

NO. 61912-8-I
(Consolidated with Nos. 63011-3-I & 63012-1-I)

WASHINGTON STATE COURT OF APPEALS, DIVISION I

LE & ASSOCIATES, P.S.,
a professional service corporation,

Respondent,

v.

ROBERTO DIAZ-LUONG, and LAN THI NGUYEN,

Appellants,

and

EDWARD K. LE and VIENNA LE,
Individually and as spouses/partners,

Third-Party Defendants.

APPELLANTS' CONSOLIDATED REPLY BRIEF

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I. INTRODUCTION & GENERAL REPLY.

The Le Firm's Response Brief ("Response") misses (or studiously ignores) the central point Roberto and Lan made in their Consolidated Opening Brief ("Opening Brief"): the procedure imposed by Judge Inveen for the contempt proceedings was fatally flawed because it did not permit live testimony or cross-examination, the "greatest legal engine ever invented for the discovery of the truth," which is one of the hallmarks of our legal system as a whole, and of due process in particular. *See* Opening Brief, p. 37-38. Thus, its factual and procedural arguments about what errors are preserved are irrelevant because the Court will never get to the point of determining whether substantial evidence supports the findings and whether the findings, in turn, support the remedial and punitive sanctions imposed. *See* Opening Brief, p. 32, n.15.

The Response's claim that the manifest Constitutional Due Process defect of denying live testimony and cross-examination was not preserved (Response, pp. 27-29) is especially specious given Lan's and Roberto's criminal defense lawyer's explicit due process argument early in his first appearance¹ and Judge Inveen's grant to Lan and Roberto of a continuing objection on that issue in the April hearing. I RP 31:10-13. That

¹ Mr. Wayne responded to Judge Inveen's question as to the reason why a show cause, evidentiary hearing is required by the applicable statutes, RCW 7.40.150 & .160, by stating at I RP 16:1-8 (emphasis added):

It's because of the Draconian relief that can be imposed. ***Due process requires that an accused must be able to meet the opponent and examine them.*** And where you have, further, under the special [contempt] statute [RCW 7.21.040], the referral of the matter to the prosecutor, I think Sixth Amendment rights are also implicated and ***it makes it all the more important that strict due process compliance occur.***

fundamental claim of error did not have to be repeated at every step since that is what a continuing objection is designed to excuse. *See State v. Powell*, 126 Wn.2d 244, 257-58, 893 P.2d 615 (1995). Lan and Roberto, nevertheless, did renew the objection at the outset of the June 5 hearing. II RP 5:14-6:1. Judge Inveen denied this request, and also denied Lan's and Roberto's earlier request for additional live testimony of other witnesses. *See Opening Brief*, pp. 19-24. As the Opening Brief pointed out, Judge Inveen denied Lan's and Roberto's motion to strike the supplemental declaration of Mr. Andrew which tendered new evidence and new opinions, despite the fact they raised as one objection that they were denied any opportunity to cross-examine him as to his new opinions, upon which Judge Inveen ultimately relied in part. *Opening Brief*, pp. 22-23.

It is hornbook law that by denying the right to both live testimony and cross-examination on these new issues and opinions of Mr. Andrew, Lan and Roberto were denied their fundamental due process right to present a defense.² *See also Opening Brief*, pp. 37-38. Moreover, this was

² *See Opening Brief*, pp. 31-32 & footnote 15. *Accord Rogoski v. Hammond*, 9 Wn. App. 500, 506, 513 P.2d 285 (1973) (emphasis added) setting out "the nature of the due process requirements of a notice and hearing" as distilled from federal cases including:

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Fuentes v. Shevin*, *supra*; *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Goldberg v. Kelly*, *supra*; *Sniadach v. Family Fin. Corp.*, *supra*. The minimum requirements are these: (1) timely and adequate notice of hearing on the probable validity of the creditor's claim which states the basis for the claim and allows the debtor adequate time to prepare for the hearing; (2) an independent and impartial decision maker; (3) the right to appear personally at the hearing, with or without retained counsel; (4) **the right at the hearing to confront and cross-examine an adverse witness and to present evidence and oral argument in support of his claim or defense**; (5) the right to a decision based on applicable legal rules and evidence adduced at the hearing. Reasons for the determination and an indication of the evidence relied upon should be stated, but formal findings are not required.

in a case where the complaining party was raising the spectre of a criminal referral so that the stakes could not have been higher.

Given Lan's and Roberto's clear objection to the denial of live testimony and cross-examination and the continuing objection granted by Judge Inveen on that point, Lan and Roberto do not need the safety net of RAP 2.5(a)(3) to insure their claim of violation of a fundamental constitutional right is reviewed. Nevertheless, the rule exists precisely to insure that, in conjunction with RAP 1.2(a), basic, fundamental issues, such as the denial of a most fundamental element of due process, do not fall through the cracks. Should the Court have any concern the error was not preserved, proper application of RAP 2.5(a)(3) and 1.2(a) insure consideration of the issue, thus promoting a decision on the merits.

Nor will the Court determine on a substantive basis whether there was an abuse of discretion in the sanctions imposed even assuming, *arguendo* (and which Lan and Roberto do *not* concede), that this was the proper test because, again, the process by which the findings were made and the sanctions were determined was so fatally flawed from a due process standpoint they cannot stand.

