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**COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON**

Case No: 67734-9-1

In re the Meretricious Relationship of:
SUSAN M. CALDWELL
Appellant

And

JOHN C. HANSELMAN
Respondent

BRIEF OF RESPONDENT JOHN C. HANSELMAN

MOLLY M. McPHERSON
ATTORNEY FOR RESPONDENT
PO BOX 1617
ONE NW FRONT STREET
COUPEVILLE, WA 98239-1617
(360) 678-4407

Susan M. Caldwell
730 East 4th Street
Port Angeles, WA 98362
(360) 912-0005
Appellant Pro se

2016 JUN 21 10:00 AM
CLERK OF COURT
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION 1
PORT ANGELES, WA
98362

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATEMENT AND ORGANIZATION OF APPELLANT’S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
III.	RESTATEMENT OF THE CASE.....	2
IV.	ARGUMENT.....	4
	A. The trial court considered substantial evidence in making its Findings of Fact. Assignments of Error 1 - 16.....	4
	B. The trial court did not abuse its discretion in rulings on Discovery, Assignments of error 17 & 18.....	6
	C. The trial court did not abuse its discretion in denying Continuance of Trial; Assignment of Error 19.....	10
	D. The trial court did not abuse its discretion in award of Judgment, Assignment of Error 20.....	13
	E. The trial court did not abuse its discretion in denying Motion for New Trial, Assignment of Error No. 21.....	13
	F. New issues cannot be raised on appeal- e.g. pro se discrimination.....	14
	G. Attorney Fees and Sanctions are Appropriate.....	16
V.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Beeson v. Atlantic Richfield Co.</i> , 88 Wash.2d 499, 503, 563 P.2d 822 (1977).....	4
<i>Biggs v. Vail</i> , 124 Wn.2d 193, 197, 876 P.2d 448 (1994).....	17
<i>Bramall v. Wales</i> , 29 Wash.App 390, 628 P.2d 511(1981).....	10
<i>Cogle v. Snow</i> , 56 Wash.App 499, 504, 784 P.2d 554 (1990).....	10
<i>Collins v. Fidelity Trust Co.</i> , 33 Wash. 136, 73 P. 1121 (1903).....	15
<i>Connell v. Francisco</i> , 127 Wn.2d 339, 346, 898 P.2d 831 (1995).....	5, 11
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 809, 828 P.2d 549 (1992).....	15
<i>Davis v. Department of Labor & Industries</i> , 94 Wash.2d 119, 124 , 615 P.2d 1279 (1980).....	6
<i>Fisch v. Marler</i> , 1 Wash.2d 698, 97 P.2d 147 (1930).....	15
<i>Gilbert v. Rogers</i> , 56 Wash.2d 185, 185-86, 351 P.2d 535 (1960).....	4
<i>Howland v. Day</i> , 125 Wash. 480, 216 P. 864 (1923).....	10

<i>John Doe v. Spokane & Inland Empire Blood Bank</i> , 55 Wn. App. 106 110, 780 P.2d 853 (1989).....	17
<i>Lawson v. Helmich</i> , 20 Wash.2d 167, 146 P.2d 537 (1944).....	15
<i>Moore v. Smith</i> , 89 Wn.2d 932, 942, 578 P.2d 26 (1978).....	13, 14
<i>In re Marriage of Olson</i> , 69 Wn.App. 621, 626, 850 P.2d 527 (1993).....	14, 18
<i>In re Pennington</i> , 142 Wn. 2d 592, 602, 605, 14 P. 3d 764 (2000).....	5
<i>Sommer v. DSHS</i> , 104 Wn.App 160, 170, 15 P.3d 664 (2001).....	13
<i>State v. Marintorres</i> , 93 Wn.App. 442, 452, 969 P.2d 501 (1999).....	14
<i>State v. Ralph Williams' North West Chrysler Plymouth, Inc.</i> , 87 Wash.2d 298, 553 P.2d 423 (1976).....	10
<i>T.S. v. Boy Scouts of Am.</i> , 157 Wash.2d 416, 423, 138 P.3d 1053 (2006).....	6
<i>Wagner v. Wheatley</i> , 111 Wash.App 9, 18, 44 P.3d 860 (2002).....	16

