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Division III  
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Case No. 37037-2-III  
(Appeal of Okanogan County No. 18-2-00458-24)

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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ALEXANDER THOMASON, *et al.*,  
*Appellants*,

v.

MICHAEL STENNES and DONNA STENNES,  
*Respondents*.

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

The trial court found respondents Mike and Donna Stenneses in contempt of stipulated Orders for Protection based solely on the disputed testimony of appellants Thomason that the Stenneses had violated the order.

At the hearing, the Stenneses testified that they had not violated the Orders. They surmised that the Thomasons were using court process in order to get a finding establishing that the Stenneses were behaving badly. With such a finding, the Thomasons could attempt to convince the owner of the property (the Estate of Bert Stennes) to evict the Stenneses and sell the home. The Thomasons denied the scheme, testifying that they had brought the contempt hearing only because they fear the Stenneses.

Following that hearing, but *before* the entry of any final order, the Stenneses moved for a new hearing based on newly discovered evidence: hand-written notes by Russ Speidel, an attorney for the Estate of Bert Stennes (respondent Mike Stennes's father). Bert's Will contains provisions that allow the personal representative (PR) (and later, the trustee) to evict the Stenneses and sell the home. The notes describe Mr. Speidel's phone calls with Alex Thomason and the Thomasons' attorneys in which the Thomason's plan to have the Stenneses evicted from their home is discussed.

At the hearing on the Stenneses' Motion for New Hearing,<sup>1</sup> the superior court (Hon. Christopher Culp) noted that the finding of contempt had been a "difficult decision" because it had been a "close case." RP 383:3-9. After reviewing the new evidence, the court exercised its discretion to set aside the contempt finding and order a new contempt hearing based upon the new evidence. CP 519-520. This interlocutory appeal followed.

The trial court's decision must be affirmed. It is frivolous, or just short of frivolous, to argue that the judge, who was the trier of fact, abused his discretion when granting a new trial based upon the presentation of newly discovered evidence indicating that the prevailing party had lied about his underlying motivations. This cannot be an abuse of discretion where the trier of fact had relied heavily on the prevailing party's credibility to find contempt in a very close case.

Furthermore, this interlocutory appeal is largely futile because there was *no final order* entered. Irrespective of what decision is made in this Court, the trial court retains its power to revise its decisions any time before the entry of a final judgment adjudicating all the claims and the rights and liabilities of all the parties. CR 54(b). Therefore, in the alternative, Stennes moves the Court to dismiss this appeal as improvidently granted.

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<sup>1</sup> Second Motion for New Hearing and Motion for Reconsideration, CP 418-442.

## II. RESPONSE TO STATEMENT OF THE CASE

Many of the hair-raising “facts” set forth in the Appellants’ Statement of the Case are merely unproven allegations, which are the subject of dispute. This includes the material from page 4, line 6 to page 8, line 5 of the Appellant’s Brief. **All** of these assertions, the biting dogs, the reckless chipping of golf balls, the urinating on fence posts, the siccing of three dogs on one adorable puppy, the vandalizing of bushes, the exposure of reproductive organs, the turning off of irrigation lines, and so forth – **are denied by the Stenneses** on the record:

COUNSEL FOR STENNESES: Your Honor, I should be clear on the record. My clients deny that they have harassed the Thomasons. But, they are willing to [accede] to the requests made by the Thomasons in their petition in order to avoid what we regard as the further inflammation among neighbors that happens in these kinds of hearings.

RP 11:20-25. *See, also*, RP 14:10-11; RP 184-185;<sup>2</sup> CP 20-21. The Stenneses stipulated to the original Orders for Protection in the vain hope of calming things down in the neighborhood. Therefore, the litany of horrors claimed by the Thomasons was never subject to consideration by the trial court. There are no findings by the trial court that the Stenneses harassed

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<sup>2</sup> COUNSEL, Q:... how did you feel about just agreeing to the order that they proposed? MIKE STENNES, A: I didn’t really like it, but I took it, you know, I decided that was probably the best option. COUNSEL, Q: And it was the best option because of what? MIKE STENNES, A: Because it would hopefully bring an end to the allegations, the phony allegations.

the Thomasons. The mere allegations of the Thomasons do not create a factual record for this Court to review.<sup>3</sup> Furthermore, those disputed allegations are irrelevant to the contempt action before this court, because even if true, they allegedly occurred *before* the Orders for Protection were even issued and therefore, cannot be the basis for a finding of contempt on the Orders themselves.

Similarly, many of the “facts” alleged in the Appellant’s Brief from the bottom of page 8 through the middle of page 12, while purportedly occurring after the Orders for Protection, are neither based on witness testimony nor the Court’s findings. Where appellants refer to the clerk’s papers, those clerk’s papers designations lead to declarations filed in the trial court. But the declarations were not admitted into evidence at the contempt hearing, and the trial court made no findings based on those declarations. RP 280-283; 288; CP 514-518.

Only those very limited instances of contempt<sup>4</sup> initially found by the trial court should be considered with respect to the Thomasons’ argument

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<sup>3</sup> This includes all the claims in the following Clerk’s Papers: CP 180-226 (Declaration of Alex Thomason), 236-239 (Declaration of Amber Gunn), 377-380 (Declaration of Jose Maldonado), and 381-387 (Declaration of Katy Thomason), and 521-534 (Petitions for Orders of Harassment against Mike and Donna).

<sup>4</sup> The trial court found that the Stenneses contacted the Petitioners by calling Alex Thomason a “goofball,” discharging weapons; and playing loud music on Easter Sunday. It found that the Stenneses surveilled the Thomasons because “there were too many unusual events that occurred while the Petitioners happened to be outside for these events to be coincidence.” CP 516.

that the new evidence could not change the outcome in this case. The other so-called facts cited by the Appellants are mere allegations that do not bear on the question of whether the trial court erred when it granted a new trial.<sup>5</sup>

This Court should disregard almost all of the Thomasons' Statement of the Case, pages 4 through 12, and recognize it for what it is: a clumsy and misleading attempt to prejudice the Court against the Stenneses.

### **III. STATEMENT OF THE CASE**

The Stenneses present the following statement of the facts in compliance with RAP 10.3(a)(5), which requires a “[a] fair statement of the facts and procedure relevant to the issues presented for review.”