Part of the Le Firm's misunderstanding flows from its use of family law and anti-harassment cases in the non-family law context of this case. Family law contempt cases simply are not applicable in this civil litigation over termination of an employment relationship and allegations of withheld wages, and by both sides of poaching and stealing clients, with all the complexities this entails. The prime example is its mis-use of the

In re Marriage of Rideout decision, 150 Wn.2d 337, 77 P.3d 1174 (2003). *Rideout* permitted a substantial evidence review of a documentary record with contested facts. But the Response tries to apply it outside the two clear boundaries that the decision itself drew: 1) it was limited to the family law context; 2) it was further limited by the fact the parties did not request a live evidentiary hearing, in contrast to Lan's and Roberto's requests for live testimony and cross-examination, beginning at the April, 2008 hearing. Anti-harassment cases like *Trummel v. Mitchell*, 156 Wn.2d 653, 131 P.3d 305 (2006), and *State v. Noah*, 103 Wn. App. 29, 9 P.3d 858 (2000), are similarly inapplicable as they arise out of an entirely different statute and context than a preliminary injunction in a detailed employment dispute.

Respondent's misunderstanding also flows from hanging on to outmoded concepts of what is acceptable procedure in adjudicating alleged contempts committed outside the presence of the court in a civil litigation, non-family law context. The Response essentially ignores the movement *away* from judicial adjudication on the papers by the United States Supreme Court beginning in the 1960's and culminating in *United Mine Workers v. Bagwell*, 512 U.S. 821 (1994), in order to meet the modern understanding of and requirements for Constitutional Due Process. Instead, the Response mischaracterizes *Bagwell* and invokes Blackstone as though the last 40 years of Constitutional jurisprudence articulating the requirement of Due Process in the context of contempt did not exist. This means ignoring as well the changed requirement in the

contempt statute in 1989, which added the intent element even in the civil context³ by specifying intentional violation of the court order so that, to be actionable, there must be knowing intent to defy the court's order. *See* Opening Brief, 32 – 36.

The Response seriously overstates the nature of the potential contempt that Judge Inveen could have found given the provisions of the Preliminary Injunction and the limited undisputed testimony from Roberto. While the Response argues Roberto (and because she is married to him Lan, even though there is no direct evidence or admission nor proper circumstantial evidence as to Lan) is in contempt because he destroyed the evidence, that is not accurate. Given the provisions of the Preliminary Injunction, at most there was violation of the provision stating that no copies were to be made. The portion of the Preliminary Injunction being enforced required Lan and Roberto to return the Le Firm files and not retain a copy. They did this, as all potential copies were returned or destroyed -- the portable hard drive with the original October 23, 2007 download; and the hard drives on the “blended laptops” which they used for their firm computers and therefore could have had some Le Firm files from the work they were contracted to do in their separation agreement.

The latter the Response works up about claimed contempt using incomplete, defective “facts” from the paper record is simply a continued effort to divert the Court from the fact the Le Firm files contain critical

³ As noted in the Opening Brief, p. 34 & n. 18, the knowing intent to violate a court order was the hallmark of criminal contempt. Negligence was not enough.

evidence to Lan's and Roberto's defense and counterclaims which are purely employment-related, as well as critical to their counterclaims which raise serious ethical violations by the Le Firm as to its clients. This intensity reflects the Les' fear of the veracity of the contentions asserted by Lan and Roberto in their counterclaims of wrongdoing by the Les (*see* CP 1596 – 1604 setting out affirmative defenses and counterclaims against the Le Firm in Lan's and Roberto's January 24, 2008, Answer and Counterclaims), which they successfully prevented from having discovery on before any of these hearings, and are still resisting.⁴ The fact is, the Les' protestations of evil-doing against Lan and Roberto are either (or both) a projection of their own unscrupulous acts on these very young attorneys, or a strident effort to pre-empt Lan and Roberto's ability to pursue those issues since they would be meritorious. In other words, the best defense is a good offense.

Finally, Lan and Roberto remind the Court of very important language in the February 11, 2008 Preliminary Injunction which seems to have been forgotten by the trial court and Respondents: the "findings"

⁴ At the outset Roberto called attention to the need for "live testimony" (and thus cross-examination) given the conflicting declaration testimony if the Court was to get at the truth of the overall situation. He did this in his February 5, 2008 declaration, three days *before* the hearing on the Preliminary Injunction on the papers, and a week *before* entry of the order. *See* CP 300 (emphasis added):

Thus, in talking to this Court, Mr. Lee claims he supervised everything and that Lan and I had no experience. He claims that he is entitled to *quantum meruit* for all the work he has done, but—as soon as an example of his deceit is uncovered—he completely changes his position and says that Lan or I did it. ***This is why the Court needs to intervene to slow this case down and allow some testimony to be taken under oath.*** There have been too many loose accusations here and too many convenient and shifting stories from Edward, Vienna, and their counsel.

made after that motion hearing on the papers, a mere two months after the complaint was filed on December 11, 2007, and before any (much less complete) discovery, were made “for the purpose of this motion only.

They are made without prejudice to the parties pending a full litigation of the matter.” CP 479, App. B-2 (emphasis added). These findings have, in fact, severely prejudiced Lan and Roberto ever since. It has only been recently that the parties have begun to move toward a full litigation of the matter, despite the Les’ continued resistance.

