

Court of Appeals No. 68256-3-I

DELORES R. VAN HOOFF, an individual

Appellant

v.

CHRIS L. MATSON, an individual,

Respondent.

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CLERK OF COURT
KING COUNTY
WA
68256-3-I

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE MONICA J. BENTON

RESPONDENT'S AMENDED BRIEF

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I. INTRODUCTION

CHRISTOPHER MATSON, Respondent, respectfully submits this Amended brief in response to the "Brief of the Appellants Barry Kombol and Dolores Van Hoof". The Appellant's Notice of Appeal is timely only as to the Appellant Van Hoof. Appellant's brief attempts to include as an appellant, Appellant's counsel, Barry Kombol, despite his absence on the Notice of Appeal. The issues remaining brought before this Court are issues of fact inappropriate for appeal and/or were not raised at the trial level for rightful determination and are, therefore, waived.

Respondent requests this Court affirm the trial court's decision on all counts regarding Appellant, strike all proceedings interposed by Barry Kombol and Rainier Legal Center Inc., and provide Respondent attorney's fees pursuant to CR 11 and RAP 18.9.

II. ASSIGNMENT OF ERROR

Respondent asserts the following with regard to the Appellant's Assignments of Error:

- (1)(A) Appellant failed to provide any legal argument or basis regarding the invalidity of the award of attorney's fees under CR 11 for a CR 2A agreement at the Trial Court. Appellant therefore waives any argument on appeal.
- (1)(B) The Trial Court did not abuse its discretion in entering an award in favor of Respondent and against Appellant in the amount of \$2,525.00 on August 19, 2011.
- (1)(C) Appellant misstates the law in *State v. SH*, 102 Wn.App 468, P.3d 1058 (2000).

- (1)(D) Barry Kombol and Rainer Legal Center, Inc., P.S., are not Appellants. Barry Kombol and Rainer Legal Center, Inc., P.S., failed to timely appeal regarding the August 19, 2011, and September 23, 2011, Orders, Judgments, Findings of Fact & Conclusions of Law.
- (1)(E) In the alternative, the Trial Court did not abuse its discretion in awarding CR 11 sanctions against Barry Kombol and Rainier Legal Center, Inc., P.S.
- (2)(A) Appellant failed to timely preserve any objections regarding the Findings of Fact and Conclusions of Law for appeal.
- (2)(B) Appellant cites no issue of law regarding the Appellant's counsel's failure to appear as being willful and all objections were waived as determined by the Trial Court during the hearing on December 16, 2011, held for Presentation of Judgments and Findings of Fact and Conclusions of Law.
- (3) Appellant waived any right to assert error for appearance of bias and prejudice.
- (4) Appellant's implied *quasi* assertion of error regarding the duplication of Judgments is frivolous because Appellant could have remedied this clerical error under CR 60(A) at the Superior Court.
- (5) Appellant's Request For CR 11 is devoid of merit and is frivolous
- (6) Appellant's Appeal is frivolous and sanctions are appropriate pursuant to the Rules of Appellate Procedure 18.9(A), and CR 11.

III. STATEMENT OF THE CASE

A. Relevant Facts.

1) Background & Mediation Results.

This Appeal concerns the enforcement of a CR 2A agreement by Respondent Matson against Appellant Van Hoof. (CP 148). The case originated in King County Superior Court and initially involved a boundary dispute between four neighboring properties in Enumclaw, Washington. There, Respondent Matson was the sole Plaintiff. The Defendants were Van Hoof, Okita, and Schonbachler (CP 148, Ins 12-20). Defendant Okita and Defendant Schonbachler appeared *pro se*. Respondent Matson and Appellant Van Hoof were represented by counsel.

Mediation took place on April 26, 2011, and included Appellant Van Hoof, Defendant Schonbachler, and Respondent Matson. (CP 1). Defendant Okita declined to participate. The mediation resulted in a CR 2A agreement between Respondent Matson and Appellant Van Hoof that included the obligation that: "Defendant's attorney [Appellant's counsel] shall make an initial draft of pleadings and Orders consistent with this Settlement." (CP 1, Ins 21-22 and CP 2, Ins 1-2).

