

64837-3

64837-3

No. 64837-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re:

GORDON LOTZKAR,

Appellant,

v.

KRISTI KELLEY,

Respondent,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Douglass A. North)

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 OCT 15 PM 2:27

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I. INTRODUCTION

Appellant, attorney Gordon K. Lotzkar, represented Jeff Kelley in the marriage dissolution case from which this appeal follows. Lotzkar appeals four orders and judgments entered against him by the Honorable Douglass A. North in that case. CP at 81, 690, 878, 1061; *see also* Apps. 1-4.

Specifically, four times in that litigation the trial court found that Lotzkar had committed ethical violations, discovery violations, rules violations, and litigation intransigence worthy of awarding attorney fees or sanctions to Respondent Kristi Kelley (petitioner in the dissolution case). CP at 81, 690, 878, 1061. In its order entered on June 11, 2010, for example, the trial court found:

Respondent and his counsel have demonstrated continued intransigence, unreasonable demands, bad faith actions and violations of the CR 2A Agreement, Arbitration Agreement and Rules of Professional Conduct. Petitioner shall receive an award of attorney's fees and costs in the amount of \$10,199.85.

CP at 881-82; App. 3. The trial court made similar findings in each of the orders under review. CP at 81, 690, 878, 1061.

The universal issue in this appeal is whether the trial court had an adequate basis for imposing the awards of attorney fees and sanctions

against Lotzkar.

The standard of review of a trial court's order of attorney fees and sanctions against a lawyer is abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993). Despite Lotzkar's effort to recharacterize the nature of this court's review, the bottom line is that the trial court did not abuse its discretion. The trial court properly found that Lotzkar not only enabled his client's intransigence, but also acted as a willing participant in the burn the bridges, take no prisoner, dang the rules conduct condemned in the four orders in question. CP at 81, 690, 878, 1061.

Finally, to the extent there may be a principle of law at stake here, it has to do with the right of Superior Court judges to manage their courtrooms. Where, as here, the offending lawyer not only enables the client's reprehensible conduct but also advocates with remarkable intransigency, the trial court should, as a matter of public policy, have discretion to sanction the lawyer to prohibit such behavior. Without such support from above, trial courts would be overwhelmed by questionable pleadings such as those of Lotzkar in the case below, which were riddled with distemper, frivolity, and disregard for rules of procedure and good lawyerly manners.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Respondent Kristi Kelley responds to the assignments of error claimed by Appellant attorney Lotzkar as follows:

1. Response to Assignments of Error 1-3: The trial court acted within its discretion to impose \$1,000.00 in attorney fees against Lotzkar in the order entered on August 12, 2008 (Order No. 1). CP at 81-84; App. 1. There is substantial evidence in the record to support the award. The order should be affirmed.

2. Response to Assignments of Error 4-6: The trial court acted within its discretion to impose \$2,500.00 in attorney fees against Lotzkar in the order entered on October 9, 2008 (Order No. 2). CP at 690-92; App. 2. There is substantial evidence in the record to support the award. The order should be affirmed.

3. Response to Assignments of Error 7-13: The trial court acted within its discretion to impose \$10,199.85 in attorney fees against Lotzkar in the order entered on June 11, 2009 (Order No. 3). CP at 878-83; App. 3. There is substantial evidence in the record to support the award. The order should be affirmed.

4. Response to Assignments of Error 14-17: The trial court acted within its discretion to impose \$3,000.00 in attorney fees against Lotzkar in the order entered on July 22, 2009 (Order No. 4). CP at 1061-

63; App. 4. There is substantial evidence in the record to support the award. The order should be affirmed.

4. Response to Assignment of Error 18: The trial court acted within its discretion in entering a conclusion of law to support the final decree entered in the underlying marriage dissolution to the effect that all judgments in the matter which remain unpaid should be paid. CP at 1102.

III. RESTATEMENT OF THE ISSUES

The issues and Respondent's contentions are:

A. Whether abuse of discretion is the proper standard of review of the orders of a trial court imposing attorney fee awards and sanctions against a lawyer for intransigence and violations of CR 11 and discovery rules? Respondent contends that abuse of discretion is the proper standard of review.

B. Whether the trial court acted within its discretion in ordering Lotzkar to pay \$1,000 in attorney fees in Order No. 1, entered on August 12, 2008? CP at 81; App. 1. Respondent contends the trial court acted within its discretion and there is substantial evidence in the record to support that order.

C. Whether the trial court acted within its discretion in ordering Lotzkar to pay \$2,500 in awards for attorney fees and sanctions in Order No. 2, entered on October 9, 2008? CP at 690; App. 2.

Respondent contends the court acted within its discretion and there is substantial evidence in the record to support that order.

D. Whether the trial court acted within its discretion in ordering Lotzkar to pay \$10,998.85 in attorney fees and sanctions in Order No. 3, entered on June 11, 2009? CP at 878; App. 3. Respondent contends the trial court acted within its discretion and there is substantial evidence in the record to support the order.¹

F. Whether the trial court acted within its discretion in ordering Lotzkar to pay \$3,000 in attorney fees and sanctions in Order No. 4, entered on July 27, 2009? CP at 1061; App. 4. Respondent submits the trial court acted within its discretion and there is substantial evidence in the record to support the order.

G. Whether, under RAP 18.1 or RAP 18.9(a), Respondent should be awarded attorney fees and costs in responding to this appeal? Respondent contends she should be awarded attorney fees and costs.

IV. RESTATEMENT OF THE CASE

This is a fact intensive appeal.

Appellant attorney Lotzkar seeks to avoid the noose of sanctions

¹ Appellant attorney Lotzkar states in Issue No. 5 of Appellant's Opening Brief, at pg. 6, that the trial court may have erred in naming Mr. Lotzkar as a judgment debtor for his client's financial obligations of \$3,200 in Judgment No. 3. There is, in fact, a clerical error in the Judgment Summary, but not in the court's order. We intend to file a corrected judgment summary to correct the clerical error so that Mr. Lotzkar is no longer named as a judgment debtor for \$3,200 worth of his client's past due child support.

hung four times upon him by a King County Superior Court Judge, the Honorable Douglass A. North. Lotzkar argues for exoneration by cobbling together a collage of irrelevant and dubious factual allegations about the Respondent Kristi Kelley and her attorney that bear no debatable relation to the orders and judgments entered against Lotzkar.

