent water draining across the road. *Id.* at 182:16. The Thomason sprinklers do not create a water problem, but it is possible that the Gebbers' sprinklers (of which there are dozens along the road) could cause water drainage issues. *Id.* Regardless, Mr. Thomason paved the road in August, 2018, to avoid any water damage to the surface. While contractors were working on this project, Mike Stennes told them multiple times to place a speed bump at the entrance to the Thomason's driveway. *Id.* at 182:20-23. Mr. Thomason had to leave work to go prevent Mike from harassing the contractors. *Id.*

On July 14, 2018, while the Thomason children were playing on paddle boards on the river in front of the Thomason property, Mike or Donna (the Thomasons could not see which) raced by the children on their red jet ski at about 40-50 mph and at a distance of 30-40 feet. *Id.* at 182:9-15. The wake nearly knocked the children into the water. *Id.*

On July 28, 2018, Mr. Maldonado installed some solar lights along the Thomasons' driveway. After placing the lights, he discovered that the lights had been removed and thrown into a pile. *Id.* at 379, ¶10. He saw Donna Stennes walking away from the pile. *Id.* Donna later admitted to police that she moved the lights but stated she did not damage any. *Id.* at 199.

2. The Predicate, Stipulated Antiharassment Order:

As a result of the long-term course of conduct that became more and more severe over the summer of 2018, the Thomasons sought an Antiharassment Order against the Stenneses, filed September 21, 2018. *Id.* at 521-34. Without the need for a hearing, the Stenneses stipulated to the entry of Antiharassment Orders protecting the Thomasons and their children on October 18, 2018. *Id.* at 508-13.

3. Continued Harassment:

Just days after the Antiharassment Orders were entered protecting the Thomasons, on October 23, 2018, Mike flooded a portion of the Thomasons' property. After the Thomasons installed a fence between the properties, Mike began leaning equipment on the fence, causing it to lean slightly. *CP* at 5:4-13. Mr. Thomason hired Mr. Maldonado to reinforce the fence; he dug holes for another line of posts to be set in concrete. *Id.* After he dug the holes, Mike moved a water sprinkler to that area and left it on overnight, flooding the holes. *Id.* The Stenneses had not previously watered

that area. *Id.*; *see also VRP* at 36:14 *et seq.* Mike blamed this on valve failure. *VRP* at 212:16-213:12.

Between October and December, the Thomasons experienced loud banging in the middle of the night on different occasions. *VRP* at 67:24-68:4. Twice, they found rocks, but have been unable to identify the cause (though they believe it was the Stenneses). *Id.* at 68:10-17. This did not occur after December 15, 2019. *Id.* at 68:17-19.

On December 15, 2018, the Thomasons accepted delivery of a trained protection dog. *CP* at 1. Mr. Upegui, who delivered the animal, indicated he had accidentally gone to the Stenneses house first, and that Mike had been very interested in the decals on his vehicle (for his company, K9 Protection). *Id.* at 2:1-4. Within minutes of his arrival at the Thomason house, both he and Mr. Thomason were outside when they heard 3-4 suppressed rifle shots from the Stennes property. *Id.* at 2:5-9. On Christmas Day, 2018, Mr. Thomason was outside at about 8:00 PM in front of his house; again, he heard Mike shooting a rifle. *Id.* at 2:21 *et seq.*; *see also VRP* at 38:14 *et seq.* Mike denied both of these incidents at the hearing. *VRP* at 201:24-202:5; 202:22-203:5.

On January 16, 2019, a surveyor ran stakes along the property line fence; Mr. Thomason inspected them on January 17, 2019. *CP* at 3:3-8. He walked along the fence line as it snowed; because of the location of the

properties (at the bottom of the valley, well below the highway, and on the river), it was very quiet, and the only sound was the snow crunching under Mr. Thomason's shoes. *Id.* About halfway down the fence line, Mr. Thomason heard a suppressed gunshot on the other side of the fence, about 30 feet away. *Id.* at 3:9-14. There was no safe place where someone could shoot right there other than into the ground. *Id.*; *see also* 218 (overhead image of area); *see also* *VRP* at 202:10-21 (Mike testifies that shooting in the area would be unsafe). Mr. Thomason walked about another 15 feet and heard Mike say, "You're a goofball." *Id.*; *see also* *VRP* at 52:9 *et seq.* Mike denied this incident as well. *VRP* at 205:6-9. However, he did indicate that he called his dog a goofball. *Id.* at 205:10-206:1.

The Thomasons believe that Mike Stennes has "painted" their car with a rifle-mounted laser on multiple occasions. *Id.* at 3:20 *et seq.*⁴ Mr. Thomason has previously seen a rifle-mounted laser in Mike's possession. *Id.* Mr. Thomason has equipped their vehicles with Escort 360 Max⁵ laser/radar detectors. *Id.* On multiple occasions, the laser detector has

⁴ The Stenneses will surely point out that the Court was clear that no part of its decision would be based on the laser event. *VRP* at 157:21-158:6. We include the facts related to this event because it goes to the reasons that the Thomasons filed the Motion for Contempt – a central point of attack in the Stennes' post-hearing Motions.