Over two months passed and Respondent's counsel received no documents for review or communication from Appellant's counsel. (CP 2, Ins 3-4). Consequently, on July 01, 2011, Respondent's counsel contacted Appellant's counsel regarding his drafts of the documents. (CP 2, Ins 3-7) On that same date Appellant's counsel affirmed his duty to undertake this task, stating he would work on those documents soon. (CP 2, Ins 7-8).

2) No Drafts & Assistance by Respondent's Counsel.

Another three weeks passed with no communication from Appellant's counsel. Subsequently, on July 19, 2011, Respondent's counsel sought to facilitate the production of the settlement agreement because the trial date of August 01, 2011, approached in eleven days (CP 2, lns 10-11). In order to reach an amicable resolution without court involvement, Respondent's counsel drafted the Stipulated Judgment at the Respondent's cost and then delivered the drafts to Appellant's counsel via email and regular mail. (CP 2, lns 9-13). Respondent's counsel included an explanatory letter stating,

In Order to help facilitate resolution in this case, I am enclosing a draft of the Stipulated Judgment between Matson and Van Hoof for your review. I have highlighted sections that I am not certain of regarding your client and would appreciate your cooperation in this matter.

(CP 12).

As of July 19, 2011, Defendant Okita and Respondent Matson reached no settlement, thereby disallowing the possibility of filing of a timely Notice of Settlement with the Superior Court. *See* KCLR 41(e)(1). Subsequently, with the influence of a pending trial in a little more than a week, Defendants Okita and Respondent Matson ultimately agreed to settle. (CP 158, lns 21-24 and 159, lns 1-2).

3) Further Delay of the Van Hoof Stipulated Judgment.

After the court decided issues not within this record pertaining to other parties, an Amended Notice of Settlement was entered with the court on July 25, 2011. (CP 2, lns 21-22). The Notice of Settlement period would elapse forty-five (45) days later on September 08, 2011, allowing the court to dismiss the case outright. (CP, lns 21-23).

Yet, the Stipulated Judgment for Appellant Van Hoof continued to languish. (CR 2, Ins 6-7). Consequently, on July 29, 2011, with no communication from Appellant's counsel nearly fifteen weeks after mediation, Respondent's counsel attempted contact with Appellant's counsel one last time in a good faith effort to reach amicable resolution. (CR 2, Ins 6-7). The letter stated in part:

While I realize that you have had some difficulties and setbacks in the past year, I feel stymied with moving this case forward. I have provided you with every courtesy. We mediated this case on April 26, 2011...

In order to help move the settlement forward, I provided you with an initial draft of the Stipulated Judgment....As you know, the Notice of Settlement was entered with the court on July 25, 2011. Within 45 days of July 25, 2011, we need to have all of the settlement documents entered with the court. Unfortunately, at this point I have little hope that this case will be resolved without my having to file a motion to enforce the settlement agreement.

If you would please provide me with the pleadings for settlement I would appreciate it, or at least contact me about revising the ones that I provided. If not, you leave me no choice but to file a Motion to Enforce the Settlement Agreement, with attorney's fees. I will be filing the motion by August 12, 2011.

(CP 26).

Ten days after sending the letter, with no communication from Appellant's counsel, Respondent proceeded by filing the Motion to Enforce the Settlement Agreement. (CP 3, Ins 9-11).

B. Procedural History.

1) Order & Motion to Enforce to Settlement Agreement.

Respondent's counsel sent to Appellant's counsel via US mail the Motion to Enforce the Settlement, Declaration of Cindy A. Johnson, the Note for Motion, and the

Order Enforcing the Settlement Agreement for the hearing set for August 19, 2011. (CP 1 Ins 3-4, and CP 405-406). Appellant acknowledges that the Respondent's Motion and Order "...was mailed out pursuant to the Court Rules." (CP 41, Ins 16-19). The Proposed Order was included with the Motion. The Proposed Order required Appellant's counsel to provide "initial pleadings" consistent with the language in the CR 2A Agreement. The Proposed Order clearly required Appellant's counsel to comply. (CP 405, Ins 24-25 and CP 8).