We choose not to answer in kind. Instead, we urge the court to respect, as verities, the unchallenged findings of the trial court and of the arbitrator who dealt with Lotzkar and his client in the case below. *See State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009).

The following are findings of Judge North or Cheryll Russell, the arbitrator who heard much of the underlying dissolution proceedings. Appellant Lotzkar does not challenge these findings of fact, which therefore should be regarded as verities² on appeal:

First, Arbitrator Russell made the following findings in her April 20, 2009 Arbitration Decision awarding \$50,000 compensation to Respondent Kristi Kelley due to litigation fraud by Lotzkar's client and \$25,000 in attorney fees against Lotzkar's client due to his bad faith and intransigent litigation:

Ms. Kelley was diagnosed with Acute Disseminated Encephalomyelitis (ADEM) in August 1998. She was in a coma for 8 weeks. While she was in the coma, she was diagnosed with

² *See Valdez*, 167 Wn.2d at 767.

breast cancer and a mastectomy was performed. Ms. Kelly's breast cancer recurred in 2006. She underwent a second round of surgery as well as chemotherapy and radiation. Ms. Kelley has been receiving rehabilitation through Evergreen Rehabilitation. She has ongoing issues with short term memory loss which affects her ability to do tasks that require complex concentration, complex sequencing and mental flexibility, and attention tasks involving novel problem solving. Based on her doctor's recommendations, Ms. Kelley works part-time two days a week as a teacher's assistant. She continues to have difficulty with interpersonal relations and communications in situations where she must express her emotions.

Mr. Kelley attended the Marine Academy in California. He worked as a Merchant Marine and on fishing vessels from 1984 through 1996. Since returning from his marine career, Mr. Kelley has managed four family owned apartment buildings and has solely managed the family finances.

This case has been intensely litigated as confirmed by a review of the Court file docket sheet.

CP at 840-841 (footnote omitted).³ Second, in the same Decision,

Arbitrator Russell found:

Judge North has found Mr. Kelley has engaged in unfair litigation tactics, has refused to comply with the Court's Orders, has been intransigent, has acted in a pattern of control and intimidation, and has attempted to circumvent the prior orders and the authority of the Court. See Judge North's February 27, 2009 Order.

In this Arbitration matter, Mr. Kelley was not forthright during the Settlement conference about the outstanding payments on the buildings awarded to Ms. Kelley, did not fully disclose the conditions of the buildings, and did not fully disclose the circumstances of the tenants. Mr. Kelley has made it difficult for Ms. Kelley to assume ownership of the property awarded to her. Mr. Kelley has not performed even rudimentary acts such as providing an accurate list of the tenants and the apartments leased to each tenant. Mr. Kelley has not taken steps to dissolve the LLC

³ The full arbitration decision may be found in the Clerk's Papers at 832-875.

or corporation holding the property awarded to Ms. Kelley.

While Mr. Kelley may not consider his actions to be intransigent, he has exhibited bad faith by causing Ms. Kelley to unnecessarily incur fees due to his actions. Based on the facts of this case and in consideration of the case law, this is a case where fees may be ordered without regard to Mr. Kelley's ability to pay fees. Therefore, in consideration of Mr. Kelley's actions and the position in which he has left Ms. Kelley and in consideration of the financial information submitted about both parties, this Arbitrator Finds it is reasonable for Mr. Kelley to pay a sum for Ms. Kelley's fees. Considering the fees Ms. Kelly has incurred in this matter, this Arbitrator determines Mr. Kelley shall pay \$25,000.00 of Ms. Kelley's fees.

CP at 864.

Third, in linking arbitrator Russell's findings to sanctions against

Lotzkar, Judge North found:

Respondent and his counsel have demonstrated continued intransigence, unreasonable demands, bad faith actions and violations of the CR 2A Agreement, Arbitration Agreement and Rules of Professional Conduct. Petitioner shall receive an award of attorney's fees and costs in the amount of \$10,199.85.

CP at 881-82; App. 3.

Thus, the factual record discloses that Jeff Kelley pursued a strategy of intransigence facilitated by Lotzkar and prompted by Lotzkar's own actions. The legal procedures used by Lotzkar were more than an attorney's strategic implementation of a client's goals—indeed, Lotzkar's procedures advocated the goal of litigation intransigence and would not have been legal tools a layman, such as Kelley, would have known. Judge

North observed as much in his own findings, in each of the four orders under review. We shall address each order in chronological sequence, and each order is in the Appendix to this Reply, as follows:

Order No. 1 is the order entered August 12, 2008, CP at 81-84, App. 1; Order No. 2 is the order entered October 9, 2008, CP at 690-92, App. 2; Order No. 3 is the order entered June 11, 2009, CP at 878-83, App. 3; and, Order No. 4 is the order entered July 27, 2009, CP at 1061-63, App. 4.

V. ARGUMENT

A. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION.

A trial court's award of attorney fees and sanctions is reviewed for abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); *Fisons Corp.*, 122 Wn.2d at 338-39; *Bay v. Jensen*, 147 Wn. App. 641, 659, 196 P.3d 753 (2008); *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 415, 157 P.3d 431 (2007); *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006).

The test for abuse of discretion in cases of sanctions against lawyers is measured by whether there are findings supported by substantial evidence; findings supported by substantial evidence will not be disturbed. *Fisons Corp.*, 122 Wn.2d at 345. In such cases, substantial evidence is evidence sufficient to persuade a fair-minded rational person

of the truth of the declared premise. *Mitchell v. Wash. State Inst. of Public Policy*, 153 Wn. App. 803, 814, 826, 225 P.3d 280 (2009).