II. REPLY ARGUMENT.

- A. **The Standard of Review for an Adjudication of an Alleged Violation of a Preliminary Injunction as Contempt Under RCW 7.21.010 *et seq.*, Which is Outside the Contexts of Courtroom Management, Family Law, and Anti-harassment, is Not Abuse of Discretion On the Papers, But Substantial Evidence Under the Correct Quantum of Proof Following a Proper Evidentiary Hearing. The Substantial Evidence Review is Irrelevant Where, as Here, the Trial Court Failed to Use the Required Procedures to Protect Due Process When It Denied Live Testimony and Cross-Examination Which Was Requested and Required Given the Nature of the Matter, the Hotly Disputed Facts, and What Was at Stake.**

Respondent’s argument for an abuse of discretion standard of review on a documentary record flows from its contention that a contempt hearing on the alleged violation of a complicated, out-of-court preliminary injunction can be properly done on the papers and no live testimony or cross-examination is required, no matter how complicated the facts, no matter how severely the testimony and other evidence conflicts, no matter how incomplete the record, and no matter that willful disobedience with

clear intent must be established. In one sense, Respondent's argument helps focus the Court for argument. This issue is directly tied to the amount of due process to which Lan and Roberto were entitled in the Les' effort to try and enforce the Preliminary Injunction, obtain a criminal referral and, at the same time, force an early end-game to acrimonious employment litigation, *all* without being required to prove *any* part of their case under normal standards of evidence and proof.

Family law cases, which are commonly cited for general propositions about contempt including the burden of proof and the standard of review, apply a different statute, RCW 26.09.160. As the Supreme Court recently held in *In re Dependency of A.K.*, 162 Wn.2d 632, 174 P.3d 11 (2007), the statute governing the particular contempt proceeding at hand controls because there are different policies underlying the many various, more specific contempt statutes that now exist alongside the general statute. *See* 162 Wn.2d at 649, ¶23.

So, for example, the family law statute specifies a different, less stringent substantive requirement for finding contempt than Ch. 7.21 RCW due to the unique context involving the welfare of children. Establishing contempt under RCW 26.09.160 does not require proof of the element of intent; there is no need to establish the alleged contemnor knowingly intended to violate the court's order in question. Rather, the nature of such contempt proceedings in family law is a matter of strict liability: Was the required provision of the order met, *i.e.*, were payments made, or were they not made? There is no need to prove intent to violate

the order and the consequences typically are not as severe as here. The domestic violence and anti-harassment statutes also have their own provisions for contempt arising in those contexts. As a consequence, because of the differences in statutes and context of the cases (there is no best interest of children to be concerned with in this proceeding), family law cases are all distinguished, as are those from other statutory contexts. *In re Dependency of A.K., supra.*

Respondent cites *In re Marriage of Rideout*, 150 Wn.2d 337, 340, 77 bP.3d 1174 (2003), for the proposition that the abuse of discretion standard applies where contempt is found on a solely documentary record and that *de novo* review of the contempt proceeding, even though made on an exclusively documentary record, was specifically rejected. Response, p. 22. Respondent fails to point out several critical elements of *Rideout*.

First, *Rideout* is a family law case which, as noted in that case, is therefore treated differently. As Chief Justice Alexander said for the Court, in quoting from a recent decision:

. . . local trial judges decide factual domestic relations questions on a regular basis and consequently stand in a better position than an appellate judge to decide whether submitted affidavits establish adequate cause for a full hearing on a petition to modify a parenting plan.

In re Marriage of Rideout, 150 Wn.2d at 351, quoting *In re Parentage of Jannot*, 149 Wn.2d 123, 126, 65 P.3d 664 (2003).

Second, the parties in *Rideout* never requested live testimony. This is in stark contrast to Roberto and Lan, who requested it and were rebuffed by Judge Inveen. The Chief Justice's comment on the

importance of live testimony, even in the context of a family law matter where far more deference is given to trial courts, is instructive. That comment, in context with the entire decision, reinforces the fact the trial court committed error here by denying Roberto and Lan the right to live testimony and cross-examination before determining contempt occurred.

As we noted in *Jannot*, 149 Wn.2d 123, trial judges and court commissioners routinely hear family law matters. In our view, they are better equipped to make credibility determinations. Having said that, **we recognize that where an outcome determinative credibility issue is before the court in a contempt proceeding, it may often be preferable for the superior court judge or commissioner to hear live testimony of the parties or other witnesses, particularly where the presentation of live testimony is requested.** In that respect, **we agree with the amicus WSTLAF that issues of credibility are ordinarily better resolved in the “crucible of the courtroom, where a party or witness’ fact contentions are tested by cross-examination, and weighed by a court in light of its observations of demeanor and related factors.”** Br. of Amicus Curiae WSTLAF at 14. Here, Sara had a right to request the opportunity to present live testimony pursuant to Thurston County Local Rule 43(e) or CR 43(e)(1), **but she failed to make that request.**

In re Marriage of Rideout, 150 Wn.2d at 351-52 (emphasis added).