The proposed Order sent to Appellant's counsel stated:

...it is hereby ORDERED, ADJUDGED AND DECREED that the Settlement Agreement is enforceable and the Defendant Van Hoof and its attorney shall comply with the terms of the agreement by providing Plaintiff Matson's attorney with "an initial draft of pleadings and orders consistent with this settlement" as according to section 7 of the Settlement Agreement by or before August 24th of 2011.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Van Hoof and Defendant's attorney Mr. Barry Kombol of Rainier Legal Center Inc. P.S., jointly shall pay reasonable attorney's fees in the amount of \$525.00 to Plaintiff Matson for having to bring the Motion to Enforce the CR 2A Agreement.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Van Hoof shall pay \$500.00 in attorneys fees for every day past August 19th that Defendant Van Hoof fails to comply with their duties under the settlement agreement.

(CP 156). The Honorable Judge Monica Benton signed the Order on August 19, 2011.

(CP 156, Ins 27-29).

2) False Representations & Dubious Tactical Maneuvers.

a. Allegations of Bullying & Untimely Reply.

Instead of complying with the Order, Appellant's counsel filed an untimely reply to the Motion to Enforce on August 19, 2011, the day of the hearing. Despite Respondent's counsel's repeated efforts facilitating the resolution of the case, in his Reply, Appellant's counsel alleged Respondent's counsel employed "bullying/bludgeoning tactics" and asked the trial "court to consider whether it would be appropriate to schedule a hearing to review the conduct of Ms. Johnson [Respondent's counsel] in this case." (CP 42, lns 11-17).

Appellant's counsel based his allegation of "bullying" on his perceived inequity that Respondent's counsel paid Defendant Schonbachler no attention and focused her attention only upon Appellant Van Hoof. In fact, trying to bring the case to conclusion, Defendant Schonblacher received communications from Respondent's counsel on the same dates and in a similar spirit as those provided to Appellant's counsel in order to bring this case to conclusion. (CP 169, 173).

b. Hearing Request to Review the Conduct of Respondent's Counsel.

In addition to alleging "bullying" tactics by Respondent's counsel, Appellant's counsel also requested a hearing and included an order requesting review of "pertinent court rules, statutes and Rules of Professional Conduct" for such to set a hearing date for September 08, 2011. (CP 174). The determination regarding why the Judge struck this motion is outside the record.

c. Untimely Request for Motion of Reconsideration.

Appellant's counsel missed the August 29, 2011, deadline for filing a Motion for Reconsideration. Instead, on September 08, 2011, Appellant's counsel filed a Motion for Reconsideration/Motion for Relief from Order based on the following legal authority:

The relief being requested in this Motion is based upon the provisions of CR 59(a)(5); 59(c) based upon the Court's own initiative in the Order it entered on August 24, 2011; CR 59(e)(2) based upon the Note for Presentation of Judgment filed herein this day; CR 60(b)(1); CR 60(b)(9).

(CR 178, 179 Ins 1-4). No legal analysis or case law was provided. Nonetheless, a hearing was set for September 23, 2011. (CP 178).

d. Misleading Purpose of the Hearing.

During the Motion for Reconsideration/Motion for Relief hearing on September 23, 2011, Appellant's counsel reframed his purpose as seeking relief from sanctions. He presented the following statement regarding the Motion for Reconsideration: "Yes, your Honor. Basically I'm--that would be the essence, not reconsideration, but relief from. Yes?" (VR p. 4, Ins 14-16 September 23, 2011).

Contrary to the stated purpose of the hearing, rather than present a motion in any form, Appellant's counsel indicated that he sought not relief from the terms of the settlement agreement or Orders, but rather relief from the sanctions granted at the hearing on August 19, 2011, via review of Appellant's counsel's conduct. He stated to the Court, "But there is another motion in front of the Court, I think, for sanctions. So if – I mean, I'm here to answer questions that the Court may have." (VR p. 6, Ins 7-8).

In yet a third interpretation, Appellant's brief argues that he truly sought a review of the conduct of Respondent's counsel at the September 23, 2011 Motion for

Reconsideration/Motion for Relief. "Mr. Kombol believed the Court wanted the parties' attorneys to discuss the matters described in the Court's Order of August 24th which ordered both to appear." (Appellant Brief p. 36). Yet, the relief requested in the Motion for Reconsideration/Motion for Relief specifically stated: "that the Court vacate its Order of August 19, 2011 on CR2A Settlement." (CP 178, lns 25-26).

e. **False Representations to the Court.**

i) **Language in the Order.**

Continuing on his course of duplicity, Appellant's counsel asserted Respondent's counsel failed in her duties despite clear evidence to the contrary. He stated to the trial court that Respondent's counsel failed to include the Respondent's obligations under the CR 2A Agreement in the proposed Stipulated Judgment stating, "...they didn't even impose on the plaintiff, her client, the two burdens that he had." (VR p. 12, lns 1-2 September 23, 2011). ...I mean, you didn't have to draft pleadings, I suppose, consistent with the settlement agreement, and could have, you know, entered those, had there been no reply." (VR p. 12, lns 9-12 September 23, 2011).