#### **A. BACKGROUND OF THE DISPUTE**

Alex Thomason was the former attorney for Bert Stennes, Mike Stennes's deceased father. RP 273:13; CP 88.<sup>6</sup> In his Will,<sup>7</sup> Bert Stennes placed his real properties into trust. CP 93. Bert granted Mike Stennes the right to occupy the parcel of property that abuts the Thomasons' land. CP 95, Will at XI.E, RP 189, 190.

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<sup>5</sup> For example, the Thomasons' Brief claims that Mike Stennes pointed a laser device at Thomason's car. App. Br., pp. 10-11. But the trial court dismissed that claim as pure speculation by the middle of the day, RP 156:22-158:6, and the Thomasons did not assign error to that dismissal.

<sup>6</sup> Bert describes Thomason as “my attorney, friend and neighbor, ALEX THOMASON” in his Will.

<sup>7</sup> 5/16/19 Hearing, Exhibit 8. The Will can also be found at CP 82-103. CP numbers are used here for ease of reference.

There is an unusual provision in Bert's Will that relates to the contempt hearing. The Will grants the Trustee the discretionary power to evict the Stenneses if any one of them "undertakes an action or activity that harasses or harms an adjoining landowner..." CP 100, Will at XIV.B. The Bert Stennes Estate has been in probate for the last three years, and the Trust has not yet been funded. However, the Personal Representative of the Bert Stennes Estate has the same power to evict the Stenneses as the Trustee. CP 101, Will at XV.C.

The Will also mentions Alex Thomason. It cancelled and forgave all of Thomason's debts to his former client, Bert Stennes (CP 88-89; 94-95). It directs the PR and Trustee to indemnify and defend Thomason for any lawsuit brought against him that relates to Thomason's business transactions with his former client.<sup>8</sup> CP 89. It grants Thomason the right to remove and replace, without court proceedings, any trustee of the Trust. CP 101, Will at XVI.B.<sup>9</sup>

Since Bert Stennes' death in August of 2017, litigation has burned on two fronts between the Stenneses and the Thomasons. One fire is in

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<sup>8</sup> The reasons underlying the strange provisions in the Will (e.g., the anti-neighbor harassment provision, the indemnification and defense provided to the testator's lawyer) is not in this record. They presumably will not be known until Bert's attorney, Alex Thomason, is deposed in lawsuits brought against him by the Stennes Estates.

<sup>9</sup> It appears that once the properties go into trust, the Will allows Thomason to appoint himself (or a buddy) Trustee and make the decision himself as to whether a beneficiary should be evicted.

Chelan County, where Bert Stennes's Estate, and that of his wife Evelyn, are being probated. Mike Stennes and attorney Roberto Castro (the PR of the Evelyn Stennes Estate), have taken the position that Alex Thomason financially abused Bert Stennes by taking over \$600,000 from his client when Bert was between the ages of 85 and 93.<sup>10</sup> CP 113-135, 119, 122-128, 427-428. These allegations that Thomason exploited his elderly client led to hotly contested proceedings between Thomason and Mike Stennes. This Court is aware of that Chelan litigation, because Thomason has twice appealed the probate court's rulings. *See* Div. III cases 37170-1-III, 37555-2-III. The trial court was also aware of it. RP 98, 188, 253, 279, et seq.

The second litigative front is in Okanogan County. There, the Thomasons brought Petitions for Orders for Protection against Respondents Mike and Donna Stennes. On October 18, 2018, the Stenneses stipulated to entry of Orders for Protection-Harassment. 508-513. They did so "to avoid a hearing and further inflammation of the neighborhood war." RP, 6:10-11. Because the relief was agreed, the trial court did not consider whether Mike and Donna Stennes in fact ever had harassed the Thomasons.<sup>11</sup> CP 76-81.

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<sup>10</sup> The first two PRs of Bert Stennes' Estate refused to bring claims against Thomason for his conduct relating to Bert Stennes. *See* Commissioner's Ruling, No. 37170-1-III, filed January 28, 2020.

<sup>11</sup> Mike and Donna Stennes consistently have denied harassing their neighbors and denied violating the Orders of Protection.

**B. CONTEMPT CLAIMS AND THE HEARING ON MAY 16, 2019.**

In April of 2019, the Thomasons filed a Motion for Contempt, seeking a finding that the Stenneses had violated the Orders and requesting the court to expand the Orders' scope. CP 451-452. The Thomasons also sought to strip the Stenneses of firearms through a Motion for Surrender of Weapons. *See*, CP 495-498. The Stenneses denied any violation of the Orders for Protection. Because they refused to agree to any further abridgments of their rights, an evidentiary hearing was held on May 16, 2019. RP 23-292.

The trial court's first order of business was to inform the parties that the judge, the Honorable Christopher Culp, personally knew one of the Thomason's witnesses, a local gardener.<sup>12</sup> The Stenneses waived any objection to the Judge's continued service. RP 25-26. The Stenneses did object, however, to the consideration of declarations filed by the Thomasons. RP 33:14-21; 41:6-7.

Ultimately, many of the declarants (including the gardener known to the Court) did not appear at the hearing. The trial court heard the testimony of only five witnesses. The Thomasons called themselves. The Stenneses called Sergeant Tracy Harrison, Mike and Donna Stennes, and Alex Thomason. No declarations were admitted into evidence.

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<sup>12</sup> The Court did not inform the parties that it also knew Alex Thomason. This became a controversy later. *See* page 17 of this Brief.

Alex and Katy Thomason testified that Mike and Donna had violated the Orders for Protection between October of 2018 and April of 2019 with a variety of activities, including, but not limited to, screaming and “yodeling,” RP 36, 70-71; turning on a water sprinkler on the Stennes property that flooded post holes dug by Thomason on the Thomasons’ property, RP 37; calling Thomason a “goofball,” RP 56-57; playing heavy metal music on Easter Sunday afternoon, RP 72-73; driving by Katy Thomason and her children while they were walking on a road at the junction of the Thomason and Stennes properties, RP 119-123, 129; revving a car engine loudly, again while Katy Thomason was standing next to the Stennes property, RP 115-118; and firing guns when Alex Thomason was outside his home. RP 42, 44-45, 48, 50, 55-56.