⁵ *See* *VRP* at 60:22-62:9 and 64:20 *et seq.* for a discussion regarding this device. Counsel for the Stenneses did note a standing objection to hearsay and speculation, which would likely be levied at this discussion. The import, however, is not in the actual capabilities of the device, but rather as to Mr. Thomason's belief that Mr. Stennes was aiming a rifle at his children in the vehicle. *See* RCW 10.14.020(2) ("...the course of conduct would cause a reasonable parent to fear for the well-being of their child.")

activated while in line-of-sight to the Stennes' house. On February 10, 2019, Mr. Thomason observed the laser detector chirp as he came into line of sight of the Stennes's house; it continued chirping until he was no longer in line of sight. *Id.* at 4:6-13. There were no other cars around. *Id.*

As the weather warmed and the Thomason children began playing outside, the Stenneses would come outside and watch or drive nearby the Thomason children. *Id.* at 388. On March 22, 2019, Mike drove his side-by-side very slowly down a parallel road across the railroad tracks, appearing to watch Ms. Thomason and the children. *Id.* at 390:8 *et seq*; *VRP* at 111:15 *et seq*. Mike admitted to driving past the group four times, but attributed it to two trips to a storage shed. *VRP* at 214:21-215:4.

On April 2, 2019, Ms. Thomason and the Thomason children (as well as other, related children) were outside; the children were riding bikes and scooters up and down the paved Thomason driveway. *CP* at 389:2 *et seq*. As they got towards the end of the driveway, where it runs adjacent to the Stennes' property, Donna's truck started up and quickly accelerated towards the fence line. *Id.* The truck stopped on the other side of the fence and the engine revved over and over for about fifteen seconds. *Id.* *See also, VRP* at 115:19-118:5. Then, the truck slowly crept out of the Stennes property, crossed the railroad tracks, and parked a few hundred feet away at Marcus Stennes' residence. *Id.* (*CP*). The driver backed the vehicle in and watched

Ms. Thomason and the children through the windshield. *Id.*; *See also*, *VRP* at 118:21-119:20. Donna Stennes admitted to being the driver. *VRP* at 233:10-12. But she denied doing so to surveil the Thomasons and *Id.* at 233:20-234:2.

On Easter Sunday (April 21, 2019), the Thomasons and some friends and family returned home from Church to have an Easter brunch. *VRP* at 74:10-12. When they did, the Stenneses began playing very loud music from their property, described as “demonic like screaming rage death music.” *Id.* at 74:15-16. Mike denied playing “satanic death music” but admitted to playing “80s hair metal.” *Id.* at 206:8-207:3.

4. Motion for Contempt and All-Day Hearing:

Having had enough, the Thomasons brought proceedings against the Stenneses for Contempt in April of 2019, citing violations of the Orders of Protection. *CP* at 451-52. Because of the numerous gun discharge events, they also sought an Order to Surrender Firearms. *Id.* at 495-98. These matters proceeded to a hearing⁶ on May 16, 2019.

During cross-examination of Mr. Thomason, counsel inquired, “Who owns the home that Mike lives in?” *VRP* at 97:3-4. After an objection

⁶ Which is referred to interchangeably as a “trial” herein. *See* CR 38 (“A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact.”)

and some discussion of the Chelan County matters *Estates of Stennes*⁷,
counsel explained the alleged relevance of this line of inquiry:

MS. GARELLA: [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.

VRP at 98:22-99:1.

This was explored further later in the proceeding when counsel for the Stenneses recalled Mr. Thomason as their witness. *VRP* at 241:15 *et seq.*

Counsel inquired:

Q: [by Ms. Garella] Okay and you’ve made numerous complaints to the personal representatives about Mike and Donna, is that correct?

A: I have, yes.

Q: And you’ve made numerous complaints to the sheriff?

A: I have.

Id. at 243:12-17. Then, on cross:

Q: [by Mr. Chase] And you have complained to other entities?

A: I have.

Q: And did you do that before you sought court action?

A: I did.

⁷ *In Re Estate of Bert Stennes*, 17-4-00253-6; and *In re Estate of Evelyn Stennes*, 17-4-00322-0.

Q: And did any of the other entities provide you any type of relief for these complaints?

A: No, they didn't do anything.

Q: Okay, so you coming to court was your last option?

A: This was the worst last thing I wanted to have my personal problems aired in front of a court, yes, this is the last option.

Id. at 244:14-24. Then, the *Court* pressed deeper:

THE COURT: So, counsel, I hate to do this, but I'm gonna ask – I'm gonna ask Mr. Thomason, you commented that in your opinion there are no trustees for the Stennes Family Trust.

MR. THOMASON: It's my understanding – it's my understanding that in order for there to be a trustee, a trust has to be funded and this property has to be placed inside of this trust and that has not occurred, to my knowledge, and so therefore, there's no trustee. They're merely in the – they're merely still in the process of a probate matter.

[. . .]

THE COURT: Has – has any PR or trustee, if there is on, within the probate taken any action based on the agreed order from last fall to somehow evict the Stenneses?

MS. GARELLA: No.

MR. CHASE: No, your honor.

VRP at 252:18-253:3; 254:3-8. On direct examination of Mike Stennes, counsel explored this issue again:

Q: [by Ms. Garella] Okay, how did you learn that you [and

Mr. Thomason] were no longer friends?

A: Because my father had recently passed away and there was a Will that was written that had a lot of, I don't know what you would call them, points in them that were less than favorable and I had to be a good neighbor or I could be evicted from my house and all of a sudden I started getting all these complaints, letters from - -

[. . .]⁸

Q: Okay, so what's your understanding about the meaning of this?

A: That I can be evicted for anything that's being – that's deemed harassment by the trustee.

[. . .]

Q: And what's that – what's your concern [about Mr. Thomason]?

A: Fake allegations that –

Q: Why would he do that?

A: To get my house – to get me evicted from my house.

Q: And why would you think he would do that?

A: Because he wants to own it. He would like to own that property.

[...]⁹

Q: Okay, has [Mr. Thomason] ever indicated to you directly that he would like to live in it?