Appellant's counsel, who implied he reviewed the documents by stating he redrafted them, made these statements to the court knowing that the proposed Stipulated Judgment included the following statement:

ORDERED, ADJUDGED, AND DECREED that the terms of that certain CR2A Settlement Agreement entered into by and between the parties on or about April 26, 2011 shall be the final disposition of this case and that this case shall otherwise be dismissed as between Plaintiff Matson and Defendant VanHoof with prejudice and without an award of costs or fee, except said Settlement Agreement (CR2A) shall remain in force and binding against both parties.

(CP 8).¹ (emphasis added)

With this language included, Appellant's counsel lacks any reason for suggesting that Appellant's counsel omitted the terms of the CR 2A Agreement or the burdens placed on Respondent.

ii) Drafting the Initial Pleadings.

Despite the fact that Respondent's counsel drafted the entire pleading for the Judgment, Appellant's counsel asserted that he "worked [on the initial pleadings] all day...on the day" he received the signed Order to Enforce. (VR p. 14, lns 2-5, September 23, 2011). In defense, Respondent's counsel stated that she "...provided a copy of my draft with a copy of his 'hard' work" to the Court:

THE COURT: "So--and your point is really?

MS. JOHNSON: The point is that he didn't make any changes.

(VR p. 15, lns 13-22, September 23, 2011).

While the Respondent's "initial pleadings" was not made part of the record, both the Respondent's draft and the final Stipulated Judgment are. (CP 14-22 and CP 201-208). Ten changes in total were made: three clerical changes; three wording changes; two rephrasing changes; one change to a legal direction [Appellant's error]; and one cut and pasted section added instead of a reference to another document. (CP 14-22 and CP 201-208).

¹Even now, Appellant continues to assert that Respondent's counsel failed to provide a copy of the CR 2A agreement with their Motion to Enforce the Settlement Agreement. (Appellant's Brief p. 6., lns. 10-12). Yet, Respondent's counsel provided the CR 2A with the Declaration of Cindy A. Johnson in order to swear that the copy was a true and correct copy. (CP 7-11).

3) **Judge Benton's Comments & the Order Against Rainier Legal Center and Barry Kombol.**

During the September 23, 2011, hearing, the Honorable Judge Monica Benton made the following statement: **"It's not the first case where I've had to issue a sanction where parties have just let things sit too long, and better it be a monetary penalty than one from the bar association, is what I would think."** (VR p. 16, lns 11-14 September 23, 2011). (emphasis added).

The Order signed on September 23, 2011, specifically stated, "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's attorney Mr. Barry Kombol and Rainier Legal Center, Inc. P.S. shall jointly and severally pay attorney's fees in the amount of \$1,225.00 to ACEBEDO & JOHNSON, LLC." This Order is not against Appellant, Delores Van Hoof. (CP 156).

4) **Presentation of Judgments and Findings of Fact & Conclusions of Law.**

As Respondent's counsel prepared to finalize the Presentation of Judgments and Findings of Fact & Conclusions of Law, she mailed Notes for Motion to Appellant's counsel on November 21, 2011, but emailed the same to Appellant's counsel on November 20, 2011. (CP 262, 263). Hearings for both actions were set for December 16, 2011. The Notes for Motion were sent timely, although Respondent's counsel admitted filing the Declaration of Mailing for the Notices at a later date. (VR p. 4, lns 15-21, December 16, 2011). The Declaration of Mailing did not prejudice Appellants.

In preparation for hearing on the Findings of Fact and Conclusions of Law, Respondent's counsel's staff transcribed the recording of the September 23, 2011, hearing in-office, causing a short delay. On December 05, 2011, Respondent's counsel mailed the transcription to Appellant's counsel, who filed no objections with the Court

regarding the transcription of the hearing or the Findings of Fact and Conclusions of Law.