Finally, the Response also notes that the abuse of discretion standard “governs review of sanctions for noncompliance with discovery orders via a contempt order,” citing *In re Matter of Young*, 163 Wn.2d 684, 185 P.3d 1180 (2008). Response, p. 23. But Lan and Roberto were not being policed by the trial court for violations of discovery orders or protocols. Respondent was seeking sanctions via contempt for alleged violation of a preliminary injunction which went to the merits of the litigation and which was brought under Ch. 7.40 RCW and enforced by the general contempt statute with its requirement of proof of an intentional

disobedience of a court order which includes knowledge. This is not a matter of the trial court policing its courtroom. A matter arising under Ch. 7.40 RCW to police an injunction's requirements outside the courtroom and enforced under Chapter 7.21 RCW, it is precisely the situation addressed by *Bagwell*. Like the situation in *Bagwell*, which also involved potential severe consequences if the alleged out-of-court and highly fact-intensive and contested contempt actually was found, making that determination requires proper fact finding in a contested evidentiary setting with a neutral fact-finder using a heightened burden of proof, a fact-finder who is not the judge whose order was allegedly violated.⁵

The standard of review of a properly conducted proceeding for adjudicating an alleged out of court contempt is not, therefore, abuse of discretion based on a documentary record in front of the trial judge who issued the order. It will be substantial evidence following a proper hearing which has yet to be held and with a proper quantum of proof requirement: either clear and convincing evidence, or evidence beyond a reasonable doubt. *See* Opening Brief, pp. 31-32. Only then may there be an abuse of discretion review of the sanctions imposed, but that will contain as a critical part of the analysis whether the sanction imposed was in fact permitted under the applicable law given the circumstances, a question of law reviewed *de novo*.

⁵ The contempt hearings in *Bagwell* itself were conducted in state court as full evidentiary bench hearings following discovery, with cross-examination, and with proof beyond a reasonable doubt. *Bagwell*, 512 U.S. at 824.

B. Roberto Properly Appealed All Orders Underlying the January 2009 Orders in This Consolidated Appeal, Including the June 2008 Orders, Notwithstanding His Withdrawal From the First Appeal Because the June 2008 Orders Prejudicially Affect January 2009 Orders, and Did not Waive His Right to Appeal.

Respondent claims Roberto's withdrawal from the first appeal bars review of the June 2008 Orders with respect to Roberto. Response, p. 23-25. This is incorrect. *First*, RAP 2.4(b) by its terms gives this Court authority to review prior rulings not designated in the notice of appeal where those rulings prejudicially affect the decisions designated in the notice -- and Respondent does not contend the June 2008 Orders do not prejudicially affect the January 2009 Orders. *Second*, dismissal under RAP 18.8 is without prejudice and does not bar Roberto from future timely appeals. *Third*, Respondent has not shown (nor can it show) detrimental reliance on, or prejudice from, Roberto's withdrawal. Its response brief was written: *after* Roberto had rejoined the appeal with his notice as to the 2009 orders; *after* the Court consolidated the appeals without any objection by Respondent; *after* Roberto and Lan filed their Consolidated Opening Brief; *and after* choosing to not bring a motion to dismiss Roberto or other potential relief before writing and filing its response brief. It chose to proceed and cannot now claim after the fact it was prejudiced.

RAP 2.4(b) specifically provides for review of issues not designated in the notice of appeal:

Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling *prejudicially affects the decision designated in the notice*, and (2) the order is entered, or the ruling is made, before the appellate court accepts review. . . .

(Emphasis added.) *See Hwang v. McMahon*, 103 Wn. App. 945, 949, 15 P.3d 172 (2000) (“We will review a trial court order not designated in the notice of appeal if that order prejudicially affects the decision designated in the notice and is entered before the appellate court accepts review”). Lan and Roberto will address only the first element because it is undisputed the second element of RAP 2.4(b) is met, since the June 2008 Orders were entered before the second notice of appeal was filed in 2009.

1. The June 2008 Orders are Reviewable as to Roberto Because They Prejudicially Affect the January 2009 Orders.

Respondent does not contest that Roberto filed a timely notice of appeal with regards to the January 2009 Orders. The question the Response Brief seems to raise (at most) is, are the January 2009 Orders prejudicially affected by the June 2008 Orders such that both must be reviewed to determine the merits of the consolidated appeal? They are.

The prejudicial affect element of RAP 2.4(b) is satisfied where the designated order “would not have occurred but for the underlying order” or, where the orders are “so intertwined that to resolve the order appealed, the court must consider the order not appealed.” *Right-Price Recreation*,

LLC v. Connells Prairie Community Council, 146 Wn.2d 370, 378-80, 46 P.3d 789 (2002).⁶

Both the 2008 and the 2009 orders address the need for a protective order preventing disclosure of Lan's and Roberto's confidential information to Respondent. The June 11, 2008 Findings of Fact, Conclusions of Law and Order of Contempt required Roberto and Lan to turn over to the Le Firm's IT specialist "any and all computers, storage devices and media designated by the Plaintiffs [the Le firm] for analysis." CP 1540, ¶ C. The June 25, 2008 order stayed the previous order requiring Roberto and Lan to immediately give their computers to the Le firm's IT specialist, pending negotiation of a protective order to prevent disclosure of protected confidential client information. CP 1568-69, ¶ 1.