Of the last (and most serious) charge, firing guns, only Thomason heard the gunfire. He admitted on cross that he never saw Mike shoot any weapon. Instead, all he could say was that he thought the sound came from the direction of the Stenneses’ home, RP 82, 87, 88, and that he “knew” Mike was communicating with him, *e.g.*, RP 44:8-18:

Q: Okay, so you hear what you believe is suppressed gunfire?

ALEX THOMASON: I hear what I know is suppressed gunfire.

Q: Okay and what happened next?

ALEX THOMASON: I knew that Mike was trying to communicate with me that I may have had a dog --

MS. GARELLA: Objection, speculation.

ALEX THOMASON: -- but he had guns.

THE COURT: Well, it is speculative, but I think it goes to weight and not admissibility. I'm going to allow it.

Donna and Mike Stennes denied that they violated the Orders for Protection. Donna testified that the "yodeling" is how she calls her dogs, RP 231-232; Mike stated he turned on his water sprinklers merely to water his grass and did not know about the Thomasons' postholes, RP 212-213; Mike denied ever firing guns on or near the Thomason/Stennes properties, RP 202; Mike stated that he calls his dog "goofball," but that he did not call Thomason a "goofball," RP 205-206; Mike admitted playing metal music on a small speaker while washing his car on Easter Sunday but denied it had anything to do with the Thomasons, RP 206-207; Mike and Donna admitted that they have driven by when the Thomasons were standing or walking on the road into which the Stenneses' driveway exits. RP 213-220, 234-235.

Mike Stennes testified that he believed that the Thomasons were seeking findings that he was in violation of the Orders for Protection in order to convince the Personal Representative of Bert Stennes' Estate that he and/or Donna were harassing or harming the Thomasons. Mike offered un rebutted testimony that both the initial Personal Representative, Cody Gunn, and the successor Personal Representative, Daniel Appel, are friends of Alex Thomason. RP 192:19-194:3. Mike thought that Thomason was

angling to have his friends evict the Stenneses and sell their home, as allowed under the Will at XIV.B. RP 188-194, CP 99-100. Mike suspected this because of the enmity of the two men and Thomason's past comments about how much he admired the Stenneses' home. RP 191-192.

Thomason admitted that he believed that the PR had the right to evict the Stenneses. RP 242:25-243:6. But both Thomasons testified that they brought their Motion for Contempt Hearing because they feared Mike and Donna. Katy Thomason swore that she brought the motion because of the Stenneses' "ongoing harassment against me and my children that have made me feel unsafe and afraid for our safety." RP 110:6-8. Thomason asserted that his goal was to protect himself, his wife, and his children. RP 245:2-5.

[Note regarding the Appellants' Statement of the Case, pp. 22-24:

The Thomasons imply that the Stenneses have litigated in bad faith because the Stenneses asserted that the provisions in the Will allowing the PR/Trustee to evict the Stenneses are merely discretionary (in Chelan) while also claiming that the Thomasons could compel the Stenneses eviction (in Okanogan).<sup>13</sup> The argument is baseless. Stennes' position in Chelan is not

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<sup>13</sup> The Thomasons' claim that the Stenneses have taken two different positions is a failed attempt to retaliate. In 2019, the trial court in Chelan ordered Mr. Thomason to pay \$40,000 in CR 11 sanctions because, among other abuses, Mr. Thomason told the Okanogan County Superior Court that he was not a party in the Chelan probate case, and then told the Chelan County Superior Court that he was

inconsistent with the Stenneses' contention, in this case, that the Thomasons are motivated by a belief that a finding of harassment would convince the PR/Trustee to evict the Stenneses. RP 186-191; 193-194; 266:20-267:10. As noted by the trial court, the new evidence suggests that the Thomasons were seeking a finding of contempt or harassment to be used as a "sword" with the PR/Trustee. RP 383:23-384:8.]

In its oral ruling at the end of the day-long hearing, the Court dismissed the Motion for Surrender of Weapons. RP 276-278. However, the Court made oral findings of contempt against Mike and Donna Stennes. After noting that "there's actually little direct evidence of violations," RP 280:10-11, the trial court explained that it found contempt based on four categories of events.

*First*, the trial court discussed the incident in which Mike uttered the word "goofball" while Alex Thomason was on one side of an opaque eight foot tall fence and Mike was on the other side.<sup>14</sup> The court stated that Mike's testimony that he was talking to his dog did not overcome Thomason's testimony because "it is a legitimate interpretation to believe that the comment was directed at [Thomason]" and therefore "that's direct contact,

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a proper party in the probate case. *See* No. 37555-2-III, Notice of Appeal, 12/16/19 Order, Findings of Fact Nos. 14-17.

<sup>14</sup> RP 36:25; 57:8; 84:18-20.

that's direct evidence. And, it's a violation of the order." The court admonished Mike to be more careful: "If you're up against the property line, then you got to error on the side of caution and call your dog by his name or her name." RP 280:18-281:4.

*Second*, the trial court found that Mike Stennes played music loudly on Easter afternoon in April, 2019 and guessed that Stennes' intent was to harass the Thomasons.

THE COURT: ... 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 plans in a way that you weren't entitled to. RP 283:4-11.

*Third*, the trial court believed Thomason's testimony that Mike Stennes shot guns when Thomason was outside on at least three occasions. RP 281-282. And *fourth*, that the Court believed that a handful of incidents over the six months since the entry of the Orders for Protections showed that the Stenneses were keeping the Thomasons under surveillance: "it certainly seems like it's a lot of times, that [when] they [the Thomasons] happen to be outside weird things happen." RP 288:12-13.

The third and fourth reasons, above, were based entirely upon the Thomasons' uncorroborated testimony. Mike Stennes denied shooting guns on his property. Nobody actually witnessed him shooting. Only Thomason

claimed to have heard the sound of gunshots coming from the direction of the Stenneses' home on three or four occasions. RP 82, 87, 88, 202. Only the Thomasons asserted, for example, that when Mike Stennes drove past them on the common access road, it was a drive-by snooping.<sup>15</sup>

The Court, however, believed the Thomasons over the Stenneses. Indeed, the court was familiar with Alex Thomason, who practices law in Okanogan: **"I've known you for a long, long time. I've always found you to be honest and forthright with the Court."** RP 273:20-22.