5) **Declarations Filed by Appellant's Office.**

a. **Urgent Appearance at Federal Court.**

Two days prior to the hearing set for December 16, 2011, Appellant's counsel lodged an objection to the hearing date. On December 14, 2011, Appellant's counsel's paralegal faxed Respondent's counsel an "objection to hearing date" stating that "no copy was received by this office." The message further states, "Mr. Kombol is not available for any hearing on December 16, 2011, because he is scheduled to appear at a Federal District Court hearing that day." (CP 95, lns 26-27 and 97 lns 9-11). The message stressed the urgency of Appellant's counsel's presence at the hearing: "Mr. Kombol committed himself to appear at an important hearing at the U.S. District Court in Tacoma this Friday." (CP 108).

Respondent's counsel inquired with the U.S. District Court and learned that the only hearing involving Appellant's counsel on Tuesday, December 16, 2011, required no oral argument. The case, *The Prudential Insurance Company of America v. Shannon Atkinson*, C11-05299 RBL, held a hearing for Motion for Summary Judgment, which was presented **without oral argument**. (CP 103, lns 13-17). However, in Appellant's brief Appellant's counsel asserts to this Court that he was "scheduled to be at" a hearing "at the U.S District Court in Tacoma" on December 16, 2011. (Appellant's Brief p. 38, lns 16-18).

b. Four Scheduled Hearings at Pierce County Superior Court.

In the late afternoon, the day before the hearing set for December 16, 2011, Appellant's counsel lodged another untimely objection to the hearing date. On December 15, 2011, at 4:30 PM, Appellant's counsel's office faxed to Respondent's counsel's office a Declaration stating that Appellant's counsel faced conflicts requiring him to appear in Pierce County Superior Court on December 16, 2011. Therefore, he asserted he would not attend the hearing set for King County Superior Court the same day (VR p. 6, Ins 18-20 December 16, 2011).

This Declaration stated, "In the absence of any Notice of Hearing from Plaintiff's Counsel, and in reliance on Ms. Johnson's **first** Notice of Unavailability dated November 14, 2011, **I scheduled four** (4) Superior Court matters in Pierce County on December 16, 2011, **all of which have been confirmed.**" (CP 140 Ins 15-18 and 141 Ins 1-9). (emphasis added). By stating "first" Notice of Unavailability, Appellants acknowledge that they knew of the Amended Notice of Unavailability, yet do not disclose the fact that there was an Amended filing.

Respondent's filed an Amended Notice of Unavailability on November 18, 2011, four days after the Respondent's counsel's initial Notice of Unavailability. (CP 224-225). The Amended Notice of Unavailability stated Respondent's counsel would be unavailable starting December 17, 2011. (224-225).

c. Substitute Counsel and Response to Four Hearings.

On December 16, 2011, without notice to Respondent's counsel, attorney Loretta M. Fiori-Thomas appeared on behalf of Appellant's counsel. Ms. Fiori-Thomas sought a

continuance of the entering of the Findings of Facts and Conclusions of Law and the entering of the Judgments. (VR p.3, lns 18-21 December 16, 2011).

In opposition to the impromptu Motion to Continue, Respondent's counsel provided the following information about the four scheduled hearings requiring Appellant's counsel to appear in Pierce County Superior Court:

MS. JOHNSON: The first case, Cause No 06-4-01183-2, was a show cause hearing for an estate that was filed in 2006, requiring a notice of completion. That completion was filed yesterday, so -- my understanding from the Court is, he didn't need to show up for that.

(VR p. 7, lns 9-13 December 16, 2011).

MS. JOHNSON: The second case, Guardianship of Trevor Kane, which is Cause No. 07-4-00824-4, was a guardianship, which is a simple accounting, which is at 9:00 this morning, before Judge Serko. My appearances before Judge Serko have been such that guardianships always go first, and a simple accounting could have brought him here on time.

(VR p.7, lns 24-25 and p. 8, lns 1-4 December 16, 2011).

The third one, Shannon Atkinson vs. Jerry Edward Atkinson, Cause No. 09-3-04059-1, this was-- this was the most disturbing to me. Mr. Kombol actually filed this motion on December 12th, with an order to show cause-- or an order to shorten time to have it scheduled today, which I thought was very unfair.