Finally, where the record supports an inference that counsel has engaged in condemnable behavior but there are inadequate findings of fact, the appropriate remedy is to remand to the trial court for entry of adequate findings of fact. *See State v. S.H.*, 102 Wn. App. 468, 476, 8 P.3d 1058 (2000); *see also Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 71-72, 155 P.3d 978 (2007); *Blair v. GIM Corp., Inc.*, 88 Wn. App. 475, 481-83, 945 P.2d 1149 (1997).

In short, when reviewed for abuse of discretion, under the substantial evidence standard, the orders of Judge North against appellant Lotzkar are entitled to deference in this appeal. *Fisons Corp.*, 122 Wn.2d at 339. If not affirmed, Judge North should be given the chance, on remand, to lay out in more explicit terms why Lotzkar needs to pay for what he did to disrupt justice below. *Biggs*, 124 Wn.2d at 201-02. Judge North, not Lotzkar, should control the rules of order in the court— Washington courts have held as much, allowing sanctions for intransigence that leads to unnecessary litigation. *In re Morrow*, 53 Wn. App. 579, 590-91, 770 P.2d 197 (1989); *Eide v. Eide*, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969); *see S.H.*, 102 Wn. App. at 476.

B. SUBSTANTIAL EVIDENCE SUPPORTS ORDER NO. 1

On July 29, 2008, Lotzkar filed a Motion and Declaration to Compel Production of Psychological Evaluation. CP at 10-16. Lotzkar's motion requested attorney fees and sanctions, and was "based upon the subjoined Declaration of Counsel." CP at 10. The motion was not signed or supported by any words, under oath, by declaration or otherwise, from Lotzkar's client. *See* CP at 10-16. Lotzkar, however, made several factual statements in his "Declaration"⁴ that could not arguably have been based on his personal knowledge. CP at 11-12.

In response, Kristi Kelley filed a Memorandum of Law and Objection to Motion which identified numerous procedural and legal flaws in Lotzkar's motion. CP at 108. She condemned the false statements in Lotzkar's declaration. CP at 23. She provided as exhibits prior orders showing the highly litigious tone of the dissolution, and she asked for attorney fees and sanctions based upon CR 11, RCW 4.84.185, RPC 3.7, and common-law intransigence grounds. CP at 24-26.

Lotzkar's Memorandum in Strict Reply contained yet further similar statements, again without any basis in law or fact. CP at 77-80.

Faced with Lotzkar's inaccurate factual submissions, misuse of the court rules, and blurring of his attorney-client boundaries, Judge North

⁴ Neither the Motion/Declaration nor strict reply were signed under penalty of perjury.

made the following findings in Order No. 1:

1. Respondent's reply submittal contains inadmissible testimony from his counsel in violation of RPC 3.7. In addition, it contains information not in strict reply. The following paragraphs of Respondent's reply submittal are stricken and shall not be considered by the Court: Paragraphs 4, 5, 7, 8, 10, 13, 14 and 16. Due to the unfair litigation tactics by Respondent, an award of \$500 in attorney fees is GRANTED and included in the judgment herein.

2. Respondent's motion to compel production of Petitioner's psychological evaluation is DENIED. His motion fails to comply with the requirements of KCLR 7 and has no legal authority or basis. In addition, Respondent failed to comply with the discovery rules, specifically CR 26(i), CR 34, and KCLR 37. Respondent's demand for release of privileged medical records is improper without the entry of an appropriate protective order.

....

5. Petitioner is awarded judgment against Respondent and his counsel, Gordon Lotzkar, as follows: \$500.00 in attorney fees for improper motion; \$500 for attorney fees related to objection, as set forth above. A judgment is entered herein.

CP at 81-84; App. 1.

Thus, substantial evidence supported the trial court's findings, as documented in the memoranda of law and supporting papers. *See* CP at 17-76.

C. SUBSTANTIAL EVIDENCE SUPPORTS ORDER NO. 2

On September 4, 2008, Kristi Kelley filed a simple discovery

motion, a Motion to Compel Answers to Interrogatories and Production of Documents and Other Relief. CP at 125-39. On September 10, 2008, attorney Lotzkar filed his Memorandum in Response, containing factual statements not sworn under penalty of perjury, nor signed by his client. CP at 365-73. Again, Lotzkar violated his duties, testifying, contrary to RPC 3.7, on the merits of the motion. CP at 365-68. Kristi Kelley challenged Lotzkar's improper actions in her Reply. CP at 393-99

In Order No. 2, Judge North made the following findings of fact:

Respondent's responsive submittal contains inadmissible testimony from his counsel in violation of RPC 3.7. In addition, the evidence of Respondent's intransigence and willful violation of the rules of discovery, including CR 26-37 and KCLR 26-37, is overwhelming. Respondent's counsel certified that the responses to the discovery were in compliance with CR 26(g). By doing so, Respondent's counsel has violated CR 11 and caused Petitioner to incur unnecessary fees and costs. Due to the unfair litigation tactics by Respondent, sanctions of \$1,500 is GRANTED and included in the judgment herein.

CP at 690-92; App. 2.

In entering Order No. 2, Judge North considered the substantial evidence in the record. *See* CP at 125-39; 365-73; 606-73. Thus, Judge North cited Lotzkar's violation of the explicit terms of numerous civil rules in a nontrivial way. The trial court properly acted within its discretion when it ordered Lotzkar to pay for his violations of the rules.

D. SUBSTANTIAL EVIDENCE SUPPORTS ORDER NO. 3

On May 15, 2009, Kristi Kelley filed her Motion for Order Enforcing CR2A Agreement, Arbitrator's Decision re: Allocation of Fees, Releasing Arbitration Decision, and Awarding Judgment for Arbitration Fees, Attorneys Fees and Costs. CP at 699-702, 797-805. She filed this motion to enforce the arbitrator's award, in which the arbitrator found Jeff Kelley liable for his fraud, intransigence, and misconduct. *See* CP at 851, 854, 863-865. In her sworn Declaration in support of her motion, Kristi Kelley provided specific details of attorney Lotzkar's foot-dragging and intransigence. CP at 800-801.