### C. ENTRY OF CONTEMPT FINDING ON JUNE 20, 2019

Following the oral finding of contempt on May 16, 2019, the trial court directed counsel to prepare further proposed orders, including an expansion of the Orders for Protection. RP 284-292. The Thomasons set the presentation of their proposed order on their motions for contempt and to surrender weapons for June 20, 2019. CP 43, ¶8.

The Stenneses' attorney made arrangements with the clerk of the trial court to appear by telephone at the presentation hearing. The court failed to call counsel at her correct phone number. CP 43, ¶¶ 9, 10. The judge assumed that counsel had failed to appear and proceeded to enter

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<sup>15</sup> Cf. RP 112:18-113:1, Katy Thomason's testimony that Mike Stennes surveilled her while he drove past her, with RP 213:20-220:12, Mike Stennes' testimony that he was not looking at Katy, he was taking items from his home to a storage facility on a neighbor's land.

Thomason's proposed Order on Motions for Contempt and to Surrender Weapons. CP 43-44, ¶¶ 10, 11; RP 293-324.

The resulting order held Mike and Donna Stennes in contempt and found as follows:

Testimony at the hearing established by a preponderance of the evidence that the Respondents contacted the Petitioners by (1) calling Mr. Thomason a "goofball" through the fence between the properties; (2) discharging weapons; and (3) playing loud music on Easter Sunday.

Testimony at the hearing established by a preponderance of the evidence that the Respondents Surveilled the Petitioners. The Court finds that there were too many unusual events that occurred while the Petitioners happened to be outside for these events to be coincidence. The Court finds by a preponderance of the evidence that these events demonstrate that the Respondents were surveilling the Petitioners.

CP 516. These are the only written findings of contempt.

#### **D. THE NEW EVIDENCE**

On May 17, 2019, the day after the contempt hearing, the Chelan Superior Court (which handles the probate of Bert Stennes' Estate) ordered the disclosure of all attorney-client materials prepared by Bert's attorneys and the attorneys for his Estate's Personal Representatives. CP 136-141.

On June 10, 2019, the Stenneses' counsel received records from Speidel Bentsen LLP. CP 45, ¶17. Mr. Speidel and Mr. Bentsen formerly represented the PRs for Bert Stennes' Estate. Handwritten notes taken by Russ Spiedel (or possibly David Bentsen) disclose a January 23, 2019

telephone conference in which Alex Thomason told the Estate's attorney:

*"I need Mike to be benef. so I can evict him"*

*"I need Mike [Stennes] to be [a] beneficiary] so I can evict him."*

CP 46, 584, 590. On March 25, 2019, Mr. Chase, one of the Thomasons' lawyers, asked Mr. Speidel:

*Don't believe properties moved into trust  
1 - is the harassment claim ripe?  
2 - does existing harassment order result in eviction*

*"Don't believe properties moved into trust*

*1. Is the harassment claim ripe?*

*2. Does existing harassment order result in eviction?"*

CP 47-48, 594, 599. Please recall that the Thomasons claimed that they were motivated entirely by fear and that they were not interested in evicting the Stenneses:

COUNSEL FOR THOMASON: He doesn't need to be here to get rid of the Stenneses if that's his motive. He's here because he fears for his family, he fears for his wife and he fears for himself. He lives in constant fear.

RP 271:6-9. The Stenneses' attorney concluded that Mr. Speidel's notes placed the Thomasons' testimony and entire claim of "fear" into doubt. CP 46-48.<sup>16</sup>

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<sup>16</sup> Other notes relating to these calls suggest that court process in Okanogan was being used for strategic purposes relating to the Chelan probate case, and/or to evict the Stenneses. Id.

### E. MOTION FOR NEW HEARING

Before a separate order addressing remedial sanctions and/or the new anti-harassment order was issued (*see* CP 517, ¶6), the Stenneses moved for a new hearing. CP 418-442, 41-179, 577-600. The Motion for New Hearing,<sup>17</sup> CP 418-442, was based on three primary arguments:

(1) That **new evidence** (the Speidel notes) could alter the result of the hearing. CP 425-430, 438-440.

(2) That there was a **violation of the appearance of fairness doctrine** because the trial court remarked, after the hearing, that “I’ve known you [Alex Thomason] for a long, long time. I’ve always found you to be honest and forthright with the Court.” CP 419-422, 431-438.

(3) That none of the trial court’s findings related to Donna Stennes’ conduct and therefore **the contempt against Donna Stennes should be dismissed**. CP 423-425, 440.

A lengthy hearing was held on July 26, 2019. The Stenneses argued, *inter alia*, that the new evidence was devastating to the Thomasons’ contempt case because it showed that the Thomasons in fact were looking to evict Mike Stennes. RP 366:4-17. The Thomasons argued, *inter alia*, that the new evidence was not “new” because the theory that they were trying to evict the Stenneses already had been presented to the court, RP 371:2-9; that the new evidence is not material, RP 373:3-8, and that the new evidence

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<sup>17</sup> This was the second of two similar motions. The first Motion for a New Hearing is located at CP 405-417. It was denied on June 20, 2019, at the hearing at which counsel did not appear due to the court’s error. The argument for denial, and the denial itself, was conducted *ex parte* and without notice to the Stenneses. CP 43-44. RP 328-332; 334-337.

would not cause a reversal because the court's decision was not "a close case." RP 372:2-9.

The trial court disagreed:

**THE COURT: ... Counsel [for Thomason] suggests it wasn't a close case. In fact, it was because as has been pointed out here, notwithstanding the Court's comments about Mr. Thomason and knowing him and so forth, the Court struggled in its decision in making facts which it thought were found -- supported a finding of contempt. Difficult decision...** But, the Court found it was a violation.

Now, now with this newly found evidence, which the Court finds is material, and which was not reasonably available. ... **These [Speidel notes] are problematic because what happens then is that the Court -- this Court's decision about well, was it contempt is thrown into question. ...**

And so, it calls into question then in my mind, well, **was there a violation or was this an attempt at somehow gaining a sword which could be used within the terms of the trust to get rid of the Stenneses. I don't know and I want to hear, I -- the Court would want to hear then from this attorney, Mr. Speidel about what were these notes, what did they mean and what did he think that Mr. Thomason wanted.**

RP 383:3-384:11 (emph. added). The trial court granted the Stenneses' Motion for New Hearing based on CR 59(a)(4): "newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial."<sup>18</sup>

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<sup>18</sup> The trial court denied that part of the motion that sought a new trial based on the appearance of fairness argument. RP 359-364; CP 519-520. The trial court did not discuss the argument that Donna Stennes was not in contempt, possibly because it had ordered a new hearing.