Two of the January 2009 Orders specifically concern the protective order required by the June 2008 Orders. First, the trial court denied Roberto's and Lan's motion for protective order which called for an *independent* IT specialist, rather than the one chosen by the Le Firm. CP 2455-56. The trial court then entered a protective order presented by the Le Firm which designated the Les' expert to do the work without requiring

⁶ In *Right-Price*, the Supreme Court reviewed denials of both a motion to dismiss and a summary judgment, neither of which orders were designated in the notice of discretionary review of the order compelling discovery, because the earlier orders fit the text of RAP 2.4(b) by prejudicially affecting the designated ruling and they were entered before the appellate court accepted review. 146 Wn.2d at 377-80. The Court pointed out that the test was the same whether characterized as the designated order "would not have occurred but for the underlying order" (as first stated in *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 134-35, 750 P.2d 1257, 756 P.2d 142 (1988)), or if characterized as the "the orders must be so intertwined that to resolve the order appealed, the court must consider the order not appealed," as Division II characterized the *Franz* holding. *Right-Price*, 146 Wn.2d at 378-80, quoting the Court of Appeals decision.

him in any way to submit proposed disclosures to Roberto's and Lan's trial counsel for review for privilege or other objection, nor for any form of *in camera* review prior to disclosing data to the Les and their attorneys. CP 2457-61.⁷

A third ruling from the January, 2009, Finding of Fact, Conclusions of Law and Order Imposing Sanctions for Contempt (CP 2468-75, App. E-14-20), also concern the protective order. Finding No. 14 states Appellants were "unreasonable" in negotiating the terms of an agreed protection order because their proposed protection order called for an independent IT specialist and thus contradicted the trial court's June 2008 Orders. CP 2471, App. E-17. Without a hearing, and without even oral argument, the trial court went on to find Lan and Roberto in contempt for failure to comply with the June 2008 Orders and ordered what it termed "remedial" sanctions. CP 2472-73, App. E-18-19.

The trial court's January 2009 Orders plainly "would not have occurred but for the underlying" June, 2008 Orders which required Roberto and Lan to turn over their computers to Respondent's IT specialist. Lan and Roberto were found in contempt and sanctioned for the claimed failure to negotiate in good faith within the terms required by

⁷ Commissioner Verellen's March 20, 2009 modification of the January 2009 Orders imposed precisely these two critical elements before allowing the materials to be provided to the Les' attorneys: 1) disclosure of data *first* to Lan and Roberto's attorneys for assertion of privilege or other objection; and 2) genuine *in camera* review. Commissioner Verellen also added a third critical element to the discovery protocol: explicit designation of Mr. Andrew as an officer of the court in conducting these tasks, and thus responsible directly to the Court, not the Les. Neither party moved to modify Commissioner Verellen's order.

the trial court's June 2008 Orders. The reasonableness of those terms must necessarily be on review since that underlies the eventual contempt and sanction orders, along with the entry of the protective order proposed by Respondents.

2. Orders that Underlie Sanctions are Reviewable When Reviewing the Sanctions.

The timely appeal of sanctions entered by a trial court brings up for review the underlying rulings on which those sanctions are based under RAP 2.4(b). *Franz v. Lance* 119 Wn.2d 780, 836 P.2d 832 (1992),⁸ *Ambach v. French*, 141 Wn. App. 782, 786-87, 173 P.3d 941 (2007) ("*Ambach I*") ("When a party seeks review of an award of CR 11 sanctions, the underlying judgment resulting in the sanctions is also subject to review pursuant to RAP 2.4(b)"), *reversed on other grounds*, ___ Wn.2d ___, 2009 WL 3031416 (Sept. 24, 2009) ("*Ambach II*").⁹ *Accord, Right-Price*, 146 Wn.2d at 374, 378-79 (2002) (reviewing denials of motion to dismiss and of summary judgment, neither of which were designated in the notice of discretionary review, where they fit the text of

⁸ *Franz v. Lance* challenged sanctions in a quiet title action where the trial court found defendants liable for trespass and ordered sanctions under CR 11. The defendants filed a timely notice of appeal of the order imposing sanctions and also sought review of the judgment underlying the sanctions pursuant to RAP 2.4(b). 119 Wn.2d at 781-82. The Court of Appeals dismissed the appeal from the underlying judgment as untimely and the defendants sought discretionary review from the Supreme Court. *Id.* The Supreme Court granted discretionary review, reversed the partial dismissal of the appeal, and reinstated the appeal of the underlying judgment. *Id.*

⁹ *Ron & E Enterprises, Inc. v. Carrara, LLC*, 137 Wn. App. 822, 825-26, 155 P.3d 161 (2007) recognized that the rule in *Franz* was modified by changes to RAP 2.4(b) as it relates to appeals of attorneys fees, so that an appeal of a fee award made after a judgment does not bring up for review the judgment underlying the fees. *Accord, Bushong v. Wilsbach*, 151 Wn. App. 373, 213 P.3d 42, 43-44 (2009). The *Ambach* cases taken together demonstrate that the changes to RAP 2.4(b) apply just to fee awards or, in other words, the language of the rule means what it says, and no more.

RAP 2.4(b) by prejudicially affecting the designated rulings and were entered before the appellate court accepted review.)

The two recent decisions in *Ambach* illustrate that, as stated in *Right-Price* and *Franz*, the law is that an appeal of sanctions brings up the underlying substantive ruling. In *Ambach*, the underlying summary judgment dismissing *Ambach*'s CPA claim against her surgeon was not appealed. Rather, she appealed only after the later final judgment imposing over \$7,000 in sanctions against her attorneys under CR 11. 141 Wn. App at 786. The substantive rulings on summary judgment were reviewed at the Court of Appeals only under the provisions of RAP 2.4(b). *Id.*, 141 Wn. App. at 786-87. After reviewing and analyzing the underlying decision, Division III reinstated the CPA claim on the basis the plaintiff's economic loss damages were recoverable under the CPA. *Id.*, 141 Wn. App at 786-87 (basis for review of the summary judgment underlying sanctions) and at 789-90 (nature of damages). The only issue the Supreme Court reviewed in *Ambach II* was "whether the increased cost a consumer pays for surgery instead of alternative medical treatment constitutes an injury to "business or property" as it is used in Washington's Consumer Protection Act (CPA)." *Ambach II*, 2009 WL 3031416 *1, ¶1. The Court did not take a procedural dodge of the substantive issue. Rather, it addressed it and reversed the Court of Appeals on the substantive analysis of the CPA claim and reinstated dismissal of the plaintiff's action in a 9-0 decision with Justice Chambers specially concurring.