Statutes

RCW 4.84.185.....	16
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I. INTRODUCTION

Ms. Caldwell's (Caldwell) appeal has no legal basis and is a continuation of her malicious prosecution of Mr. Hanselman (Hanselman). The appeal is nothing more than re-argument of the same disjointed statements that have failed at trial and subsequent motion for a new trial. Caldwell improperly brings new complaints not raised at trial. Hanselman asks for this court to uphold the prior judgments and rulings and to award attorney fees to him for the costs of this frivolous appeal.

Please note that Brief of Caldwell was not served on Mr. Hanselman's counsel until received by mail September 26, 2012; contrary to Affidavit of Proof of Service signed September 24, 2012, which states service was made September 24, 2012. RAP 10.2(h).

II. RESTATEMENT AND ORGANIZATION OF APPELLANT'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Identification of issues:

- A. Factual issues, Assignments of Error 1 – 16. Did the trial court consider substantial evidence in making its finding of facts?
- B. Discovery, Assignments of Error 17 and 18. Did the trial court abuse its discretion in limiting part of Caldwell's request for discovery?

C. Request for continuance of trial, Assignment of Error 19. Did the trial court abuse its discretion in denying Caldwell's request for continuance of trial?

D. Judgment, Assignment of Error 20. Did the trial court abuse its discretion in awarding fees to Hanselman on Caldwell's contempt motion in July 2010?

E. New Trial/Motion for Reconsideration, Assignment of Error 21. Did the trial court abuse its discretion in denying Caldwell's request for a new trial?

F. Can Caldwell raise new issues for the first time on appeal?

G. Are fees and costs to Hanselman appropriate on appeal?

Hanselman requests dismissal of Caldwell's Assignments of Error because they do not state the legal error appealed. RAP 10.3(4), 10.7.

III. RESTATEMENT OF THE CASE

Petitioner's statement is argument. The Findings of Fact were entered by the court without objection. CP 5 – 16. Petitioner makes multiple statements without support of the record. AB 8 - 9. RAP 10.3(a)(6). Hanselman objects to Caldwell's inclusion of hearsay and evidence not part of the trial record appealed. CP 36 - 43, 48 - 82, 90 - 94, 97 - 98.

Procedural History of the case.¹

Petitioner brought a civil action under the doctrine of meretricious relationship or committed intimate relationship on June 1, 2010. After multiple hearings on various property matters, the court entered partial summary judgment regarding the character of Hanselman's separate property. The court ruled that Hanselman's small business interests were his separate property and reserved the issues of characterizing the parties' relationship and any subsequent property determinations for trial. (Letter decision December 23, 2010). The summary judgment ruling was not appealed.

On March 21, 2011, Caldwell filed a motion to compel discovery, which motion was heard April 25, 2011. The court issued its letter opinion May 6, 2011, ruling on discovery. CP 24 - 25. Trial was held May 10 CP 22 - 23 and May 17, 2011 CP 20 - 21. The court issued its letter decision on the trial on August 15, 2011, and entered Findings of Fact and Conclusions of Law (CP 5-16) and Judgment on October 24, 2011, which basically denied all of Caldwell's allegations and requests. Caldwell neither responded nor appeared regarding the entry of the Findings of Fact and Conclusions of Law and Judgment.

¹ Underlined material is in appellate record, the rest is provided for information.

Caldwell filed appeal with this court first on September 19, 2011, then again on November 22, 2011. In the interim, Caldwell filed a motion for new trial with the trial court. Caldwell chose to not appear on that matter. The trial court denied Caldwell's Motion for New Trial and an order was entered accordingly on November 21, 2011. CP 4.

IV. ARGUMENT

A. **The trial court considered substantial evidence in making its Factual Findings. Assignments of Error 1 – 16.**

Standard of Review.

i. Credibility determinations of the trial court.