The July 26, 2019 Order vacated the 6/20/19 Order, which had made findings of contempt but had not entered any remedial orders or sanctions. CP 519-520; CP 514-518. Petitioners moved for reconsideration of the 7/26/19 Order. Their motion was denied in a third order. CP 507. The Thomasons appealed.

**F . RECORD IN THE COURT OF APPEALS**

On September 13, 2019, this Court issued a letter ruling requesting briefing on whether or not the Thomasons' appeal was an appeal as of right or should be heard as a matter of discretion. Among other reasons, the Stenneses argued that the appeal should be rejected because there was no underlying final order that adjudicates the rights and liabilities of the parties. Therefore, they pointed out, this is a futile interlocutory appeal.

The Commissioner of this Court agreed with the Respondents, determining that "the Thomasons have no right of appeal from the Order that granted the Stenneses a new hearing because no final Order of Contempt had been effectively entered at that time." Commissioner's Ruling, 11/5/2019. The Thomasons moved to modify Commissioner Wasson's ruling, which reversed the Commissioner and ruled that the order granting new trial was appealable as a matter of right under RAP 2.2(a)(9).

## IV. ARGUMENT

### A. STANDARD OF REVIEW

#### 1. The scope of review is limited.

As stated in the Order Granting Motion to Modify (1/7/20) this Court's review is limited to the order granting a new trial. The scope of review for an order granting a new trial is limited to the order granting a new trial, the trial court's reasons supporting it, and "...any denied motion that would dispose of all claims before the trial court." Espinoza v. Am. Commerce Ins. Co., 184 Wn. App. 176, 191, 336 P.3d 115 (2014).<sup>19</sup>

#### 2. The standard for review is abuse of discretion.

The standard for review of an order granting a new trial upon new evidence is abuse of discretion.

We review a trial court's order granting a new trial solely for abuse of discretion when it is not based on an error of law. And we require a much stronger showing of abuse of discretion to set aside an order granting a new trial than one denying a new trial. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.

Teter v. Deck, 174 Wn.2d 207, 222, 274 P.3d 336 (2012) (citations omitted).

Appellants concede that abuse of discretion is the standard of review. App. Br. at p. 26.<sup>20</sup>

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<sup>19</sup> This Court already has applied Espinoza to these proceedings. *See*, 1/7/2020 Order Granting Motion to Modify Commissioner's Ruling.

<sup>20</sup> The Appellants assign error to the decisions of the trial court finding the new

Under this standard, the trial court's decision will not be disturbed absent manifest abuse of discretion:

After all, it must not be forgotten in any case that the motion for a new trial on [new evidence] is addressed to the discretion of the trial court, and that the discretion is a real one conferred to attain the end of substantial justice...

**“...where the motion is denied, the fact that the newly discovered evidence is merely cumulative will in general be a sufficient ground for affirmance; but where the motion is granted, the contrary will hold. For, in either case, it is for the trial judge to determine whether the evidence is of character probably to affect the result on a new trial...”<sup>21</sup>**

Roe v. Snyder, 100 Wash. 311, 316-17, 170 P. 1027 (1918) (emph. added).

*See also*, O'Brien v. Seattle, 161 Wash. 25, 27, 296 P. 152, (1931) (noting the “well recognized rule that the very large discretionary power vested in trial courts in passing upon motions for new trials will be reviewed only when it appears that such discretion was abused”).

In the review of the five relevant factors (below), the issue is NOT whether the Thomasons or this Court would have applied those factors differently if the decision were theirs to make. The issue is whether the trial court that made the original ruling manifestly abused its discretion in applying those factors to grant a new trial.

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evidence is material and that it is likely to change the outcome. App. Br. at p. 2. In their argument, however, the Appellants affirm that the actual standard of review is abuse of discretion. App. Br. at p. 26.

<sup>21</sup> Quoting Oberlander v. Fixen & Co., 129 Cal. 690, 62 Pac. 254 (1900).

**B. THE GRANT OF A NEW TRIAL ON NEW EVIDENCE WAS NOT ABUSE OF DISCRETION**

A trial court properly grants a new trial because of the availability of new evidence where:

- (1) The new evidence will probably change the result if a new trial is granted...
- (2) It must have been discovered since the trial.
- (3) It could not have been discovered before the trial by the exercise of diligence...
- (4) It is material to the issue...
- (5) It is not merely cumulative,... or impeaching.

Praytor v. King County, 69 Wn.2d 637, 639, 419 P.2d 797 (1966).<sup>22</sup> This standard makes sense, for judicial economy militates against a useless second trial. On the other hand, justice requires a new hearing if the outcome is likely to change. Again, where a new trial is granted, the trial court's application of these five factors is reviewed for manifest abuse of discretion. Skov v. Mackenzierichardson, Inc., 48 Wn.2d 710, 712-715, 296 P.2d 521 (1956).

In the case at bar, all five of the elements are met. Two of them need not be discussed here, as the Thomasons do not argue that (2) the new evidence was not discovered after trial, or that (3) the new evidence could have been discovered before trial by due diligence. App. Br., p. 25. The other three elements, (1) likely to change the result, (4) materiality, and (5) not "merely" cumulative or impeaching, are discussed below.

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<sup>22</sup> Praytor, internal citations omitted, quoting Nelson v. Placanica, 33 Wn.2d 523, 206 P.2d 296 (1949).

**1. The new evidence will likely change the result if a new trial is granted.**

Here, the trial court judge was the finder of fact and was in the best position to determine whether the evidence would have been material to him in reaching his decision. Upon a review of the new evidence, Judge Culp immediately vacated the contempt order and ordered a new hearing, commenting:

THE COURT: ...what I do know on the face of it is under Civil Rule 59(a)(4), in my view, there is newly discovered evidence that is material for the party making the application. ...I'm talking about these attorney notes which in the context of the Will, I don't know what they mean, but they are troubling.

... These are problematic because what happens then is that the Court -- this Court's decision about well, was it contempt is thrown into question. In other words, was it contempt or - - or was it in an effort to try and secure a court order...