Lotzkar filed an inappropriate Response on May 20, 2010. CP at 710. Ms. Kelley, refusing to cave into Lotzkar's tactics, replied, providing legal justification for her request of attorney fees and sanctions against him for advocating with intransigence. CP at 775-796 Mr. Lotzkar then objected to Ms. Kelley's reply for various frivolous reasons, including it being delivered *eight minutes late by email*. CP at 808-811. He also broke the rules when he attached to his objection two documentary exhibits that had not been previously before the court. CP at 812 and 814. Ms. Kelley's counsel responded to Lotzkar's frivolous objection, countered the false statements Mr. Lotzkar made to the court, and objected to the exhibits that

Mr. Lotzkar had attempted to introduce in violation of local Court Rules. CP at 815-831.

In Order No. 3, on June 11, 2009, Judge North affirmed the arbitrator's decision. CP at 881; App. 3; *see also* CP at 832-75.

Furthermore, the trial court made the following findings concerning the litigation intransigence of Appellant attorney Lotzkar and his client:

c. Respondent and his counsel have demonstrated continued intransigence, unreasonable demands, bad faith actions and violations of the CR 2A Agreement, arbitration agreement and Rules of Professional Conduct. Petitioner shall receive an award of attorney fees and costs in the amount of \$10,199.85.

CP at 881-882.

Thus, the findings in Order No. 3 with respect to litigation intransigence and bad faith on the part of Lotzkar is supported by substantial evidence provided to the court as part of the voluminous motion, supporting declarations and exhibits. *See* CP at 699-702, 704-805.

E. SUBSTANTIAL EVIDENCE SUPPORTS ORDER NO. 4

On July 1, 2009, Lotzkar filed another motion devoid of substance, this time to terminate Jeff Kelley's child support obligations. CP at 891-915. Astounded, yet required to respond, Kristi Kelley filed her Response with a sworn declaration, sealed financial documents, and a Statement of

Counsel and Memorandum of Law. CP at 916-1044. The Response detailed attorney Lotzkar's complicity in his client's intransigence, including refusal to enter orders, the pattern of attempts to litigate matters not properly before the court, bad-faith litigation tactics, and violation of local court rules. CP at 1025.

On July 27, 2009, Judge North denied Lotzkar's motion, making the following detailed findings to support the award of attorney fees:

1. Respondent failed to file any financial disclosures as required by KCLFLR 10. In addition, the relief requested in the Respondent's motion is an improper renewal of relief previously denied by this Court and also by the Arbitrator. Such renewed relief is an improper request for reconsideration. In addition, Respondent's request failed to comply with the requirements of the CR 2A Agreement.

2. These improper filings, violations of the court rules, and violation of the CR 2A Agreement have caused Petitioner to incur unnecessary fees and costs. Respondent's failure to provide required financial disclosure is a recurring problem with has been noted by this Court and sanctions have been entered against Respondent previously. Additional sanctions are appropriate due to Respondent's ongoing intransigence.

CP at 1062. Moreover, Judge North also found that Lotzkar's actions showed his own participation in his client's intransigence, including Lotzkar's violation of court rules and the CR2A Agreement, basing the award against Lotzkar on his conduct:

2. Respondent *and his counsel* have demonstrated continued intransigence, unreasonable demands, bad faith actions and violations of the CR2A Agreement, arbitration rulings, prior orders of this Court, and CR 11. Petitioner shall receive an award of attorney fees and costs in the amount of \$2,000. In addition, due to the egregious nature of the misconduct by Respondent and his counsel and the financial distress and harm caused to Petitioner by their actions, an award of \$1,000 in sanctions is also granted to Petitioner. Judgments for these sanctions and fees/costs are entered herein.

(emphasis added). CP at 1063. Again, substantial evidence in the record supports the trial court's findings. *See* CP at 891-1044. That the trial court acted to maintain control of the court in ordering sanctions against Lotzkar is apparent from Judge North's handwritten alterations of the order. CP at 1061, 1063.

F. PUBLIC POLICY SUPPORTS JUDGE NORTH AND HIS ORDERS OF SANCTIONS AGAINST LOTZKAR.

We urge this Court to support Judge North's Orders as a matter of public policy. We submit the Supreme Court would do so as well.

The principle we advocate is that where, as here, a lawyer advocates with the kind of intransigence that the trial court finds abhorrent, as a matter of public policy, he or she should be sanctioned just as the client who behaves with similar intransigence. The policy of the cases of *In re Morrow*, 53 Wn. App. at 590-91; *Eide*, 1 Wn. App. at 445-46; and *S.H.*,

102 Wn. App. at 476; stand for nothing less, even when those cases involved sanctions against parties, not lawyers.

Here, Lotzkar cites thousands of pages of irrelevant Clerk's Papers to support a failed argument. With his head buried in the sands of ethics, he claims, fundamentally, that he was only "following orders" of his client, a failed ethical defense if ever there were such a defense. This defense lost whatever sheen it may have had during the dark days of the last century. It is not even a valid defense by a junior attorney who knowingly acts improperly under the direction of a senior attorney. RPC 5.2(a).

This court should draw a clear line: Defenders, even those of injustice, cannot hide their intransigence behind a facade of zealousness—especially when the intransigence is of the attorney's own making. Professionalism demands more; we do not lightly say so. Washington's courts have established beyond argument that intransigence in litigation is subject to sanctions, including awards of attorney fees. *In re Morrow*, 53 Wn. App. at 590-91; *Eide*, 1 Wn. App. at 445-46; and *S.H.*, 102 Wn. App. at 476.

Here, it is not a defense, as Lotzkar seems to urge, that he was "only following orders" of his client. Without overly dramatizing the point, if at the end of the day this case turns on a principle of law, it should be that lawyers must follow rules of ethics and procedure, rising above

client demands and objectives to act in a professional manner. Often, professionalism requires an attorney tell his client “no”. Trial courts may invoke the law of litigation intransigence in sanctioning lawyers as well as parties. Otherwise we lawyers could say, without fear of public or trial court disgust, that we were “only following orders” to advocate for a result, regardless of the rules of procedure or ethics.