In reviewing credibility determinations, an appellate court does not reweigh the evidence, assess the credibility of witnesses, or substitute its own judgment for that of the trial court. *Davis v. Department of Labor & Industries*, 94 Wash.2d 119, 124, 615 P.2d 1279 (1980). The appellate court reviews trial court credibility determinations for substantial evidence. *Gilbert v. Rogers*, 56 Wash.2d 185, 185-86, 351 P.2d 535 (1960). Substantial evidence exists if there is sufficient evidence to persuade a fair-minded, rational person of the truth of the declared premise. *Beeson v. Atlantic Richfield Co.*, 88 Wash.2d 499, 503, 563 P.2d 822 (1977).

ii. Committed intimate relationship.

A meretricious relationship is a stable, marital-like relationship where the parties cohabit knowing they are not married. *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). Five factors help determine whether the parties had a meretricious relationship: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties. *Connell*, 127 Wn.2d at 346. The list of factors is not exclusive, and no single factor is more important than another. *In re Pennington*, 142 Wn.2d 592, 602, 605, 14 P. 3d 764 (2000).

Argument.

Caldwell failed to meet her burden of proof at the trial. Caldwell had not shown elements in several of the factors to prove a committed intimate relationship, and provided limited self-serving evidence regarding only a few elements of some factors. The undisputed findings of fact are replete with the elements not proven. (CP 5-16). Common elements unproven by Caldwell include: Use of surname; Will naming other as beneficiary; attempt to have children; engagement; engagement ring; did one party move from where they were living; did the parties move together; continuous cohabitation; duration of elements; stable relationship; purpose of the relationship; pooling of resources for joint

projects; pooling of funds, bank accounts, property, credit cards, utility bills, household bills and tax returns; pooling of services; insurance; estate planning; retirement planning; intent of the parties; etc. (See Hanselman opposing testimony, RP 051011 129- 132).

The appellate court will not substitute its judgment for that of the trial court on issues of fact. *Davis v. Department of Labor & Industries, supra*. In the current case, Hanselman provided sufficient evidence that there was no committed intimate relationship between Caldwell and Hanselman. The trial court found rightfully that Caldwell had failed to meet her burden to show the existence of a committed intimate relationship.

B. The trial court did not abuse its discretion in Rulings on Discovery, assignments of error 17 & 18.

Standard of Review.

The appeals court reviews a trial court's discovery order for an abuse of discretion. *T.S. v. Boy Scouts of Am.*, 157 Wash.2d 416, 423, 138 P.3d 1053 (2006).

Argument.

Caldwell's Assignment of Error No. 17 alleges 'the trial court erred in its finding that Mr. Hanselman had not been properly served the Motion for Order to Compel Discovery.' AB 5. The logical argument of

the error is not explained. The record presents no evidence to support the alleged error. Considering that Caldwell set and argued a Motion to Compel Discovery, and service was effected, any error is harmless.

Caldwell's Assignment of Error No. 18 regarding the specifics of discovery is untimely as it was not appealed within 30 days of May 6, 2011, and should be dismissed. RAP 5.2(a). Said appeal was filed November 22, 2011. If considered by the appellate court, the trial court's ruling should stand. The Assignment of Error is nothing more than a statement of disagreement with the court's ruling. Hanselman assumes that CP 36 – 42 are related to this assignment and objects to consideration of Caldwell's unsigned, unconfirmed documents as part of the present record. Review of BA at page 15 – 17 is not helpful in formulating a response as Caldwell chooses to quote her own arguments at the hearing and her own statements as those of Hanselman. There is no proper argument on appeal. The trial court issued its ruling on discovery on May 6, 2011. In summary, after briefing and a hearing on the merits, the court rightfully found that the business records request by Caldwell was unduly burdensome and oppressive and not reasonably intended to lead to discoverable evidence. CP 24 - 25.