And the--the forth one, Cause No. 11-2-08534-7, Baja Properties vs. SDC Homes, was an order of default entered on September 30th, 2011. All that Mr. Komol had to do in that case was file a declaration supporting his order of default. And if he did not do so by today, then a review hearing was done-- was required for today. He didn't do so, so a review hearing was required for today.

(VR p. 7, lns 24-25 and 8 1-18, December 16, 2011). (emphasis added).

6) Judge Benton's Remarks and Reaction.

At the December 16, 2011, hearing, the Honorable Judge Monica Benton considered Respondent's counsel's information on the four Pierce County hearings of Appellant's counsel. She then stated, "Typically, though, the remedy would not be to go forward, but rather to sanction and require attorneys' fees to be paid." (VR p. 8, lns 24-25, December 16, 2011). Respondent's counsel argued that, in fact, their attempts to move the case forward continually met resistance from Appellant's counsel. Recalling that mediation reached an agreement in April, that the Court applied sanctions twice previously, and the motion at this hearing intended to enforce the previous sanctions, respondent's counsel stated "Well, we've been trying to do that for quite some time now." (VR p. 9, lns 2-3 December 16, 2011).

Judge Benton's statement was quite clear, "**It's --Ms. Fiori, you've inherited a snake in a basket, and it's fighting its way out of the basket, on its way to the state bar. So I want you to communicate that to Mr. Kombol.**" (VR p. 8, lns 4-7, December 16, 2011). (emphasis added) "**...You know, in other words, I'm not satisfied that his failure to appear is anything but willful, so I'm going forward as though he's --he's forfeited any objection.**" (VR p. 11, lns 13-16, December 16, 2011). (emphasis added).

7) Clerical Error & Judgments.

Subsequent to Judge Benton's ruling, the Findings of Fact and Conclusions of Law were entered and the Judgments against the Appellant, Appellant's counsel, and Rainier Legal Center Inc. P.S., were signed by the Judge. A clerical error occurred and a second set of Judgments were also signed by Judge Benton. (CP 315, lns 18-19). The

second set of Judgments was never recorded. (CP 315, ln 22) No motion was filed by Appellant or Appellant's counsel regarding resolving a clerical error under CR 60(a).

8) Insufficient Alternative Security.

On March 09, 2012, Appellant's counsel attempted to seek an alternative means of security in this case, which duplicated the lien Respondents already held as security. (CP 315, lns 26-29 and 316, lns 1-4). Consequently, Respondent asked for an additional bond due to the frivolous nature of this appeal. (CR 313, lns 10-13). Judge Benton granted the additional collateral.

However, Appellant since caused further additional work for Respondent's counsel resulting in the inability of the existing collateral to cover attorney's fees and costs. First, Appellant filed two briefs. Due to court Rules, Respondent's counsel was required to respond to both briefs by the deadline or risk failing to address all issues. This Court subsequently disallowed the second brief but only after the deadline for the Respondent to file his reply brief.

Second, Appellant's counsel attempted to expand the number of parties by adding himself and Rainier Legal Center, Inc., as Appellants as well as adding additional errors to their brief not listed on the Notice of Appeal. Third, Appellant's counsel addressed issues not included in the original Notice of Appeal. Finally, as of the filing of this brief, Appellant moved the Court to Join Barry Kombol and Rainier Center, Inc. in this appeal. Due to these four ploys by Appellant's counsel, the collateral will no longer cover Respondent's attorney's fees and costs. (CR 358-359).

IV. ARGUMENT

(1)(A) APPELLANT FAILED TO PROVIDE ANY LEGAL ARGUMENT OR BASIS REGARDING THE INVALIDITY OF THE AWARD OF ATTORNEY'S FEES UNDER CR 11 AT THE TRIAL COURT. APPELLANT THEREFORE WAIVED ANY ARGUMENT ON APPEAL.