Instead, we urge that lawyers should be accountable to a higher standard: That of a distinguished profession. Where, as here, a lawyer advocates the intransigence of his or her client, substitutes the lawyer’s testimony for that of the client, and otherwise cuts ethical corners to torment adversaries, the trial court should be empowered to impose sanctions on the attorney as well as the client. Justice demands it. The trial court’s orders should be affirmed, with exclamation.

VI. CONCLUSION

The trial court had authority to issue sanctions under CR 11, CR 26, RCW 4.84.185, common-law intransigence grounds, and its inherent power to control the course of litigation. Four times the trial court below ordered sanctions against attorney appellant Lotzkar for good reasons.⁵

⁵ As a Commissioner of this Court aptly noted in an earlier motion for discretionary review:

The trial court has found as to both judgments that Jeff and Lotzkar have demonstrated continued intransigence, have made unreasonable

Furthermore, there are important public policy reasons for these sanctions to stand: These matters are fact intensive, trial courts addressing family law cases confront difficult factual situations that can test the ethics of the best of counsel, and trial courts need the support from above to minimize chaos while establishing clear boundaries for the conduct of advocates. Nowhere should lawyers be allowed to skate away from sanctions just because they were following client directions.

In short, this Court should affirm the trial court.

VII. ATTORNEY FEES ON APPEAL

We request that this Court grant attorney fees and costs on appeal under RAP 18.9(a) for Lotzkar's continuing intransigence or under RAP 18.1 because Kristi Kelley was entitled to recover attorney fees in the trial court. Under RAP 18.9(a) sanctions are available for a party's "recalcitrance or obstructionist attitude." *In re Adoption of B.T.*, 150 Wn.2d 409, 419 & n.6, 78 P.3d 634 (2003). As might be surmised, it is our contention that this appeal is merely an extension of the conduct that occurred before the trial court and, thus, sanctions are appropriate here.

demands, have acted in bad faith, and have violated CR 11. The imposition of sanctions and the award of attorney fees based on such findings are within the usual course of judicial proceedings.

Ruling on Appealability and Denying Discretionary Review, Case No. 63987-1-I at 4-5 (January 11, 2010).

But even if this appeal does not constitute the necessary recalcitrance and obstructionism on appeal, Kristi Kelley was entitled to attorney fees at trial for both Gordon Lotzkar and Jeff Kelley's intransigence. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001); *In re Morrow*, 53 Wn. App. at 590-91.

Respectfully submitted this 15th day of October, 2010.

HELSELL FETTERMAN LLP

By 
Larry Setchell, WSBA # 4659
Attorneys for Respondent Kristi Kelley

APPENDIX 1

HELSELL FETTERMAN

Judge Douglass North
Hearing Date: August 7, 2008
No Oral Argument

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

In re the Marriage of:

KRISTI KELLEY,

Petitioner,

and

JEFF KELLEY,

Respondent.

No. 07-3-08390-5 SEA

ORDER STRIKING PORTIONS OF
REPLY SUBMITTAL, DENYING
MOTION TO COMPEL AND
AWARDING FEES AND SANCTIONS

Clerk's Action Required

I. Judgment Summary

The judgment summary:

- A. Judgment creditor: Kristi Kelley
- B. Judgment debtor: Jeff Kelley and Gordon Lotzkar
- C. Principal judgment amount (back child support) from _____ [Date] to _____ [Date] \$ _____
- D. Interest to date of judgment \$ _____
- E. Attorney's fees \$ 2,000.00 D.A.N.
- F. Costs \$ _____
- G. Other recovery amount (sanctions) \$ ~~500.00~~ D.A.N.
- H. Principal judgment shall bear interest at _____ % per annum
- I. Attorney's fees, costs and other recovery amounts shall bear interest at 12 % per annum
- J. Attorney for judgment creditor Natalie M. Beckmann, WSBA #29031
- K. Attorney for judgment debtor Gordon Lotzkar, WSBA # _____

HELSELL
FETTERMAN

1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 WWW.HELSELL.COM

Order Denying Respondent's Motion to
Compel Production of Psychological Evaluations - Page 1

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1 L. Other: The judgment must be paid in full within 7 days of entry of this order.
2 Failure to make payment within 7 days will entitle Petitioner to pursue
3 collection action, including wage garnishment, without further notice to
4 Respondent.

5 II. Order

6 THIS MATTER, having come on before the above-entitled Court upon the
7 Respondent's Motion to Compel Production of Psychological Evaluation; the court
8 having reviewed the moving party's and opposing party's documents, including
9 the Objection to Respondent's Improper Reply Submittals and Request for Fees,
10 and the records and files herein and deeming itself fully advised in the premises;
11 now, therefore, it is hereby ORDERED, ADJUDGED and DECREED as follows:

12 1. Respondent's reply submittal contains inadmissible testimony from
13 his counsel in violation of RPC 3.7. In addition, it contains information not in
14 strict reply. The following paragraphs of Respondent's reply submittal are
15 stricken and shall not be considered by the Court: Paragraphs 4, 5, 7, 8, 10, 13, 14
16 and 16. Due to the unfair litigation tactics by Respondent, an award of \$500 in
17 attorney fees is GRANTED and included in the judgment herein.