In this appeal the January 2009 Orders found Lan and Roberto in contempt and ordered sanctions for an alleged failure to comply with the terms of the June 2008 Orders. They meet the RAP 2.4(b) test no matter how it is stated: 1) they are so intertwined that to resolve Roberto's appeal of the January 2009 Orders the court will have to consider the June, 2008 orders; or 2) the January 2009 Orders as to Roberto would not have occurred but for the underlying June 2008 Orders.

3. Roberto's Withdrawal of His Appeal From the June 2008 Orders Under RAP 18.8 Did not Waive His Right to Review of Those Orders By His New Appeal.

Respondent argues that Roberto waived his right to appeal the June 2008 Orders by withdrawing from the first appeal. To the contrary, Washington law holds that abandonment of an appeal does not impair a party's right to perfect a new appeal. *See* the pre-RAP case of *Erz v. Reese*, reiterating Washington law with respect to abandoned appeals:

It is well settled in this state that the failure to perfect an attempted appeal, or the abandonment of an appeal by a party having the right to appeal, *does not impair such party's right to give notice of and perfect a new appeal*, providing that the new appeal is perfected within the time prescribed by law.

157 Wash. 32, 288 Pac. 255 (1930) (emphasis added), citing *Carstens & Earles v. Seattle*, 84 Wash. 88, 146 Pac. 381 (1915).

RAP 18.2 now governs voluntary withdrawal of an appeal. Nothing in the rule changed Washington's common law rule that abandonment of an appeal does not prejudice an appellant's right to perfect a new appeal. *See generally* RAP 18.2. There was no waiver by Roberto.

C. Lan and Roberto Did Not Concede Any Findings Below.

The Response argues that Roberto and Lan abandoned their assignments of error to the findings below so that they are verities on the basis that the Opening Brief did not specifically argue against the challenged findings, except for five as to Lan. Response, pp. 25-26. They did not abandon their assignments of error. Moreover, the Response's argument is circular reasoning that would never permit a constitutional challenge to a proceeding the flaws for which resulted in fact-finding because (so its reasoning goes), those improperly found facts which were verities would require affirmance. This is nonsense.

The Opening Brief challenged the findings and then argued the process which resulted in them was so seriously flawed that they cannot stand. The basis for making the findings violated due process so that the findings themselves must be vacated. *See* Opening Brief, pp. 31-32 & n.15. This is not a substantial evidence argument that requires arguing the findings. It is a legal error argument that says they must all be thrown out because it was a fundamentally unfair proceeding. In this posture the findings below are not verities or considered verities for the analysis. They are challenged. The appeal is not moot and nothing is conceded.

D. The Preliminary Injunction is Also Properly Subject to Review Under RAP 2.4(b), is Sufficiently Identified in the Arguments in the Opening Brief so that its Facts are Not Verities on Appeal and They Do Not and Cannot Control the Appeal, and Issues Related to the Preliminary Injunction are Properly Addressed on the Merits Per RAP 1.2(a) and *State v. Olson*.

The Response also contends that the Preliminary Injunction was not fully challenged with argument in the Opening Brief and therefore the

findings in it are verities on appeal, even though error was assigned to certain findings. Response, pp. 42-43. This argument fails for two reasons.

First, the arguments in the Opening Brief clearly implicate the Preliminary Injunction and are more than sufficient to fairly put Respondent on notice of the challenge.¹⁰ In this circumstance, and absent “compelling circumstances,” the normal rule is for the appellate court to apply RAP 1.2(a), exercise its discretion, and overlook technical flaws so that it addresses associated issues and thus, reaches the merits. *State v. Olson*, 126 Wn. 2d 315, 318-23, 893 P.2d 629 (1995); *Hadley v. Maxwell*, 144 Wn.2d 306, 310-11, n.1, 27 P.3d 600 (2001).¹¹ This even includes addressing the merits related to an assignment of error that was not argued in the opening brief. *See In the Matter of the Recall Charges Against Seattle School District No. 1 Directors*, 162 Wn.2d 501, 506-08

¹⁰ The Preliminary Injunction was specifically discussed in the following sections of the Opening Brief: p. 1, in the introduction, emphasizing that the preliminary injunction findings were made without prejudice and that the contempt order was based on the preliminary injunction; p.35-36, arguing that the underlying order (here the Preliminary Injunction) should be strictly construed; p. 44-45, discussing the Preliminary Injunction’s requirements versus the contempt order, and stating that the Preliminary Injunction imposed a “code of conduct”; p. 48, discussing whether the scope of the Preliminary Injunction included destroyed computer drives other than the one containing the Le Firm database; p. 55, in the conclusion, stating that the requirements of the Preliminary Injunction were vague.