Caldwell's assignment is without merit. The court's consideration of the discovery issue was comprehensive. There was a hearing on the

matter of Caldwell's Motion to Compel Discovery and Hanselman's Motion for Order of Protection from Discovery. RP 042511 2. The court was aware that substantial discovery had been produced by Hanselman. This includes the business bank records Caldwell admits to having. RP 042511 4. It also includes "two huge binders of discovery" as described by Hanselman's counsel. RP 042511 13. These binders were available to the court for review. RP 042511 27. Caldwell did not argue that she did not receive this information in response to her discovery request. Caldwell's appeals on the issue of "fish tickets" and "cancelled checks" are rearguing specific issues considered at oral argument. In fact, the trial court assumed, *arguendo*, that these documents showed what Caldwell alleged them to show. The court then asked what relevant matter that would lead to? In response, Caldwell stated that her request was based on the issue of credibility: "I want them for credibility and, as I said, to put the puzzle together and show the time frame and everything." RP 042511 22 - 24.

The trial court considered Caldwell's request for production, motion to compel discovery, her oral argument, and reviewed the discovery already provided to Caldwell in chambers taking as much time to review the motions as the trial judge determined necessary and issue a ruling. The trial court assumed the facts alleged by Caldwell in applying

CR 26.² The judgment of the trial court should be upheld as no abuse of discretion has been shown. The appeal should be rejected.

² CR 26(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that:

- (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

C. The trial court did not abuse its discretion in denying Continuance of Trial; Assignment of Error 19.

Standard of Review.

Continuances may be had upon a showing of good cause. The granting of a continuance rests within the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of abuse. See *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wash.2d 298, 553 P.2d 423 (1976). A continuance based on the failure to conduct discovery must be supported by an adequate showing of due diligence. See *Howland v. Day*, 125 Wash. 480, 216 P. 864 (1923).

Bramall v. Wales, 29 Wash.App 390, 393
628 P.2d 511 (1981)

The ruling on the motion for a continuance and for reconsideration is within the discretion of the trial court and is reversible by an appellate court only for a manifest abuse of discretion. *Coggle v. Snow*, 56 Wash.App 499, 504, 784 P.2d 554 (1990). The proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion. *Id.* at 507.

Argument.

On April 25, 2011, Caldwell made an improper oral motion in court for continuance of trial without notice or basis for continuance. RP 042511 26. The court denied the request. There was no objection by Caldwell recorded. There is no showing of what error the court allegedly

made. There is no argument in the record as to “why she should be entitled to a continuance.” AB 5.

Caldwell was the moving party regarding the continuance and reconsideration. Caldwell demonstrated during litigation, and again on appeal, that she is well aware of the factors considered relevant in Washington cases regarding meretricious relationships, yet she failed to prove or even offer evidence on many of these factors. Caldwell produced six witnesses at trial, including Caldwell herself. CP 6. Caldwell offered 13 exhibits at trial, 11 were entered. CP 6 – 7. In her case-in-chief, Caldwell had the opportunity to ask her witnesses questions relevant to her case and enter exhibits relevant to her case. In presenting her case, Caldwell failed to elicit information to support her case as required in *Connell v. Francisco, supra*, such as: whether she used Hanselman’s surname; announced an engagement; exchanged engagement rings; whether they held themselves out as married; etc. She failed to offer retirement or estate planning documents, joint accounts of any kind, or records of joint purchases or any significant and continuous contributions to assets or household. She also failed to provide evidence on her claim of personal property damages, which had been reserved for trial following the contempt motion.

None of these failures to demonstrate even the basic elements of a committed intimate relationship can be tied to Caldwell's failed discovery motion or failure to have the trial continued.

Caldwell had almost a year to prepare and present her case and there is no showing that a continuance would have affected the outcome or that she was prejudiced, or that the trial court abused its discretion in denying a continuance. Caldwell had a full and fair opportunity to present her case.

Caldwell knew the law required numerous elements to prove a meretricious relationship. Below, she briefed the same cases as she cites with her appeal. Yet she failed to present the elements of the action at trial. Then, she filed a motion for a new trial, which was denied. Then, she knowingly pursued this appeal. A reasonable person would know that 'they had no case.' The only rational conclusion to be drawn from her actions is that she is determined to harass Hanselman and bankrupt him with attorney fees incurred in resisting these relentless, baseless civil attacks.

A continuance would have served no purpose other than to delay the inevitable at an increasingly high cost to Hanselman.