18 2. Respondent's motion to compel production of Petitioner's
19 psychological evaluation is DENIED. His motion fails to comply with the
20 requirements of KCLR 7 and has no legal authority or basis. In addition,
21 Respondent failed to comply with the discovery rules, specifically CR 26(i), CR
22 34, and KCLR 37. Respondent's demand for release of privileged medical records
23
24
25

1 ~~is~~ without the entry of an appropriate
2 is improper and a violation of the physician/patient privilege, the confidentiality
3 of medical records, and HIPAA. *protective order. D.A.N.*

4 3. Neither party's psychological evaluation nor other medical records
5 shall be released without entry of a Protective Order. Due to the father's history of
6 violating court orders and improperly involving the children in the litigation, the
7 Court finds it necessary to impose strict restrictions upon the release of any
8 medical records or reports, which shall be set forth in a Protective Order. These
9 restrictions include the following:

10 ~~(a) the documents shall be accessed only at the GAL's office and~~
11 ~~only under the GAL's direct supervision;~~ *D.A.N.*

12 (b) the Respondent's attorney shall be personally and professionally
13 responsible for any unauthorized distribution of or access to
14 Petitioner's medical records;

15 (c) access shall be restricted to those named by court order,
16 including opposing counsel, experts and court staff;

17 (d) the documents shall be secured and inaccessible to anyone
18 besides the GAL and family therapist, without further court
19 order;

20 (e) access shall be only for purposes of the case;

21 (f) the making of additional copies shall be prohibited, in any format
22 or means, including digitization, scanning, Xeroxing,
23
24
25

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Seattle, WA 98154-1154
206.292.1144 WWW.HELSELL.COM

APPENDIX 2

1 L. Other: The judgment must be paid in full within 7 days of entry of this order.
 2 Failure to make payment within 7 days will entitle Petitioner to pursue
 3 collection action, including wage garnishment, without further notice to
 4 Respondent.

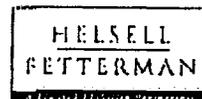
5 **II. ORDER**

6 THIS MATTER having come on for hearing without argument by the
 7 Honorable Judge Douglass A. North of this court, upon the motion of the Petitioner
 8 to compel the Respondent to provide answers to interrogatories and provide
 9 requested documents and for an award of attorney's fees; the Court having
 10 reviewed the records and files herein; being fully advised in the premises; now
 11 therefore it is hereby ORDERED, ADJUDGED and DECREED that:

12 The Respondent, Jeffrey Kelley, must supply the answers and the requested
 13 documents to the Petitioner on or before ~~September 19~~ ^{October 17,} 2008. If Respondent fails to
 14 comply with the terms of this order, the Court may enter further sanctions,
 15 including but not limited to denying Respondent's evidence presented at trial,
 16 including expert witness testimony.
 17

18 The Petitioner is granted an award of \$1,000.00 in attorney fees and costs to
 19 be paid by the Respondent within 7 days of entry of this order, and judgment is
 20 hereby entered in that amount. Failure to make payment within 7 days will entitle
 21 Petitioner to pursue collection action, including wage garnishment, without further
 22 notice to Respondent.
 23

24 Respondent's responsive submittal contains inadmissible testimony from his
 25 counsel in violation of RPC 3.7. In addition, the evidence of Respondent's



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1 intransigence and willful violation of the rules of discovery, including CR 26-37
 2 and KCLR 26-37, is overwhelming. Respondent's counsel certified that the
 3 responses to the discovery were in compliance with CR 26(g). By doing so,
 4 Respondent's counsel has violated CR 11 and caused Petitioner to incur
 5 unnecessary fees and costs. Due to the unfair litigation tactics by Respondent,
 6 sanctions of \$1,500 is GRANTED and included in the judgment herein.
 7

8 DATED this 9th day of ~~September~~ ^{October}, 2008, at Seattle, Washington.

10 Douglas A. North
 11 HON. DOUGLASS A. NORTH

13 Presented By;

14 HELSELL FETTERMAN LLP

15 By: Natalie M. Beckmann
 16 Natalie M. Beckmann, WSBA #29031
 17 Attorneys for Petitioner

18 *If Mr. Kelley fails to respond to requests for discovery, the court will take as proven at trial Ms. Kelley's highest reasonable estimate of the value of assets in Mr. Kelley's control and Mr. Kelley's monthly income and will find that all of the property is community property.*
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 D.A.N.

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APPENDIX 3

RECEIVED
JUN 22 2009

HELSELL FETTERMAN

Hon. Douglass A. North

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

In re the Marriage of:

KRISTI KELLEY,

Petitioner,

and

JEFF KELLEY,

Respondent.

No. 07-3-08390-5 SEA

Order re CR2A Agreement,
Arbitration Decision re Fees, Releasing
Arbitration Decision, and Awarding
Judgment for Fees and Costs

I. Judgment Summary #1

- A. Judgment creditor: Kristi Kelley
- B. Judgment debtor: Jeff Kelley and Gordon Lotzkar
- C. Principal judgment amount: back child support from 2/01/09 to 5/30/09 \$ 3,200
- D. Interest to date of judgment \$ 0
- E. Attorney's fees (related to this motion) \$ 5,841
- F. Costs \$ 0
- G. Other recovery amount \$ 0
- H. Principal judgment shall bear interest at 12% per annum
- I. Attorney's fees, costs and other recovery amounts shall bear interest at 12 % per annum
- J. Attorney for judgment creditor Natalie M. Beckmann, WSBA #29031
- K. Attorney for judgment debtor Gordon Lotzkar, WSBA #25701
- L. Other: The judgment must be paid in full within 10 days of entry. Failure to make timely payment will entitle Petitioner to pursue collection action, including garnishment, without further notice to Respondent.

D.A.N.

Judgment Summary #2

Order re CR2A Agreement,
Arbitration Decision re Fees, Releasing
Arbitration Decision, and Awarding
Judgment for Fees and Costs - Page 1

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- 1 A. Judgment creditor: Cheryll Russell
 2 B. Judgment debtor: Jeff Kelley and Gordon Lotzkar
 3 C. Principal judgment amount: \$ 0
 4 D. Interest to date of judgment \$ 0
 5 E. Arbitration fees ~~\$ 3,600~~ *or Paid late*
 6 F. Costs \$ 0 *May. D.A.N.*
 7 G. Other recovery amount \$ 0
 8 H. Principal judgment shall bear interest at 12% per annum
 9 I. Arbitration fees, costs and other recovery amounts shall bear interest at 12 %
 10 per annum
 11 J. Attorney for judgment creditor Cheryll Russell, WSBA #
 12 K. Attorney for judgment debtor Gordon Lotzkar, WSBA #25701 *D.A.N.*
 13 L. Other: The judgment must be paid in full ^{within 5 days} immediately Failure to make
 14 payment within 24 hours of entry will entitle judgment creditor to pursue
 15 collection action, including garnishment, without further notice to judgment
 16 debtor.