Appellant failed to raise any issue regarding a flawed application of CR 11 or "bad faith" before the trial court. Appellant cannot present any new arguments not raised at the trial court level. Any new argument by Appellant is waived. "We generally will not review an issue, theory or argument not presented at the trial court level. The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials." *Demelash v. Ross Stores, Inc.*, 105 Wn.App 508, 527, 20 P.3d 447 (2001). "An appellate court may refuse to review any claim of error which was not raised in the trial court." *State v. Morgensen*, 148 Wn.App 81, 91 197 P.3d 715 (2008).

Appellant addressed no CR 11 issue in her untimely Motion for Reconsideration/Motion for Relief. Appellant's counsel only restated the fact that the CR 2A agreement did not allow for fees. (CP 192, lns 11-17). In fact, the only time Appellant's counsel approached the issue of bad faith or CR 11 was in a Memorandum of Authorities when Respondent's counsel initially noted the Motion for Entry of Judgments. (CR 214-221 and CR 211-213). Appellant's Memorandum stated that when Respondent initially filed his Note for Entry of Judgment, Respondent should have filed Findings of Fact to support the bad faith. In response to Appellant's assertion regarding filing Findings of Fact and in an effort to remove any controversial issues, Respondent's counsel Re-noted the Entry of Judgment with Proposed Findings of Facts and Conclusions of Law, (CP 226-228 and CP 229-231).

Appellant filed no further legal analysis regarding CR 11 or bad faith and therefore waived any argument before the Appeals Court. Regardless, Appellant's Notice of Appeal includes "parts of the Findings of Fact and Conclusions of Law entered in the above captioned matter on December 16, 2011, in which the Court found 'Bad Faith' on the part of the party and the attorney sanctioned." (CP 288, lns 1-4). However, in order to ensure that all matters are fully briefed, Respondent responds as follows.

The attorney's fees were appropriate under CR 11 due to the fact that a CR 2A agreement was a binding court document, pleading or memorandum. This makes sense because CR 2A agreements can be construed as "a contract between them embodying the terms of the judgment." *Washington Asphalt v. Kaeser*, 51 Wn.2d 89, 91, 316 P.2d 126 (1957). A CR 2A agreement "...operates to end all controversy between the parties within the scope of the judgment..." *Id.*

Civil Rule 11 provides in pertinent part:

The signature of a party or of an attorney constitutes a certificate by the party or attorney **that the party or attorney has read the pleading, motion, or legal memorandum**, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, **upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both**, an appropriate sanction, which may include an order to pay to the other party or

parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(emphasis added). Because of the actions in this case and because of the authority in CR 11, Judge Benton held the authority to sanction "both" the attorney and the Appellant an appropriate sanction. Notably, Mrs. Van Hoof signed the CR 2A Agreement as well. This was appropriate and should be affirmed.

(1)(B) THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ENTERING AN AWARD IN FAVOR OF RESPONDENT AND AGAINST APPELLANT IN THE AMOUNT OF \$2,525.00 ON AUGUST 19, 2011.

The Trial Court committed no error in granting Respondent an award against Appellant on August 19, 2011. "Decisions either denying or granting sanctions...are generally reviewed for abuse of discretion' [citation omitted] ...But the 'choice of sanctions remains subject to review under the court's inherent authority applying the arbitrary and capricious, or contrary to law, standard of review.'" *State v. SH*, 102 Wn.App 468, 475, 8 P 3d 1058 (2000). The Appeals Court review concerns "...whether the [trial] court's conclusion was the product of an exercise of discretion that was **manifestly unreasonable or based on untenable grounds of reason.**" *Skimming v. Boxer*, 119 Wn.App 748, 754, 82 P.3d 707 (2004). (emphasis added).

Judge Benton's review included numerous factors. She reviewed the record of information regarding Respondent's attempts to work with Appellant's counsel as follows:

The mediation took place on April 26, 2011. Respondent's counsel waited two months and then tried to communicate with Appellant's counsel: calling, sending letters; asking for Appellant's counsel's cooperation. (CP 2, lns 3-7, CP 2, lns 9-13, and CP 12).

Finally, Respondent's counsel even wrote the "initial pleading" for Appellant's counsel in order to facilitate an amicable resolution. The letter from Respondent's counsel, sent with the proposed draft stated:

In Order to help facilitate resolution in this case, I am enclosing a draft of the Stipulated Judgment between Matson and Van Hoof for your review. I have highlighted sections that I am not certain of regarding your client and would appreciate your cooperation in this matter.

(CP 12).