D. The trial court did not abuse its discretion in award of Judgment, Assignment of Error 20.

This Assignment of Error appears to relate to CP 106 - 107. There is no mention of “malicious prosecution” in the order cited by Caldwell. It is, however, illustrative of Caldwell’s state of mind. Caldwell characterizes this as ‘malicious prosecution,’ which more accurately applies to her actions in this matter. Additionally, the Findings of Fact expressly state that Caldwell was raising as new the same issues heard and addressed by the court and memorialized in the court’s previously issued letter opinion as the basis for fees. CP 108 – 109.

This Assignment has no other argument presented by Caldwell and Hanselman requests that it be rejected from consideration as an Assignment and referred to as supporting evidence in awarding of attorney fees to Hanselman. There is no basis to disturb the trial court’s ruling.

E. The trial court did not abuse its discretion in denying the Motion for New Trial, Assignment of Error No. 21.

Standard of Review.

Abuse of discretion is the standard of review for an order denying a motion for a new trial: “An order denying a new trial will not be reversed except for abuse of discretion. The criterion for testing abuse of discretion is: ‘[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?’” *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978).

Sommer v. DSHS, 104 Wn.App 160, 170, 15 P.3d 664 (2001).

Argument.

Caldwell's motion for new trial pursuant to CR 59 was denied. CP 4. Applying the court's reasoning in *Moore, supra*, the trial judge would substitute for the jury. The appellate court would look to whether Caldwell was prevented from having a fair trial. Caldwell presents no viable evidence regarding any prejudice to her because a Motion for New Trial was denied. Caldwell provides neither her motion nor Hanselman's brief in opposition on review. There is no statement regarding the error. Caldwell did not appear at the trial court in support of her Motion for New Trial. No abuse of discretion is shown; Caldwell's Statement of Error 21 should be dismissed.

F. New issues cannot be raised on appeal- e.g. pro se discrimination.

(These are NOT included in Caldwell's Assignments of Error.)

Standard of Review.

Pro se litigants are held to the same standard as attorneys and must comply with all procedural rules on appeal. *In re Marriage of Olson*, 69 Wn.App. 621, 626, 850 P.2d 527 (1993). Failure to do so may preclude appellate review. *State v. Marintorres*, 93 Wn.App. 442, 452, 969 P.2d 501 (1999). An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and

references to relevant parts of the records.” RAP 10.3(a)(6). Arguments that are not supported by any reference to the record or by citation of authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Questions not raised below cannot be raised on appeal. *Collins v. Fidelity Trust Co.*, 33 Wash. 136, 73 P. 1121 (1903). Questions not raised in any manner before trial court will not be considered on appeal. *Fisch v. Marler*, 1 Wash.2d 698, 97 P.2d 147 (1930). Question which was not presented to or considered by trial court, will not be considered on appeal. *Lawson v. Helmich*, 20 Wash.2d 167, 146 P.2d 537 (1944).

Argument.

Caldwell appears to cry foul because she was a pro se litigant. Given review of the trial court record and the basic facts of this case, it is clear she was provided great deference by the trial court. Caldwell has failed to cite relevantly any cases or to prove in any way how she was treated unfairly because she was pro se. Caldwell makes Constitutional claims but being a pro se litigant is not a protected class. These pro se discrimination claims raised by Caldwell are frivolous.

The litany of other arguments Caldwell makes in her Brief were not raised at the trial court, not presented as assignments of error in this

appeal, and should not be considered. Were the Court of Appeals find that they should, Hanselman requests leave to respond. RAP 2.5, RAP 10.3(g).

G. Attorney Fees and Sanctions are Appropriate.

Hanselman will comply with the financial affidavit requirements of RAP 18.1(c).

An appellate court may award attorney fees under RCW 4.84.185 for filing a frivolous appeal. In determining whether an appeal is frivolous, the court considers the following factors: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Wagner v. Wheatley*, 111 Wash.App 9, 18, 44 P.3d 860 (2002).