¹¹ The Supreme Court emphasized in *Olson* the appellate rules place substance over form in appellate decision-making. *Id.*, 126 Wn.2d at 323 (emphasis added):

It is clear from the language of RAP 1.2(a) and the cases decided by this Court, that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure. **This discretion, moreover, should normally be exercised unless there are compelling reasons not to do so. In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.**

(addressing intervention issue on the merits), 513 (Johnson, J.M., J., concurring and discussing the legal principle), 173 P.3d 265 (2007). These results stem from the fact RAP 1.2(a) provides (emphasis added) that “Cases *and issues* will not be determined on the basis of compliance or non compliance with these rules except in compelling circumstances where justice demands”

Second, the Preliminary Injunction itself states that its findings are *for purposes of that motion only* and are not to prejudice either of the parties pending full litigation of the matter. CP 479.¹² The case is now in the midst of full litigation so that, pursuant to the Preliminary Injunction’s own terms, its findings cannot be used against either party. Any findings to support contempt thus must be made with new evidence that meets the correct quantum given the nature of the proceeding -- the heightened quanta of proof of either clear and convincing evidence or beyond a reasonable doubt. In those circumstances it is elementary a finding cannot be made with conflicting evidence absent a live hearing so the fact finder can determine individual credibility by assessing each witness and their testimony on direct and cross-examination. *See* Opening Brief, p. 32, n.15.

Fair consideration of live testimony by a disinterested, impartial decision-maker is also what *Bagwell* is about. Where there is a contempt allegation, an allegation by one party that the other violated the

¹² The Preliminary Injunction states its findings “are for the purpose of this motion only. They are made without prejudice to the parties pending a full litigation of the matter.”

preliminary injunction, the adjudication of whether that violation occurred is a new matter which must be determined by a fact finder other than the judge who made the order allegedly violated. If the Preliminary Injunction's findings were to become "verities" for the appeal, solidifying those findings would preempt the underlying case on the merits contrary to the notion of the *preliminary* aspect of the *Preliminary Injunction*; and contrary to the text of the Preliminary Injunction which expressly disclaims any effect beyond that motion; and contrary to the rationale of *Bagwell* that the contempt adjudication is a new, fresh matter before a new, unbiased and disinterested fact finder.

Lan and Roberto assigned error to findings in the Preliminary Injunction which they felt were erroneous or did not have sufficient basis on a paper record.¹³ Their assignments of error were designed to make it loud and clear that they did not concede those facts were correct and they also did not concede they could be used for purpose of the appeal—minimally that the language in the Preliminary Injunction that the facts only applied to that motion went no further, that they did not control this appeal as Respondent still seeks to have done. Those challenged findings from the Preliminary Injunction thus preclude their automatic application in the contempt proceedings and the failure to meet the evidentiary

¹³ One example is assignment of error 1, which challenged Finding H this way: "that Roberto *and* Lan downloaded the [Le Firm] client database '*without authorization*' where Roberto testified *he* downloaded it with permission of Vienna Le and in the presence of Edward Le." Opening Brief, p. 4.

standard in any contempt proceeding on remand, whether it ultimately is clear and convincing or beyond a reasonable doubt.

E. Live Evidence and Cross-Examination is Required to Fairly Determine the Knowing Intent Required for a Contempt Violation by the Statute Because, Where the Evidence is Hotly Contested and Complex as Related to Computer Operations and Files, and the Moving Party Seeks a Criminal Referral Following the Hearing, Only a Determination of Credibility Following Cross-Examination Permits Such a Finding Consistent with Due Process, Especially When the Stakes are so Much Greater Than the Financial Stakes of the Underlying Case: Criminal Referral and Loss of Bar Licenses.

The Response would have this Court treat this case as nothing more than a challenge to findings, and affirm because those findings are supported by substantial evidence. But as detailed in the Introduction and General Reply, the Response ignores how the constitutionally and statutorily deficient process employed by the trial court fatally taints the reliability of those findings.

Consider, as just one example, the heart of the matter before the trial court: whether to credit Roberto's explanation for why he violated the preliminary injunction and made a copy of the portable hard drive. Roberto never denied that making this copy violated the trial court's preliminary injunction. Rather, Roberto tried to explain why he felt compelled to make that copy. As Roberto explained, he feared that, by the time a copy of the records reached the trial court for safekeeping, the Les would have made sure that the evidence of their wrongdoing had been expunged. But because he realized after the fact that the copy was a

violation of the Preliminary Injunction and he did not intend to disobey the order, he destroyed what he thought was the copy.

The trial court, as we know, found this explanation not credible even though it never saw Roberto testify, and concluded that Roberto was instead engaged in a deliberate attempt to evade the court's turnover directive. But that determination was made after also depriving Roberto's and Lan's contempt counsel, Mr. Wayne, of the chance to subject the Les to a searching cross-examination. Mr. Wayne is one of the most respected criminal defense lawyers in Seattle. He was deprived of the chance to show the experienced trial court (who could well-measure and credit) a vigorous and probing examination of the Les that would provide a convincing basis to conclude that the Les were not to be trusted. And if the Les came across as shifty and evasive under Mr. Wayne's searching questions, by definition this would have to have cast the reasonableness of Roberto's explanation in an entirely different light.