...as I said, is [Katy Thomason's] motivation also the same as her husband's to somehow secure this finding of contempt, which frankly, if I'm the trustee, I'm gonna look at that pretty seriously if there is a request to evict under the Will because I think one thing is clear and that is if there's a finding of contempt, that's gonna be pretty good evidence that they're not behaving in a neighborly fashion.

RP 382:17-24; 383:23-384:2, 384:16-23. The Speidel notes, in essence, place the entire contempt hearing, and the reasons the Thomasons brought that hearing, in a new light. Had the trial court not considered Mr. Speidel's notes significant, it would have simply denied the motion.

The Thomasons argue that the new evidence cannot change the

outcome “because the Court found contempt based on actions that the Stenneses admitted *in part*.”<sup>23</sup> It is true that Mike Stennes admitted playing loud music while cleaning his truck, RP 206:18-24. He also admitted calling his dog a “goofball.” RP 205:10-23. But those actions are not contempt unless the trial court is persuaded that the Stenneses intended to harass, contact, or surveil the Thomasons with those acts. RCW 7.21.010(1)(b); Holiday v. City of Moses Lake, 157 Wn. App. 347, 355; 236 P.3d 981 (2010). The only evidence of intent, however, was the uncorroborated testimony of the Thomasons. RP 35-256.

After reviewing the Speidel notes, the trial court concluded that the Thomasons’ testimony was no longer sufficient: “I just don’t find that there’s credible evidence because of this impeaching evidence...” RP 385:2-4; 384:12-23. The Speidel notes show that both Thomasons may have motive to color their testimony—or outright lie—regarding the Stenneses’ actions. No longer confident that the plaintiffs’ testimony was sufficiently credible<sup>24</sup> to support the contempt finding, the trial court ordered a new

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<sup>23</sup> App. Br. at p. 38, *emph. added*. Appellants also argue that the new evidence can’t change the outcome because the new hearing may not be before the same judge. *See, App. Br.* at p. 37. This makes no sense whatsoever. Speculation as to what a different judge might ultimately rule is irrelevant.

<sup>24</sup> THE COURT: [The notes are] information which the Court needed to have as it weighed its decision in whether or not there was contempt... I just don’t find that there’s credible evidence because of this impeaching evidence... I’m sorry, but today the Court is vacating its order finding contempt. RP 384:25–385:8.

hearing so that Mr. Speidel's testimony could be heard:

THE COURT: ...the Court would want to hear then from this attorney, Mr. Speidel about what were these notes, what did they mean and what did he think that Mr. Thomason wanted.

RP 384:8-11. There is no reason to second-guess the trial court's decision. After all, it had weighed the evidence and heard the testimony for a full day. It is in the best position to determine whether Mr. Speidel's testimony has the potential to change the result. "[B]ecause this was a bench trial and would be a bench trial in the event of retrial, we have a definitive answer as to whether the document would probably change the result of the trial..." Marriage of Reini, No. 30420-5-III (Ct. App. May 23, 2013) (cited as nonbinding authority per GR 14.1); Skov, 48 Wn.2d at 713 ("The trial judge is in a peculiarly advantageous position, under the prevailing circumstances, to pass upon the showing made for a new trial.")

The Thomasons argue Mr. Speidel's testimony should not have factored into the trial court's decision "because a third party's mental guesswork as to a collateral issue is inadmissible". App. Br., p. 37, fn 21. Again, Appellants mischaracterize the issue. Mr. Speidel will testify to what Thomason actually said to him at the time he made the notes. "Mental guesswork" is not involved. And evidence that goes directly to a motive to mislead the court on the essential issue of the case is not a collateral issue.

The standard is not that the new evidence must result in a change of

outcome, but only that it is likely to change the result. *See e.g., Praytor*, 69 Wn.2d at 639. The trial court found that the Speidel notes cast the outcome into great doubt. This determination was squarely within the trial court's discretion.

**2. The new evidence is material.**

Material evidence is “[t]hat quality of evidence which tends to influence the trier of fact because of its logical connection with the issue.” Black’s Law Dictionary (5<sup>th</sup> Ed., 1983, abridged). The materiality prong is closely related to consideration of whether evidence is likely to change the outcome, as presumably immaterial evidence would not do so.

Here, the new evidence strikes to the heart of the factual matter before the trial court, which is whether or not the Stenneses willfully violated a court order by harassing the Thomasons. The new evidence answers the trial court’s implied question: why would Thomason, a local attorney known to the trial court as “honest and forthright with the Court” (RP 273:21-22) make stuff up about his neighbors?

Appellants argue that the new evidence is not material, but they mischaracterize the nature of the evidence and the factual inquiry it addresses. The issue is not whether there will be a “finding of harassment” (App. Br., p. 29), or whether Thomason ever actually had the power to get the Stenneses evicted (App. Br., p. 28), 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 (App. Br., p. 28). Rather, the Speidel notes are material because Thomason testified he was motivated by a fear for his own safety and that of his family, RP 110:5-8; 271:6-8, but the notes show that Thomason *believed at the time* that he could get the Stenneses evicted and that he was *working toward that goal*. The trial court did not abuse its discretion in determining that the new evidence was material.

**3. The new evidence is not “merely cumulative or impeaching”.**

A new trial may be denied where the new evidence is *merely* cumulative or impeaching. The modifier “merely” is important. It is well within the trial court’s discretion to grant a new trial based on new evidence which is more than “merely” cumulative or impeaching. The Appellants miss the distinction, arguing that the Stenneses’ new evidence is “merely cumulative” because it supports the suspicions that Mike Stennes articulated at the contempt hearing. App. Br., p. 33. This assertion flies in the face of the nature of the evidence, and of controlling case law.

**a. Evidence of a Different Kind is Not “Merely” Cumulative.**

Over a hundred years ago, in Roe v. Snyder, the Washington Supreme Court provided the rubric for understanding the type of new

evidence which supports the grant of a new trial. In Roe, the Appellant Ed Roe (client), and the Respondents (his former attorneys) offered entirely different accounts of the terms of their attorney-client contract. The trial court found for Roe in the dispute with his former counsel. The attorneys moved for a new trial, producing new evidence in the form of affidavits from disinterested witnesses. These witnesses testified that Roe had made out of court statements about the terms of the contract which conflicted with his testimony at trial. The trial court granted the motion for new trial.