⁸ Omitting discussion and recitations of the provisions of the will; the document speaks for itself.

⁹ Omitting a stricken question and answer, and comments thereon.

A: Yeah, he said he'd love to have a place like that.

Q: Like that.

A: Yes.

Q: But he didn't say your place?

A: No.

VRP at 186:18-25; 190:22-25; 191:10-16; 192:8-13. Then, on cross:

Q: [by Mr. Miller] [...] You testified that the home you reside in currently is actually owned by the Bert and Evelyn Estate, is that correct?

A: No.

Q: What's – who's it owned by?

A: It's yet to be determined. Right now it's Bert Stennes and Evelyn Stennes separately.

Q: Correct, but it's not the Stennes Family Trust –

A: No.

Q: -- it's one of the estates?

A: Yes.

Q: Okay, so if it's not the Stennes Family Trust, who is the trustee? [sic]

A: That would be Daniel Appel.

Q: Okay.

A: And Roberto Castro¹⁰.

¹⁰ Daniel Appel and Roberto Castro were, at that time, the *personal representatives* of Bert and Evelyn's Estates, respectively. *See VRP* at 367:22-368:1.

Q: Okay and have either of them made any attempt to evict you?

A: No.

VRP at 224:2-22. In closing argument, counsel stated:

MS. GARELLA: [...] It seems to me that to a certain degree what we have is something that's going deeper and vaster than what is just before the Court today, a bigger story here. Because, Mr. Thomason admitted on the stand that he thought – yeah, he thought the PRs could in fact evict the Stenneses and then they didn't take that position. And, he wrote letters to that effect and the Stenneses have been afraid, have been worried about losing their home.

VRP at 266:20-267:2. The Court took this argument under advisement:

THE COURT: [...] Mr. Thomason, this has all compounded. It is all complicated by the fact that you are mentioned prominently in Mr. Stennes' father's Will. You were his attorney and the provision that talks about the trustee or arguably, the personal representative having potentially the authority to - - to remove the Stenneses if they believe in their sole discretion that they're not acting on their best behavior at all times. That's a lot of power and it creates, and you have to agree as an attorney, you have to agree that it creates a question.

[. . .]

... and Ms. Garella, you mentioned concern on behalf of your clients about well, if the Court finds them in contempt there may be – they may be in jeopardy with regard to any leasehold or property right that they have with where they currently reside. I get that. Okay, but the problem with that argument is that if you look at the original order from back in October, it says down at the bottom of page one, based upon the stipulation of the respondent, key word, stipulation.

[. . .]

So, in the end, the Court is left with somehow trying to deal with this in a way that doesn't have any impact on any future proceedings in Chelan County, because that is not my intent and I want to record to be clear that this Court is, as I've said now multiple times, struggling with the issues that I think are presented by the Will and what it allows for Mr. Thomason to do, at least potentially. In the end, I can't worry about that.

VRP at 273:11-20; 279:3-11; 283:21-284:3.

Ultimately, the Court found the Stenneses in contempt and directed a modification of the predicate antiharassment order. *VRP* at 284:14 *et seq.*. Presentation of orders on the Thomason's Motions was scheduled for June 20, 2019. *CP* at 514-18.

5. Respondents' Motion for New Hearing

On June 7, 2019, the Stenneses moved for a New Hearing, citing irregularity, lack of substantial justice, void judgment, and the appearance of fairness doctrine. *Id.* at 405-17. This Motion was *not* noted for hearing on June 20 with presentation of the other orders.

On June 20, 2019, by all appearances in the Courtroom, counsel for the Respondents failed to appear either in person or telephonically. The Court entered orders on the Motions for Contempt and to Surrender Weapons, but also took up and denied the Motion for New Hearing *sua sponte*. *Id.* at 518; 505-06. After the hearing, it was soon determined that

Respondent's counsel did not in fact fail to appear. Rather, a confluence of clerical errors prevented her telephonic appearance. *Id.* at 423-24.

On June 28, 2019, the Stenneses filed a second Motion for New Hearing and to Reconsider the denial of the first Motion for New Hearing, citing the appearance of fairness doctrine, new evidence, insufficiency of evidence, and irregularities. *Id.* at 418-42. This Motion was set for hearing on July 18, 2019. On July 3, 2019, the Stenneses also moved for a change of venue, also to be heard on July 18, 2019. A flurry of briefing on issues of venue, new hearing, and fees followed. *Id.* at 443-50; 453-58; 499-501; 535-76; 346-76; 240-88; 231-35; 22-40.

Following this Court's ruling on the Thomason's Motion to Modify, the only remaining issue on appeal is newly discovered evidence, CR 59(a)(4). On May 17, 2019, the day after the hearing in Okanogan County, the Chelan County Superior Court directed discovery in *Estate of Bert Stennes*, 17-4-00253-6. *CP* at 136-41. Counsel for the Stenneses received the first set of discovery materials on June 10, 2019, consisting of thousands of pages of records. *CP* at 45¹¹.

Within these documents, the Stenneses discovered notes by Mr. Speidel (or perhaps Mr. Bentsen) to the effect that, on January 23, 2019,

¹¹ The pleading states June 10, 2016; there is no disagreement that 2019 is correct.