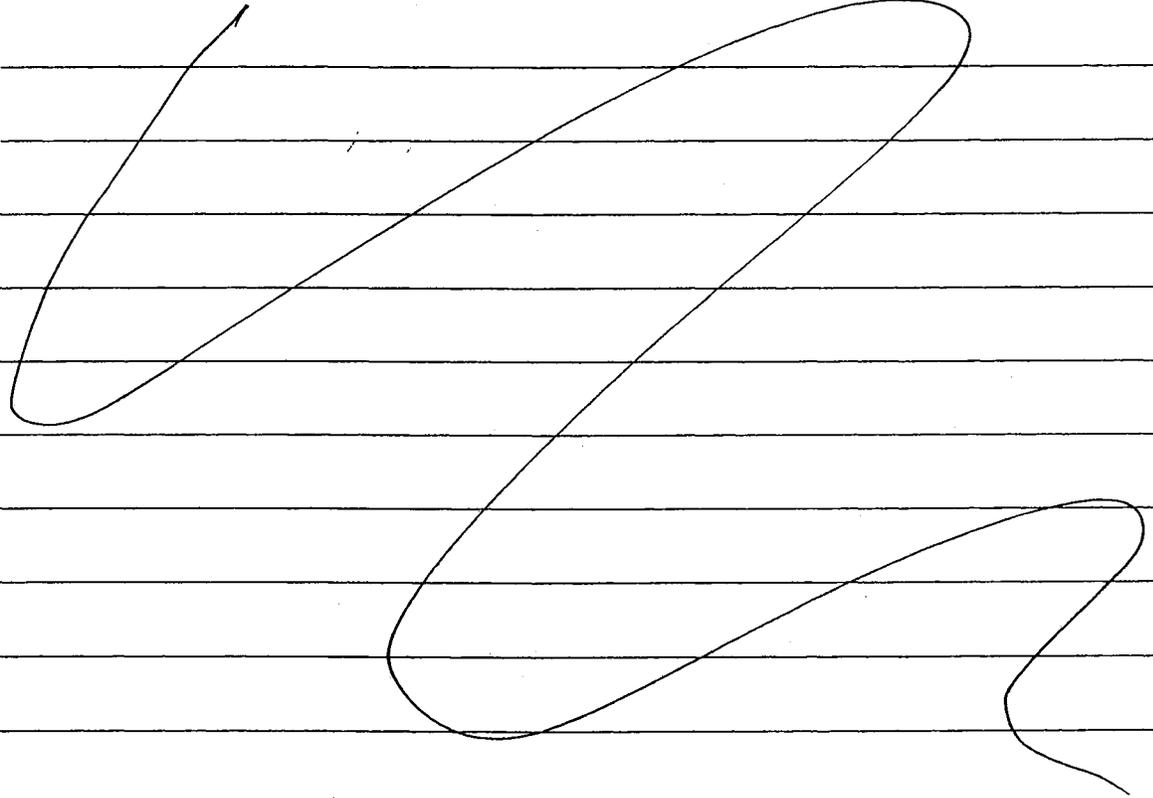
Judgment Summary #3

- 13 A. Judgment creditor: Kristi Kelley and
 14 Helsell Fetterman LLP
 15 B. Judgment debtor: Jeff Kelley and Gordon
 16 Lotzkar
 17 C. Principal judgment amount: \$ 0
 18 D. Interest to date of judgment \$ 0
 19 E. Attorney fees \$ 4,358.85
 20 F. Costs \$ 0
 21 G. Other recovery amount (sanctions) \$ TBD
 22 H. Principal judgment shall bear interest at 12% per annum
 23 I. Arbitration fees, costs and other recovery amounts shall bear interest at 12 %
 24 per annum
 25 J. Attorney for judgment creditor Natalie M. Beckmann, WSBA #29031
 26 K. Attorney for judgment debtor Gordon Lotzkar, WSBA #25701 *D.A.N.*
 27 L. Other: The judgment must be paid in full within 10 days of entry. Failure to
 28 make timely payment will entitle judgment creditors to pursue collection
 29 action, including garnishment, without further notice to judgment debtors.

II. Order

1 THIS MATTER, having come on before the above-entitled Court upon the
2 Petitioner's Motion for Order re CR2A Agreement, Arbitration Decision re Fees,
3 Releasing Arbitration Decision, and Awarding Judgment for Fees and Costs; the
4 court having considered the motion without oral argument, reviewed the moving
5 party's and opposing party's documents, and the records and files herein and
6 deeming itself fully advised in the premises; the Court makes the following
7 findings:
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D.A.N.

22 Now, therefore, it is hereby ORDERED, ADJUDGED and DECREED as
23 follows:
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25

1 1. Petitioner's Motion for Order re CR2A Agreement, Arbitration

2 Decision re Fees, Releasing Arbitration Decision, and Awarding Judgment for Fees
3 and Costs is GRANTED. An order is entered as follows:

4 a. The Decision of the Arbitrator, issued on April 20, 2009, and
5 confirmed on May 10, 2009, is approved and entered by this Court. A judgment is
6 entered against Respondent, Jeffrey Kelley, and his counsel, Gordon Lotzkar, for
7 immediate payment of the fees as ordered by the arbitrator to allow for release of
8 the full arbitration decision. Failure of Respondent or his counsel to make the full
9 payment within ^{five days} ~~24 hours~~ ^{D.A.N.} shall be considered contempt of court and subject to all
10 penalties thereto, including but not limited to jail time.

11
12 b. The obligations owed by Respondent under the CR 2A
13 Agreement from Respondent, Jeffrey Kelley, shall be paid within ^{10 D.A.N.} ~~7~~ days of entry of
14 this order, including but not limited to: maintenance; child support; uninsured
15 medical bills and portion of children's health insurance; payment of credit card
16 obligation; taxes and other obligations owed on properties awarded to Petitioner.
17 A judgment is awarded to Petitioner in the amount of \$3,200 for the unpaid
18 obligations through 5/26/09 set forth in her motion. Other unpaid obligations
19 under the CR 2A Agreement or arbitrator's decision that may exist are not
20 extinguished by this order.