This is why the Response's reliance on the putative authority of the trial court's findings begs the central question of this appeal. The cornerstone of those findings is the determination that Roberto (and Lan) were "not credible." But this determination by definition involved a *choice* by the trial court: whether to believe the Les, or Roberto and Lan. The trial court chose to believe the Les, and therefore found Roberto and Lan not credible. But by failing to allow Roberto and Lan to testify, and by depriving Roberto's and Lan's able counsel of the opportunity to test

the Les on the stand, the trial court rendered its subsequent determination of credibility legally untenable.

Moreover, the posture of the contempt motion as carefully structured by the Les required the full and complete protections of a criminal trial. Why? Because they sought at the outset a criminal referral pursuant to RCW 7.21.040. The third issue in Respondent's contempt motion (that was finally heard on June 5, 2009) states: "**Should the court refer this matter to the prosecuting attorney to pursue punitive sanctions against Defendants pursuant to RCW 7.21.040(2)(c)?**" CP 737 (emphasis added). This issue statement did more than bring the highly skilled and respected criminal defense attorney, Mr. Wayne, into the case, as he related at the April hearing. It raised the stakes to where Lan and Roberto were entitled to the fullest protections of due process. Those high stakes are continuing, as reflected in the June 11 Order which declined to make a referral to the prosecutor "At this time." CP 1539.

Doing as the Response necessarily implies, *i.e.*, waiting to see if the trial court made the referral or if it imposed punitive sanctions, to conclude that full due process and a heightened standard of proof is required, is far too late to do any good for the defendants in the dock, here Lan and Roberto. They were entitled to receive the proper quantum of due process *during* the adjudication. Getting due process after the fact does no good. This shows the importance of *Bagwell*, which emphasized courts must recognize what is at "stake" in the contempt proceeding and that the procedural protections must be correlated to that stake.

Despite the Response's efforts to make *Bagwell* its case, it supports Lan and Roberto. The Response is disingenuous when it claims that the Preliminary Injunction did not include a "code of conduct." Response, p. 38. Given the 13 separate provisions in the Preliminary Injunction, it is far beyond "a simple order to stop using and turn over computers," as the Response characterizes it at p. 38. Rather, the Preliminary Injunction also includes invasive examination of Lan and Roberto's electronic files by the Les's expert, the requirement of attestations under penalty of perjury by both Lan and Roberto, payment of the Les' expert, and broad-based provisions to have no contact with undefined past and current clients of the Les and third-party insurers and medical providers, none of whom are identified. *See* CP 478-486, App. B.¹⁴

Thus, as in *Bagwell*, the Preliminary Injunction here *did* constitute a "code of conduct." The mine operators in *Bagwell* wanted to destroy the union, the United Mine Workers. Here, the Les wanted to destroy Lan and Roberto. The Les put in place the detailed Preliminary Injunction that would provide a continuing basis for claimed contempt throughout the

¹⁴ Lest there be any doubt the Preliminary Injunction created a detailed (and also vague) code of conduct, one need only read the final provision, which states Lan and Roberto were

... enjoined from contacting **any third party of any kind**, be it a medical care provider, insurance representative, business relation of the Plaintiff law firm or having any relationship with any current or past clients of plaintiff law firm **and making any critical or disparaging remarks, irrespective of the truth of such comments**, pending the ultimate resolution of this case.

CP 489-86, ¶ 13 (emphasis added). How can Lan and Roberto practice personal injury law in Seattle with these restrictions, which the Les will try to enforce?

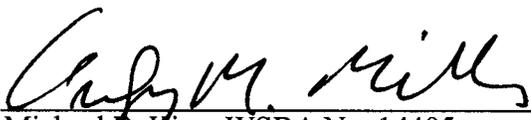
litigation. It was, in fact, their road map to preempt any genuine litigation over the merits. It is in precisely such circumstances that *Bagwell* requires an independent decisionmaker not connected to the order allegedly violated, and a sufficiently high standard of proof to insure a reliable result given the potentially severe consequences and the potential to undermine the underlying litigation and destroy one of the parties.

III. CONCLUSION.

Most fundamentally, this case on alleged contempt for violating the Preliminary Injunction is about the utter failure to provide a fair hearing with live testimony, cross-examination, and a full, fair airing of the facts. This mistake of rushing to judgment on the papers, first made at the April 4 hearing to deny an evidentiary hearing, was never corrected. It infects all the contempt rulings that were made, all the June 2008 Orders and the January 2009 Orders. Because all the orders were fatally infected, this Court must vacate and reverse the trial court's contempt and related orders and remand for further proceeding consistent with the decision.

Respectfully submitted this 2nd day of October, 2009.

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NO. 61912-8-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

LE & ASSOCIATES, P.S., a professional
service corporation

Respondent,

v.

ROBERTO DIAZ-LUONG and LAN THI
NGUYEN, husband and wife, and the
marital community comprised thereof,

Appellants,

and

EDWARD K. LE and VIENNA LE,
Individually and as spouses/partners,

Third-Party Defendants.

Consolidated with/Nos.
63011-3-I & 63012-1-I

CERTIFICATE OF
SERVICE

I declare under penalty of perjury that I caused copies of
APPELLANTS' CONSOLIDATED REPLY BRIEF, and this *Certificate of*
Service to be served to counsel of record on October 20th, 2009, as follows:

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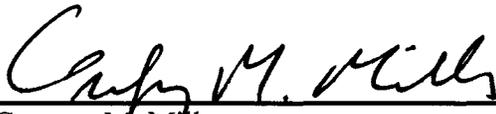
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Dated this 2nd day of October 5, 2009.



Gregory M. Miller