Mr. Thomason called the Speidel Bentsen firm and stated words to the effect, "I need Mike to be a beneficiary so I can evict him." *Id.* at 46. The notes also reflected a phone call between Mr. Chase (as Mr. Thomason's attorney) and Mr. Speidel. The notes state (with some interpretation of shorthand):

Keep Alex & Spouse out of contact w/ Mike & his Spouse
- *tied to comment*
- *Motion for contempt RE protection orders*
- *4-wheeler around their home when not present*
- *Since last August*
- *Creative ways to get around protection o*

Concern about timing of Motion for contempt
- *Katy is more concerned about this.*
- *Alex more concerned*

Andy: trying to put off contempt motion until after mediation
Don't believe properties moved into trust
1 – *is the harassment claim ripe?*
2 – *does existing harassment order result in eviction*

Id. at 47-48. On the basis of these partial notes, the Stenneses argued:

It is the undersigned counsel's opinion that the testimony of David Bentsen or Russ Speidel, or both, is material evidence that must be presented to this Court at a new hearing. The Stennes' contention that the Thomasons are trying to have them evicted could only be presented as Mike's theory at the original hearing, and Thomason could deny it without further contradiction. The statements made by Thomason to Speidel Bentsen, and by Mr. Chase to Speidel Bentsen, can now be **offered as proof of Thomason's lack of credibility and real motivations.**

Id. at 429 (emphasis added). In framing the issues in the Stenneses' Second Motion for New Trial, they addressed the new evidence issue as such:

Should a new hearing be ordered where new evidence has been discovered **which casts strong doubt on the veracity of a key witness and indicates that the witness has underlying motivations which color his testimony?**

Id. at 430 (emphasis added). The Stenneses' Motion came on for hearing with several other issues on July 18, 2019.

Following the July 18 hearing, orders thereon were entered on July 25, 2019. The Orders: (1) vacated the Order on Motion for Contempt; (2) vacated the Order Denying the first Motion for New Hearing; (3) reaffirmed denial of the Motion to Surrender Weapons; (4) granted the second Motion for a New Hearing "pursuant to CR 59(a)(4)"; (5) denied the Motion for Change of Venue without prejudice; and (6) reserved on issues of fees. *Id.* at 519-20; 502-04.

On August 2, 2019, the Thomasons moved under CR 59(a)(8) for reconsideration of the portion of the order granting a New Hearing, claiming that the Court made an error of law. *Id.* at 459-94. Consistent with Okanogan County Local CR 59, the Court denied the Motion for Reconsideration without hearing or response on August 9, 2019. *Id.* at 507.

6. Bert Stennes' Will

The Will in question can be found at 82-103 in the Clerk's Papers.

The first of two similar provisions primarily at issue, Art. XI.E, states:

... In the event that one of more of my children resides at any real property **owned by me at the time of my death**, it is my intent and wish that my Trustee allocate such property in trust to the share of such child, and that such child be permitted to continue to live at such property for as long as he or she wishes without payment of monthly rent; provided, such child, and any family of such child, that occupies any such property shall at all times be on their best behavior and abstain from any action or activity that, **in the sole discretion of my Trustee**, constitutes harassment of one or more adjoining landowners and provided, further, this allocation of such property shall not apply to [2 Stennes Point Drive, Marcus Stennes' residence].

CP at 95 (underline original; bold emphasis added). The power of eviction is spelled out in the authority of the Trustee, Art. XIV.B, and is more specific:

In the event that one of more of my children resides at any property **held in trust hereunder**, the Trustee may lease such property to such child without payment of monthly rent; provided, such child, and any member of his family that occupies any such property shall at all times be on their best behavior and abstain from any action or activity that, **in the sole discretion of my Trustee**, constitutes harassment of one or more adjoining landowners. If, **in the sole discretion of my Trustee**, any child or any member of his or her family undertakes an action or activity that harasses or harms an adjoining landowner, the Trustee may take **any action**, including, but not limited to, **judicial proceedings to evict** such child and the sale of such property to a third party.

Id. at 99-100 (underline original; bold emphasis added). The Stenneses point to part of an additional provision of the will, Art. XVI.B, of dubious enforceability:

... Notwithstanding any of the forgoing appointments of Trustee of appointments of successors, my attorney, ALEX THOMASON, shall have the right, without court proceedings, to remove any Trustee named hereunder and to appoint one or more successor Trustees.

Id. at 101. The Stenneses also point to Art. XV.B, describing powers of the personal representative:

In addition, my personal representative, during the administration of my estate, shall have all management and distributive powers and discretions provided by this Will and by law to my Trustee.

Id. at 100.

Curiously, however, in a Motion to the *Chelan* County Court in both *Estates of Stennes* cases dated March 25, 2019, the Stenneses argued that Art. XI.E is precatory and cannot be enforced by Mr. Thomason. *CP* at 255.

The Stennes' Motion was an attempt to bar Mr. Thomason from attending mediation in the *Estates of Stennes* matters. *Id.* at 242. The argument to the Chelan County Court was that Mr. Thomason lacked standing or beneficiary status (and was thus not a necessary participant) *because* he could not enforce Art. IX.E of the will. *Id.* at 256. But two months later, in the Okanogan County antiharassment proceedings, the

Stenneses pressed the opposite argument, claiming that the Will provisions had teeth and jeopardized the Stenneses. The juxtaposition of their opposing arguments on Mr. Thomason’s power to evict illuminates and undermines their position:

Chelan Co., March 25, 2019: “Because Alex Thomason has no power to invoke the ‘good behavior’ clause, and cannot compel the Trustee to act, he cannot enforce the clause through the Courts.” (*CP* at 256).

Okanogan Co, May 16, 2019: “[Alex 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. (*VRP* at 98:22-99:1).

Okanogan Co., June 28, 2019: “The Stenneses now have discovered that Thomason is in fact using the provisions of Bert Stennes’ Will to get them evicted. (*CP* at 438 (underline original)).

Okanogan Co., July 18, 2019: “They’re saying that Mr. Thomason cannot attempt to force and eviction now because the trust hasn’t been funded, but the Will itself says he can do exactly that. He can do exactly that right now. (*VRP* at 378:24-379:2).