Roe appealed, claiming that the new evidence was “merely cumulative.” Upholding the grant of the new trial, the Washington Supreme Court found:

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.**

Roe v. Snyder, 100 Wash. 311 at 315, *emph. added*. Similarly, the new evidence in this case is not cumulative (or impeaching) in the objectionable sense. Mike Stennes’ testimony at the contempt hearing about Thomason’s motivations was based on intuition—Mike combined Mr. Thomason’s past comments that he admired the Stenneses’ home with the terms of the Will that allowed eviction in order to arrive at the informed guess that the Thomasons were hiding their real agenda.

Like the new evidence in Roe, the new evidence here is on the same point (whether the Thomasons were looking to evict the Stenneses), but it is not of the same kind. The Speidel notes indicate that Mike Stennes' speculation at trial will be buttressed by the testimony of a disinterested witness. The new evidence goes directly to a motive that the only witnesses against the Stenneses denied. The new evidence bears "directly and vitally upon the main issue," which is whether the Stenneses actually did anything at all to violate the Orders for Protection. 100 Wash. at 315.

Appellants cite to Kennard v. Kaelin, 58 Wn.2d 524, 364 P.2d 446 (1961), Wick v. Irwin, 66 Wn.2d 9, 400 P.2d 786 (1965), and Phelan v. Jones, 164 Wash. 640, 4 P.2d 516 (1931). In all three cases, our Supreme Court upheld the trial courts' orders *denying* motions for new trials because the new evidence would not have, or could not have, affected the outcome. Kennard, Wick, and Phelan are not persuasive because the Thomasons are attempting to reverse a decision *granting* a new trial. That requires them to show that the trial court manifestly abused its discretion when it ordered the new trial. O'Brien v. Seattle, 161 Wash. at 27-28.

It is more informative to consider a case in which the Supreme Court has ordered the trial court to hold a new trial. In Praytor v. King County, Ms. Praytor sued King County, claiming that the County's catch basin was leaking and flooding her basement. Her allegations were based solely upon

her own inexpert observations. 69 Wn.2d at 638-639. The County's witness testified that the catch basin was sealed and could not leak. The trial court found for the County. 69 Wn.2d at 638.

Praytor moved for a new trial based upon newly discovered evidence. A surveyor had discovered that the catch basin actually had no concrete bottom at all, and therefore was not sealed. The trial court denied Praytor's motion. Reversing, the Supreme Court held:

[W]e 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.** And, there is more than a passing probability that it could change the result of the trial.

Id. at 640, *emph. added*. Likewise, in the case at bar, the testimony of an impartial witness such as Mr. Speidel is of singular importance in determining issues which were decided solely on the trial court's weighing of credibility between the two litigants. The trial court's conclusion, that the new evidence could change the outcome, must not be disturbed. RP 383:20-385:12.

**b. Respondents' New Evidence Is More Than "Merely" Impeaching.**

The decision in Roe, discussed at pages 27-28 above, delineates when evidence, although impeaching, is not "merely" impeaching. Recall that the out-of-court statements made by the appellant/client in Roe were declarations against the client's interests. This elevated the new evidence to beyond "merely" impeaching:

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.**

Roe, at 315-316 (emphases added). Such is the case at bar. The new evidence has force because it shows Thomason disclosing his real motives and plans to a disinterested third party. It is an admission against interest and it contradicts the Thomasons' statements and arguments at trial. It is independent evidence of what was actually going on in that courtroom—evidence that the Stenneses could not have produced before the hearing.

Appellants' cite to a number of cases that hold that "merely impeaching" evidence cannot support a new trial. Leaving aside that the new evidence here is for more than impeachment alone, the cases cited by the Thomasons offer them little assistance. Six of their cases<sup>25</sup> affirm orders denying a motion for new trial, and are therefore of little persuasive value because reviewing a denial of a new trial differs from reviewing the grant of a new trial. The analyses are not interchangeable. The court noted this critical distinction in O'Brien v. Seattle, which involved an appeal of a grant of a new trial:

Appellant cites many cases in which this court refused to reverse the action of the superior court in denying motions for new trials. These cases... are not in point here, as the decisions simply follow the well recognized rule that the very large discretionary power vested in trial courts in passing upon motions for new trials... In the case at bar, appellant seeks to reverse an order granting a new trial which, at least in so far as the same was granted upon the ground of newly discovered evidence, embodies a ruling peculiarly within the discretion of the trial court.

O'Brien, at 27, *emph. added*, citations omit'd.

The Thomasons cite to only two cases in which an appellate court reverses the trial court's decision granting a new trial, Donovick v.

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<sup>25</sup> Brown v. General Motors Corp., 67 Wn.2d 278, 287, 407 P.2d 461 (1965), Griffith v. Whittier, 37 Wn.2d 351, 355, 223 P.2d 1062 (1950), Harvey v. Ivory, 35 Wash. 397, 401, 77 P. 725 (1904). *App. Br.*, p. 36. Olson v. Gill Home Inv. Co., 58 Wn. 151, 162, 108 P. 140 (1910); Armstrong v. Yakima Hotel Co., 75 Wn. 477, 483, 135 P. 233 (1913); Hoffman v. Hansen, 118 Wn. 73, 78, 203 P. 53 (1921), *App. Br.*, p. 36 at footnote 20.

Anthony, 60 Wn.2d 254, 373 P.2d 488 (1962) and Trosper v. Heffner, 51 Wn.2d 268, 317 P.2d 530 (1957). But even these fail to shore up the argument that the trial court should be reversed.

In Donovick, the plaintiff sued the former owner of a logging truck that had collided with his vehicle. The defendant, Anthony, testified at trial that he had overhauled the brake system on the truck before the accident. Anthony was cross-examined, and the plaintiff called a brake expert to rebut Anthony's testimony. 60 Wn.2d at 255-56. After the jury returned a defense verdict, the plaintiff moved for a new trial based on affidavits that claimed that, after the trial, Anthony allegedly admitted that he had not overhauled the brakes. Anthony's controverting affidavit affirmed his testimony at trial. Id. at 257-58. The trial court ordered a new trial. Id. at 254. The Court of Appeals reversed, noting the plaintiffs' affidavits merely impeached the testimony at trial.<sup>26</sup> Id. at 258-259.