Fees should also be considered under RAP 18.9 or CR 11 for the baseless nature of this appeal. The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). Sanctions are properly

imposed if three conditions are met: (1) the action is not well grounded in fact; (2) it is not warranted by existing law; and (3) the attorney signing the pleadings has failed to conduct reasonable inquiry into the factual or legal basis of the action. *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106 110, 780 P.2d 853 (1989).

In the case at bar, the three *John Doe* conditions are met, although in this case, there are unusual twists as to how the *John Doe* elements fit. That is (1) the action is not well grounded in fact. Here, the evidence was considered and the facts were established by the trial court. The court found no facts in favor of Caldwell. Caldwell did not like this, so she appealed. She cannot change the facts and her appeal had no facts to support it. She simply wants to prolong this matter and make Hanselman's life as difficult as possible. (2) This appeal is not warranted by existing law. Caldwell cites no relevant cases that support her issues on appeal. A litigant cannot appeal just because he or she does not like the judge's decision; this is abuse of the judicial system. (3) Caldwell is not an attorney³; however, if she was, the court would find she must not have conducted reasonable inquiry into the factual or legal basis of the action because if she had done so, she would have known there is no factual or

³ Because she is acting pro se, Caldwell cannot use that fact as an excuse for being unable to make reasonable inquiry into the factual or legal basis of this action. See, *Marriage of Olson, supra*. "Pro se litigants are held to the same standard as attorneys..."

legal basis for her appeal, and no appeal would take place. She pursued her appeal simply to harass Hanselman; she had no regard for the facts and she had no viable legal basis for her appellate action.

This is a case of a romance gone wrong and one party's (Caldwell) vengeance against Hanselman because Caldwell sees herself as the wronged party. The only wrong here was Caldwell's intransigence below and her subsequent frivolous appeal. Caldwell has spent the past two years litigating this issue and even had a trial run at her appeal with her motion for a new trial. However, Caldwell chose to use none of her legal research efforts to structure her appeal either in organization or in legal basis for her arguments. It is incredible that she claims she has been discriminated against as pro se when she has time and again concocted a factually baseless and legally corrupt argument, thrown it before the court, and left the court and Hanselman (through counsel) to make sense of her argument and try to apply legal reasoning to her concoction. At appeal, she should not be rewarded with another pass. She brings her action solely to harass and cause financial hardship to Hanselman. She even characterizes her past actions as malicious (Assignment of Error 20); this shows her intent.

Hanselman maintains that he has been the victim of Caldwell's baseless legal assault without relief. Caldwell's actions show her

disregard for the court's resources and her singular purpose of harassing and financially harming Hanselman through protracted litigation that she knows has no basis.

At trial, the court found that the only *potential* community asset of consequence was of no value: Finding of Fact 55 "The residence has no equity and is worth at least \$16,832.00 less than when it was purchased." CP 13. Caldwell does not dispute this fact now or at its entry. This is anathema of a baseless appeal; it is a chosen fight over absolutely nothing, the only value to the aggressor is the fight itself. Fees and sanctions are not only appropriate but clearly called for under these facts.

Caldwell filed a motion for new trial requiring substantial briefing by Hanselman, and then chose not to appear at her own motion; now she appeals that ruling.

Caldwell's requests for fees is outrageous and only responded to out of an abundance of caution. She demonstrates avaricious motivation driving her irrational litigation and asks for: a judgment for personal property that was not supported by any evidence at trial nor briefed in any manner herein; reversal of a judgment that only she states was based on 'malicious litigation;' a judgment against counsel for *Caldwell's* failure to even appreciate the Rules of Civil Procedure; and a shotgun award of

whatever she can get. Her requests should be considered in the spirit they are offered and denied.

V. CONCLUSION

Hanselman requests the judgment below be affirmed and he be awarded his reasonable fees and costs for this frivolous appeal.

RESPECTFULLY SUBMITTED this 29th day of October, 2012.

Molly M. McPherson, WSBA #23027
Neil C. McPherson, WSBA #25148
McPherson & McPherson, PLLP
Attorneys at Law
Post Office Box 1617
Coupeville, Washington 98239

Attorneys for Respondent
John C. Hanselman