D. SUMMARY OF ARGUMENT

Motions for a new trial are subject to a rigorous five-element test. The Court may grant a new trial if the evidence (1) will probably change the result of the trial; (2) was discovered since trial; (3) could not have been discovered by due diligence prior; (4) is material; and (5) is not merely

cumulative or impeaching. In the trial Court, the Respondents did not meet this test; to grant a new hearing was abuse of discretion.

Here, the facts are complicated, but the law is not. At issue is whether the new evidence (the “Speidel Bentsen Notes”) was material; whether it was merely cumulative or impeaching; and whether it would have changed the outcome of the trial. It is clear from the record that the evidence was not available at trial and could not have been discovered by due diligence prior thereto, and so the second and third element of this test are not at issue here.

First, the Thomasons argue that the Speidel Bentsen notes were not material. Materiality is a threshold issue here, and if this Court finds that the evidence was immaterial, the other issues need not be passed upon. This new evidence was not material. Rather, it was collateral to the central issue in the proceeding – whether the Stenneses violated the stipulated antiharassment orders.

Next, the Thomasons argue that the new evidence was cumulative to evidence and arguments explored before the trial court and that the new evidence was offered *only* for its impeaching effect. It is expected that the “devastating effect proviso” will come into play, but the Thomasons argue that this proviso does not apply in civil matters.

Finally, the Thomasons argue that this evidence would not have changed the outcome of the proceeding. The new evidence was targeted at the argument that the Thomasons had a motive to lie about the allegations against the Stenneses. But this exact argument was presented to the trial Court and the trial Court's decision finds independent support in allegations where the Stenneses admitted the *conduct* but denied a harassing *intent*. In other words, the new evidence does nothing to undermine the Court's conclusions and finding of contempt on those bases.

E. ARGUMENT & AUTHORITY

1. Standard of Review

Motions for a new trial are reviewed for abuse of discretion. *Cox v. General Motors Corp.*, 64 Wn.App. 823, 825-26, 827 P.2d 1052 (1992). A stronger showing of abuse of discretion is required to set aside an order *granting* a new trial than an order *denying* one. *Rock v. Rock*, 62 Wn.2d 706, 714, 384 P.2d 347 (1963).

A trial Court abuses its discretion where the decision is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons. *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)¹²).

Motions for a new trial based on newly discovered evidence are subject to a rigorous five-element standard. A new hearing *may* be granted if the evidence (1) will probably change the result of the trial; (2) was discovered since trial; (3) could not have been discovered by due diligence prior; (4) is material; and (5) is not merely cumulative or impeaching. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn.App. 73, 88, 60 P.3d 1245 (2003) (citing *Holiday 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.* Thus, the Stenneses bore the burden to establish these five factors¹³ to obtain a new trial.

Here, the trial Court manifestly abused its discretion. The Stenneses offered new evidence that merely went to Mr. Thomason's credibility on an issue that was explored and argued before the trial Court. Moreover, the underlying purpose for which the new evidence would be offered is immaterial to the issues in a *contempt* proceeding. And finally, the Court's decision on at least four grounds would not be undermined by impeachment

¹² Partially superseded by statute on other grounds. *Carroll* remains a primary source for the cited proposition.

¹³ Interestingly, the Stenneses omitted the critically important impeachment element in briefing to the trial Court. *CP* at 438:16-21.

of Mr. Thomason. The Stenneses did not carry their burden to meet the five-element test. The trial Court’s decision was upon untenable grounds, for untenable reasons and thus, also manifestly unreasonable.

2. The New Evidence was not Material

In the context of CR 59(a)(4)¹⁴, materiality is fundamentally an inquiry into the underlying factual and legal questions presented by the case. “Evidence is material when it logically tends to prove or disprove a fact in issue.” *Bridgen v. Windemere Real Estate Co*, 9 Wn.App.2d 1003, 2019 WL 2273506 (2019)¹⁵ (quoting *State v. Gersvold*, 66 Wn.2d 900, 406 P.2d 318 (1965)); *See also Black’s Law Dictionary*, “material evidence” (11th Ed. 2019)¹⁶.

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). If so, and the Court finds that compliance is “yet within the person’s power to perform,” the Court may

¹⁴ As distinguished from, e.g. materiality for *Brady* purposes or material facts on summary judgment. In those contexts, “materiality” is a question of whether the evidence would have changed the outcome of the proceeding (*Brady*) or whether the litigation depends in whole or in part on the putatively material fact (summary judgment). In the CR 59(a)(4) context, materiality and a change in the outcome of the litigation are distinct elements of the test for a new trial. The *Brady*, summary judgment, and similar articulations of materiality would collapse these prongs.

¹⁵ Cited pursuant to GR 14.1 as nonbinding authority and to demonstrate applicability in civil actions because the citation therein is to a criminal matter.

¹⁶ Material evidence is “Evidence having some logical connection with the facts of the case or the legal issues presented.”

find contempt and impose remedial sanctions. RCW 7.21.030(2). Paraphrasing, the questions presented were: (1) Did the Stenneses intentionally violate the Antiharassment Orders; and (2) Is it within their power to comply?

The Stenneses argued that the new evidence was material because their “contention that the Thomasons are trying to have them evicted could only be presented as Mike’s theory at the original hearing, that Thomason could deny it without further contradiction.” *CP* at 429:20-23. It is clear that the Stenneses sought to attack Mr. Thomason’s credibility on this very issue. Recall that at the hearing, counsel argued:

MS. GARELLA: [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.

VRP at 98:22-99:1 (emphasis added).