The new evidence in Donovick was nothing more than disputed testimony that a material witness (Anthony) had contradicted himself outside the courtroom after the trial, which the witness denied under oath. Such testimony was solely impeaching, adding nothing of substance to the

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<sup>26</sup> Furthermore, the jury may have found for the defendant on several different grounds, including that defendant Anthony's negligence, if any, was not the proximate cause of the accident. 60 Wn.2d at 257. Therefore, even if the jury had heard Anthony's supposed admission that he had not overhauled the brakes, the verdict was unlikely to change.

evidence already presented at trial by both Anthony and the plaintiff's expert witness. Id. at 258. In contrast, the Speidel notes are new documentary evidence that relate directly to Thomason's actual motive for claiming misconduct by Mike and Donna Stennes.

In contrast to Anthony in Donovick, Thomason and his attorneys *never denied* making the remarks that Mr. Speidel reports in his notes. Rather than deny the comments, they attempted, in unsworn attorney argument, to 'explain away' the content of the notes. RP 374-377. The Stenneses rebutted the Thomasons' arguments and inferences. RP 378- 382. The trial court was unconvinced by the Thomasons' excuses:

THE COURT: ...Well, so the fact that we have an argument between counsel as to what the facts are, to me, is significant because this Court can't draw any conclusions from the disagreement between counsel and I'm not allowed to guess.

RP 382:13-17. The trial court was well within its discretion to determine that this new evidence was not merely cumulative or impeaching. Rather, it is important substantive evidence that the court needs to consider with the expository testimony of Mr. Speidel.

The Thomason's only other case reversing the grant of a new trial is Trosper v. Heffner. Trosper reversed the trial court on multiple grounds, including the fact that the proffered "new evidence" was simply another estimate of the cost to repair the defendants' car. The new estimate merely impeached a repairman's testimony at trial. The Trosper decision faults the

trial court for usurping the role of the jury as finder of fact, stating:

Because of the garageman's estimate and for other unspecified reasons, the trial court thought the jury should have believed that the impact of the automobiles was greater, and the injury to the respondent more severe, than the verdict indicated. These are questions of fact. It is for the court to say, as a matter of law, when evidence is insufficient to support a verdict. It is for the jury to believe the evidence it chooses when it is merely conflicting, as in the instant case.

51 Wn.2d at 270.

Trosper is not on point. The trial court in the Stennes case was the trier of fact. It therefore knows exactly how much credibility it accorded to each witness's testimony. The Speidel notes are not "merely impeaching." They go to the core of the case because those notes, with Mr. Speidel's explanatory testimony, are the first and only evidence supporting the Stenneses' suspicions that the Thomasons have ulterior motives. The trial court did not abuse its discretion in determining that the new evidence was not "merely" cumulative or impeaching.

**C. IN THE ALTERNATIVE, THIS APPEAL WAS IMPROVIDENTLY GRANTED**

Procedurally, it is important to note that the trial court never ordered sanctions or revisions to the Order for Protection. The court put those actions off for another day, determining that it would "issue an order designed to ensure compliance with a prior order of the Court... The Court will issue a separate Order to such effect," CP 517. That day never came,

however. After it saw the new evidence, the Court vacated the bare finding of contempt.

Even if this Court were to vacate the 7/26/19 Order, the trial court would fall back to the 6/20/19 Order—an order which, because it is not final, remains subject to revision at any time under CR 54(b). A bare contempt order without sanctions is not a final order subject to appeal:

An adjudication of contempt is appealable if it is a final order or judgment; i.e., the contumacy—the party's willful resistance to the contempt order—is established, and the sanction is a coercive one designed to compel compliance with the court's order.

Wagner v. Wheatley, 111 Wn. App. 9, 15-16, 44 P.3d 860 (2002). Stennes explained this to the Commissioner, who agreed that the order granting new trial was not appealable where no final order of contempt was entered. 11/5/2019 Commissioner's Ruling. The panel reversed the Commissioner, without addressing the fact that no final order of contempt has been entered.

Therefore, in the alternative to affirming the trial court, this court may consider whether this review was improvidently granted. Remand will still leave the case with no final order and the trial court will still have the discretion to consider new evidence or change its mind. The June 20, 2019 contempt order is not a final order. Thus, it is “subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” CR 54(b). It is foundational in our justice

system that “[t]he court’s final say on the merits is subject to revision at any time before final judgment.” Snyder v. State, 19 Wn. App. 631, 635-36, 577 P.2d 160 (1978).

**D. ATTORNEYS’ FEES**

The Thomasons’ request for attorney fees must be denied, for the simple reason that their appeal must be rejected.

Even was their appeal successful, the appellants request fees under an inapplicable statute, RCW 7.21.030(3). But as they admit, case-law interpreting RCW 7.21.030(3) “authorizes the award of attorney fees incurred in defending an appeal of a contempt order.” R.A. Hanson Co. v. Magnuson, 79 Wn. App. 497, 502; 903 P.2d 496, 499 (1995). Fees on appeal under RCW 7.21.030(3) are not recoverable where the appeal is of a finding of no contempt. Marriage of Curtis, 106 Wn. App. 191, 202; 23 P.3d 13 (2001). The instant case is not an appeal of a contempt order. It appeals an order for a new trial. This procedural posture does not support a request for fees under RCW 7.21.030(3).

Appellants also misrepresent the posture of the case were this Court to reverse. Upon remand, were the Appellants to prevail—which they should not—the case would return to the trial court with the finding of contempt, but no final order on contempt because the trial court did not order sanctions. (*See* Section C, above.) It would still be within the trial

court's province to determine whether or not the contemnor should pay all, some, or none, of the Thomasons' fees. RCW 7.21.030(3). Appellants' requests for fees must be denied.

## V. CONCLUSION

The trial court's decision to grant a new trial based on the new evidence presented was not a manifest abuse of discretion. The trial court's ruling should be affirmed and this matter remanded to the trial court.

RESPECTFULLY SUBMITTED this 8th day of July, 2020.

By: Elena Garella      Karen Knutsen

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### Certificate of Service

I, the undersigned, certify that on the 8th day of July, 2020, I caused a true and correct copy of this pleading to be served by e-service through the Washington Appellate Courts' Portal to:

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