21 c. Respondent and his counsel have demonstrated continued
22 intransigence, unreasonable demands, bad faith actions and violations of the CR
23
24
25

2A Agreement, arbitration agreement and Rules of Professional Conduct.

Petitioner shall receive an award of attorney fees and costs in the amount of \$10,199.85. ~~In addition, due to the egregious nature of the misconduct by Respondent and his counsel and the financial distress and harm caused to Petitioner by their actions, an award of \$ _____ in sanctions is also granted to Petitioner. Judgments for these sanctions and fees/costs are entered hereto.~~

2. Regarding request for appointment of Special Master to take immediate control of Respondent's assets, bank accounts, real properties, including any owned in whole or party by KCTJ LLC and CBI Investments:

It is not clear from the parties' submissions as of mid-May that we have reached the point where the court needs to appoint a special master. The court would consider such a step if accompanied by a clear proposal on how the special master would function.

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DATED: June 11, 2009

Douglas A. North
JUDGE DOUGLASS A. NORTH

Presented by:

Approved for entry;
Notice of presentation waived:

HELSELL FETTERMAN LLP

By Natalie M. Beckmann
Natalie M. Beckmann, WSBA #29031
Attorney for Petitioner

Gordon Lotzkar
Gordon Lotzkar, WSBA #25701
Attorney for Respondent

APPENDIX 4

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Hon. Douglass A. North
2/13/09

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

In re the Marriage of:

KRISTI KELLEY,

and
JEFF KELLEY,

Petitioner,

Respondent.

No. 07-3-08390-5 SEA

Order Denying Respondent's Motion
to Terminate Child Support and
Awarding Judgment for Fees and
Sanctions

I. Judgment Summary

- A. Judgment creditor: Kristi Kelley
- B. Judgment debtor: Jeff Kelley and Gordon Lotzkar
- C. Principal judgment amount \$
- D. Interest to date of judgment \$
- E. Attorney's fees \$ 5,000 ~~2,000.00~~ D.M.V.
- F. Costs \$
- G. Other recovery amount - sanctions \$ 1,000
- H. Principal judgment shall bear interest at 12% per annum
- I. Attorney's fees, costs and other recovery amounts shall bear interest at 12 % per annum
- J. Attorney for judgment creditor Natalie M. Beckmann, WSBA #29031
- K. Attorney for judgment debtor Gordon Lotzkar, WSBA #25701
- L. Other: The judgment must be paid in full within 5 days of entry. Failure to make timely payment will entitle judgment creditor to pursue collection action, including garnishment, without further notice to judgment debtor.

II. Order

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1 THIS MATTER, having come on before the above-entitled Court upon the
2 Respondent's Motion to Terminate Child Support; the court having considered the
3 objection without oral argument, reviewed both parties' documents, and the
4 records and files herein and deeming itself fully advised in the premises; the
5 Court makes the following findings:

6 1. Respondent failed to file any financial disclosure as required by
7 KCLFLR 10. In addition, the relief requested in Respondent's motion is an
8 improper renewal of relief previously denied by this Court and also by the
9 Arbitrator. Such renewed relief is an improper request for reconsideration. In
10 addition, Respondent's request failed to comply with the requirements of the CR
11 2A Agreement.
12

13 2. These improper filings, violations of the court rules, and violation of
14 the CR 2A Agreement have caused Petitioner to incur unnecessary fees and costs.
15 Respondent's failure to provide required financial disclosure is a recurring
16 problem which has been noted by this Court and sanctions have been entered
17 against Respondent previously. Additional sanctions are appropriate due to
18 Respondent's ongoing intransigence
19
20

21 Based upon the documents filed and the findings herein, now, therefore, it
22 is hereby ORDERED, ADJUDGED and DECREED as follows:

23 1. Respondent's motion to terminate child support is DENIED.
24 Respondent shall comply with the terms of the CR 2A Agreement regarding
25

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1 adjustment of child support. Until he does so, the child support transfer payment
2 under the Temporary Order entered January 24, 2008, shall remain in full force
3 and effect.

4 2. Respondent and his counsel have demonstrated continued
5 intransigence, unreasonable demands, bad faith actions and violations of the CR
6 2A Agreement, arbitration rulings, prior orders of this Court, and CR 11.

7
8 Petitioner shall receive an award of attorney fees and costs in the amount of
9 ~~\$5,000~~ ^{\$2,000. V.P.N.}. In addition, due to the egregious nature of the misconduct by Respondent
10 and his counsel and the financial distress and harm caused to Petitioner by their
11 actions, an award of \$1,000 in sanctions is also granted to Petitioner. Judgments
12 for these sanctions and fees/costs are entered hereto.
13

14
15 DATED: July 27, 2009

Douglas A. North
16 JUDGE DOUGLASS A. NORTH

17
18 Presented by:
19
20 HELSELL FETTERMAN LLP

Approved for entry;
Notice of presentation waived:

21 By Natalie M. Beckmann
22 Natalie M. Beckmann, WSBA #29031
23 Attorney for Petitioner

Gordon Lotzkar
Gordon Lotzkar, WSBA #25701
24 Attorney for Respondent
25

PROOF OF SERVICE

The undersigned, declares as follows:

I am now, and at all times herein mentioned was, a citizen of the United States, a resident of the State of Washington, and over the age of eighteen years.

I hereby certify that on October 15, 2010, I caused to be served a copy of the foregoing Brief of Respondent and this Proof of Service on counsel of record as follows:

Edward James Hirsch, Jr.
LAW OFFICE OF EDWARD J. HIRSCH
93 SOUTH JACKSON ST., SUITE 33995
SEATTLE, WA 98104
F: (206) 464-4202
ATTORNEY FOR APPELLANT

- Via first class U. S. Mail
- Via Legal Messenger
- Via Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

EXECUTED at Seattle, Washington this _____ day of October, 2010.

Helsell Fetterman LLP



Laurie Milliard, Legal Secretary

FILED
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STATE OF WASHINGTON
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