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.

The new evidence also lacks materiality because there was no factual issue as to whether the Thomasons sought to evict the Stenneses, and the record is well-developed on these points.

First, Mr. Thomason's testimony established that he had in fact complained to the Personal Representatives of the Estates about Mike and Donna's behavior. *VRP* at 243:12-17, 244:14-24. Testimony also showed that he did so on the belief that a landlord or landowner could and should prevent a tenant from harassing adjoining landowners. *Id.* at 242:7-17.

Second, the proffered motivation for Mr. Thomason's alleged fabrications was not precisely eviction, but rather the subsequent acquisition of the Stennes' home. *VRP* at 191:10-16; 192:8-13. But Mike testified that Mr. Thomason sought a home *like* his and was clear that Mr. Thomason did not seek *his* home. *Id.* Mike's theory makes little sense because his testimony does not support his speculation. More problematically, there is no reason to believe that the Trustee in charge of such a sale would sell to Mr. Thomason.

Third, the record is quite clear that there have been no eviction proceedings, and that a trial Court decision would be immaterial to whether the Trustee, in his sole discretion, decided to evict. As the trial Court indicated, any jeopardy that arose as a result of the Court's involvement occurred in October of 2018 with the stipulation to the antiharassment

orders. *VRP* at 279:3-11. Moreover, the trial Court's decision on contempt would not bind the Trustee's discretion in the Will. And even if the home were placed into trust and the Trustee evicted, this would still require judicial proceedings under the plain language of the will. *CP* at 99-100.

Finally, the Thomasons agree with the Stenneses argument to the Chelan County Court – the Thomasons lack a mechanism to enforce the eviction or good behavior clauses in the will. The hearing record was developed here as well. Mr. Thomason testified that without the funding of a trust and transfer of the Stennes' home into the trust, eviction was hypothetical. *VRP* at 242:18-24; 252:18-253:3. This goes back to the distinctions between Art. XI.E and XIV.B in the Will. The former is a precatory statement of intent; and the latter describes the actual powers of the Trustee, and it is here that the eviction power is found. *CP* at 95, 99-100. Even if the PR had the powers of the Trustee, without the home becoming a trust asset, there is no power to evict. *Id.* Mike testified that the home is owned by the *Estates*, not the Stennes Family Trust. *VRP* at 224:2-14.

The new evidence lacks the necessary nexus to the legal and factual issues presented. The Stennes' theory is belied by the facts. There were no eviction proceedings, despite Mr. Thomason's complaints to the PR, presumably because the PRs did not believe they could evict. In fact, the

parties *agree* that Mr. Thomason cannot enforce the “good behavior clause” to evict. The language of the will does not give anyone power to evict unless the home is a trust asset.

This Speidel Bentsen notes were not material – they do nothing to transform Mike’s theory to fact. Further, despite opportunity, counsel did not inquire of Mr. Thomason as to his underlying motivations. Counsel began to do so on cross of Mr. Thomason (*VRP* at 97:1 *et seq*), but then decided to recall him as her witness. *Id.* at 99:18-19. Later in the hearing, *after* presenting Mike’s theory (*Id.* at 189:8-194:20), when counsel recalled Mr. Thomason for direct examination, she failed to inquire¹⁷ as to his motivations. *Id.* at 241 *et seq*.

Again, the Stennes’ argument for materiality was that Mr. Thomason could “deny [Mike’s theory] without further contradiction.” *CP* at 429:20-23. Because counsel failed to ask Mr. Thomason a question to generate this denial, the Respondents failed to ever create the factual issue they now rely on for materiality. Where Mike’s theory is legally impossible and unrelated to a finding of *contempt*, there evidence lacks the necessary nexus to the issues and facts to establish materiality.

¹⁷ E.g., *Isn’t it true that you brought this action seeking to evict the Stenneses?*

3. The New Evidence was Merely Cumulative

As alluded above, this new evidence was merely cumulative to facts and arguments developed in the trial Court. While newly discovered, this was fundamentally “more evidence.” Cumulative evidence is “additional evidence that supports a fact established by the existing evidence.” *Black’s Law Dictionary*, “cumulative evidence,” (11th Ed. 2019).

The Stenneses developed the facts of this theory through Mike’s testimony. *VRP* at 189:8-194:20. Then, counsel argued this theory, specifically including the argument that Mr. Thomason “does have every wish for the Court to make a finding of contempt or harassment... that he can trot back to the PRs...” *Id.* at 266:20-267:8.

This is a necessarily fact-based inquiry. *See, e.g., Kennard v. Kaelin*, 58 Wn.2d 524, 527, 364 P.2d 446 (1961); *Wick v. Irwin*, 66 Wn.2d 9, 13, 400 P.2d 786 (1965); *Phelan v. Jones*, 164 Wn. 640, 651, 4 P.2d 516 (1931) (all conducting reviews of the evidence before the trial court in determining cumulativeness of new evidence).

Here, the newly discovered evidence does nothing more than bolster a theory that was developed in testimony, argued in closing, considered by the Court, and subsequently rejected on May 16, 2019. This is the essence of cumulative evidence.

4. The New Evidence was Merely Impeaching

In this case, the newly discovered evidence was offered *specifically* for its impeaching effect. *CP* at 430; 439 (“The Stenneses have the right to establish the **partiality of a witness at trial** for such bias is ‘always relevant as **discrediting the witness** and **affecting the weight of his testimony.**” (em. added)).

“[A] new trial should not be granted, based upon affidavits that merely impeach a witness or affect his credibility. *Brown v. General Motors Corp.*, 67 Wn.2d 278, 287, 407 P.2d 461 (1965). A self-serving declaration that proves or disproves no essential proposition in the case is not a reason to grant a new trial. *Griffith v. Whittier*, 37 Wn.2d 351, 355, 223 P.2d 1062 (1950). Courts have been very clear that a new hearing should not be granted for newly discovered evidence which merely goes to the credibility of the opposing party as a witness. *See, e.g., Donovan v. Anthony*, 60 Wn.2d 254, 258, 373 P.2d 488 (1962). This has been the law for more than one hundred years. *See e.g., Harvey v. Ivory*, 35 Wn. 397, 401, 77 P. 725 (1904)

This issue is plainly controlled by well-settled law. The evidence was only offered for its impeaching effect and there is no other purpose in offering it.

However, it is expected that the Stenneses will raise the “devastating effect proviso” in *State v. Savaria*, 82 Wn.App. 832, 919 P.2d 1263 (1996)

(disapproved on other grounds¹⁸ by *State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003)). This case states:

A new trial should nevertheless not be granted if the new evidence would only be used to impeach trial testimony. The telephone records would clearly be used to impeach Karelson's, and her father's, testimony. However, other jurisdictions have held that **impeaching evidence can warrant a new trial if it devastates a witness's uncorroborated testimony establishing an element of the offense**. In such cases the new evidence is not merely impeaching, but **critical**. We find this authority persuasive. The previous Washington cases which have touched on this issue have done so in the context of new evidence which was not likely to affect the verdict. In this case the evidence of the threat, which formed the basis for at least the harassment charge, came solely from Karelson's testimony and was denied by the defendant. In addition, the claimed phone call was used by Karelson to establish her fear, which is also an element of harassment. **Her credibility was crucial.**

Id. at 837-38 (emphasis added; internal citations omitted). *Savaria* relies on *U.S. v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991) (*cert. denied*, 500 U.S. 927 (1991) and *U.S. v. Davis*, 960 F.2d 820, 825 (9th Cir. 1992)¹⁹ (*cert. denied*, 506 U.S. 873 (1992)).

¹⁸ Related to whether fear of bodily injury, but not death, supported a conviction for *felony* harassment. *C.G.* at 611 (also calling this portion of *Savaria* dicta).

¹⁹ “In some situations, however, the newly-discovered impeachment evidence may be **so powerful** that, if it were to be believed by the trier of fact, it could render the witness' testimony **totally incredible**. In such a case, if the witness' testimony were uncorroborated and provided the only evidence of an essential element of the government's case, the impeachment evidence would be “material” under *Walgren*. Moreover, Rule 33 permits the granting of a new trial motion “if required in the interest of justice.” Fed.R.Crim.P. 33. If newly-discovered evidence establishes that a defendant in a narcotics case has been convicted solely on the uncorroborated testimony of a crooked cop involved in stealing drug money, the “interest of justice” would support a new trial under Rule 33.” *Id.* at 825 (em. added).

The touchstone of this proviso is that the uncorroborated testimony must touch “an element of the offense” – a *criminal* offense. The reason this is “critical,” rather than “merely impeaching” is to protect the rights of defendants in criminal proceedings; not to modify the requirement that new evidence have value beyond impeachment. In *Taglia* and *Davis*, the Court used the example of a defendant convicted on the lie of a single witness; in such circumstances, the judge “would have the power to grant a new trial *in order to prevent an innocent person from being convicted.*” *Taglia*, 922 P.3d at 415 (emphasis added).

The devastating effect proviso does not apply to civil matters; its underpinnings are entirely criminal. Moreover, even if it were applied, *this* newly discovered evidence is not “so powerful” that if believed it would render Mr. Thomason’s testimony “totally incredible.” *Davis*, 960 F.2d at 825. This evidence does not do that.

“Newly discovered evidence that is merely impeaching is not a permissible ground for a new trial. There is language to this effect in countless²⁰ cases.” *Taglia*, 922 F.2d at 415. Here, not only was the newly

²⁰ See e.g., *Olson v. Gill Home Inv. Co.*, 58 Wn. 151, 162, 108 P. 140 (1910) (new evidence affecting credibility not a reason for new trial, particularly where the same credibility issue was raised in prior trial); *Armstrong v. Yakima Hotel Co.*, 75 Wn. 477, 483, 135 P. 233 (1913) (refusal to grant a new trial based on new evidence impeaching or going to the credibility of the opposing party is no abuse of discretion); *Trosper v. Heffner*, 51 Wn.2d 268, 270, 317 P.2d 530 (1957) (new evidence that impeaches testimony concerning amount of damages not a reason for a new trial); *Hoffman v. Hansen*, 118 Wn. 73, 78, 203 P. 53 (1921) (new evidence of prior criminal conviction used only for impeachment is not

discovered evidence merely impeaching, it was offered for that sole, specific purpose. This evidence is not grounds for a new trial.

5. The New Evidence would not Change the Outcome

Where the judge is the factfinder (i.e. in a hearing or bench trial), the trial judge is in a position to know whether the evidence would change the result on a new trial. *Garratt v. Dailey*, 46 Wn.2d 197, 204, 279 P.2d 1091 (1955). Here, the Court approached, but did not cross the threshold of whether the new evidence would likely change the outcome. Rather, the Court indicated that it wanted to hear the new evidence and essentially re-weigh its credibility determination. *VRP* at 383:23-384:11²¹; 384:25-385:4. Here, however, the trial Court judge offered to recuse immediately after, giving the parties a “clean slate.” *Id.* at 385:22-386:6. Unlike most retrials, *this* trial Court is *not* in a good position to ascertain if retrial is likely to change the outcome; the trial Court indicated that it needed to hear more evidence, but also that retrial could potentially be before a different judge entirely.

grounds for new trial); *Donovick v. Anthony*, 60 Wn.2d 254, 258, 373 P.2d 488 (1962) (merely impeaching affidavits not grounds for new trial).

²¹ The trial court also stated that it wanted to hear from Mr. Speidel “about what were these notes, what did they mean and what did he think Mr. Thomason wanted.” *VRP* at 384:10-11. This is irrelevant and should not have factored into the Court’s decision because a third party’s mental guesswork as to a collateral issue is inadmissible.

The reason that the newly discovered evidence is not likely to change the outcome is because the Court found contempt based on actions that the Stenneses admitted in part:

The Court finds that there's actually – there's actually little direct evidence of violations. Okay, but there is – there is at least some direct evidence in the form of at least one statement. Mr. Stennes says he's talking to his dog. Mr. Thomason felt that he was talking and addressing him...

[. . .]

The point is, that's direct contact, that's direct evidence. And, it's a violation of the order.

VRP at 280:10-15; 281:2-4. Impeaching Mr. Thomason's testimony as to this violation does no work for the Stenneses. Similarly:

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.

VRP at 282:20-283:11. Impeaching Mr. Thomason's testimony does no work here either. And finally:

...I'm prepared to make a finding that the extent of these events is such that it does appear that petitioners are being kept

under surveillance and that's another reason to support a finding of contempt. I – I just don't understand why or how there would be this many instances of these kinds of unusual things happening unless there was this near constant watching of the Thomasons.

Id. at 288:14-20. These encounters are from events, like the contact at the fence and Easter music (immediately above); Mike driving by on the four-wheeler (*VRP* at 213:20-215:11); and Donna driving by in her Raptor (*VRP* at 232:23-235:8) where the Stenneses admit the *conduct* at issue but deny the *intent* to contact or surveil the Thomasons.

The Stenneses reason for impeaching Mr. Thomason's credibility were because they contended that the Thomasons' allegations were "fake". *VRP* at 191:10-16. But the above events are clearly not fake because the Stenneses admit they occurred. Any one of these violations would be sufficient to establish contempt of the original antiharassment order prohibiting contact and surveillance. *See CP* at 509, 512.

6. Attorney's Fees

Pursuant to RAP 18.1(a), the Thomasons request reasonable attorney's fees and expenses for this Appeal. However, because the trial Court reserved all issues of fees for the ultimate disposition of the case, the Thomasons also request that this Court direct fees to be determined by the trial Court upon remand. RAP 18.1(i).

RAP 18.1(a) allows fees “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals...” The trial Court may assess “any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney’s fees.” RCW 7.21.030(3). This Court has recognized that “[a] party defending the appeal of a contempt order may recover attorney fees under RCW 7.21.030(3).” *In re Marriage of Curtis*, 106 Wn.App. 191, 202, 23 P.3d 13 (2001). But the Court has also recognized a distinction between defending the appeal of a contempt order and defending an appeal of a finding of no contempt. *Id.* See also, e.g., *In re of Rapid Settlements, Ltd’s*, 189 Wn.App. 584, 617-18, 359 P.3d 823 (2015).

The Thomasons argue that applicable law grants the right to recover attorney’s fees for this appeal. First, the contempt statute provides an extremely broad award of fees: “any losses... and any costs incurred in connection with the contempt proceeding, including reasonable attorney’s fees”. RCW 7.21.030(3). Second, the statute only provides for costs against “a person found in contempt,” which finding would be the practical effect of a reversal of the trial Court’s decision here. *Id.* And third, the decisions in *Marriage of Curtis* and *Rapid Settlements*, refer to the party *defending* a finding of contempt. In other words, if such a defending party prevails, the

contempt finding is preserved. The Thomasons argue that RCW 7.21.030(3) affords attorney's fees on review here and in similar cases where the practical relief would preserve a finding of contempt.

The Thomasons thus respectfully request that this Court direct the trial court to establish fees on remand.

F. CONCLUSION

A new trial cannot be had where the newly discovered evidence is offered only to impeach the opposing party-witness on a collateral theory that was developed, argued, considered, and rejected at the trial Court.

This newly discovered evidence was not material. Even if used for impeachment, such impeachment would be on an immaterial, collateral matter. Where the Stenneses admitted the relevant *conduct*, Mr. Thomason's subjective motivations in reporting the conduct are wholly immaterial to whether that conduct violated the stipulated antiharassment orders. Additionally, the Stenneses entire theory as to Mr. Thomason's underlying motivations ignores the gatekeeper role of the Trustee. Mr. Thomason can't evict the Stenneses; nobody has tried to evict the Stenneses. They know and admit this, yet sought a new trial to argue that Mr. Thomason *is* trying to evict them.

This newly discovered evidence was offered specifically for its impeaching effect, but it is unclear what would be impeached. The

Stenneses argue that Mr. Thomason *could* deny Mike’s theory at the hearing. This denial is not in the record to impeach because the Stenneses failed to elicit that testimony. The evidence was cumulative to that which the Stenneses did introduce and argue at the hearing – it supported those facts and theories, but added nothing new to the case.

The fundamental issue here is that the new evidence could not change the outcome. To prevail on test for contempt, the Thomasons only need to show *one* incident that deliberately violated the predicate antiharassment orders. The trial Court found *four* that were based on incidents that the Stenneses admitted *occurred*, but denied occurred deliberately to contact or surveil the Thomasons. These occurrences were clearly not “fake allegations” and impeaching Mr. Thomason would do nothing to undermine the Court’s conclusion that these occurrences constituted contempt.

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 27th of April, 2020,


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