Inexplicably, Appellant's counsel, again, failed to respond.

Almost four months after the April 2011 mediation, on July 29, 2011, Respondent's counsel tried to contact Appellant's counsel one last time to give timely warning of her intended course of action if he failed to respond. The letter stated in pertinent part:

If you would please provide me with the pleadings for settlement I would appreciate it, or at least contact me about revising the ones that I provided. If not, you leave me no choice but to file a Motion to Enforce the Settlement Agreement, with attorney's fees. I will be filing the motion by August 12, 2011.

(CP 26).

Respondent's counsel waited two additional weeks. Seeing no other way to achieve compliance outside of court, Respondent's counsel only then filed the Motion to Enforce. (CP 3, Ins 9-11). Appellant's counsel made no response until the date the Order was due to be signed by Judge Benton, August 19, 2011. Appellant's counsel even admitted timely receiving the documents sent by Respondent's counsel. The documents contained a copy of the proposed Order. (CP 41 Ins 16-19 and 405 Ins 24-25).

Respondent's counsel reviewed Appellant's counsel's untimely Reply Brief and Motion for Reconsideration/Motion for Relief. However, it provided no legal analysis. The only statements made by Appellant's counsel clearly implied he knew of all of his office's circumstances, staffing shortage, and his pending vacation at the time he signed the CR 2A agreement in April 2011.

Further, at the September 23, 2011, hearing on the Motion for Reconsideration/Motion for Relief Appellant's counsel embarked on a course of providing misstatements about Respondent's counsel to the Court. He stated to the Court that Respondent's counsel failed to include the Respondent's obligations under the CR 2A Agreement in the proposed Stipulated Judgment stating, "...they didn't even impose on the plaintiff, her client, the two burdens that he had." (VR. p. 12, Ins 1-2, September 23, 2011). "... I mean, you didn't have to draft pleadings, I suppose, consistent with the settlement agreement, and could have, you know, entered those, had there been no reply." (VR p. 12, Ins 9-12, September 23, 2011). These statements stand in direct contradiction to the Stipulated Judgment drafted by Respondent that included the language "**...that the terms of said CR 2A Settlement Agreement entered by and between the parties on or about April 26, 2011, shall be the final disposition of this case and...shall remain in force and binding against both parties.**" (CP 8). (emphasis added).

Appellant's counsel not only criticized the drafts of the pleadings prepared for him by Respondent's counsel, he also asserted that he "worked [on the initial pleadings] all day...on the day" he received the signed Order to Enforce. (VR p. 14 Ins 2-5 September 23, 2011). Making this statement clearly implies he reviewed the document, which made him familiar with its contents. Yet Appellant's counsel's suggestion that

Respondent's counsel failed to include the burdens incumbent upon the Respondent in the face of their obvious presence, contradicts his suggestion that he was familiar with the contents of the Order.

In defense, Respondent's counsel stated that she "...provided a copy of my draft with a copy of his 'hard' work" to the Court:

THE COURT: "So--and your point is really?

MS. JOHNSON: The point is that he didn't make any changes.

(VR p. 15, lns 13-22).

While the Respondent's "initial pleadings" was not made part of the record, both the Respondent's draft and the final Stipulated Judgment are. (CP 14-22 and CP 201-208). Ten changes in total were made: three clerical changes; three wording changes; two rephrasing changes; one change to a legal direction [Appellant's error]; and one cut and pasted section added instead of a reference to another document. (CP 14-22 and CP 201-208). The minimal changes made by Appellant's counsel betray the statements he made regarding his "hard work...all day."

Civil Rule 11 imposes a standard of "reasonableness under the circumstances." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992). Judge Benton reviewed the pleadings and listened to counsel's arguments. She then found that Appellant and Appellant's counsel's actions were tantamount to bad faith. CR 11 is an "equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." *Wilson v. Henkle*, 45 Wn.Ap 162, 173, 724 P.2d 1069, 1076 (1986). In *Wilson v. Henkle*, conduct which was "inappropriate and improper" was tantamount to a finding of "bad faith" and was supported by the record. As a result, sanctions in the amount of attorney's

fees and costs were proper. *Wilson v. Henkle*, 45 Wn.App 162, 173, 724 P.2d 1069, 1077 (1986).

The trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith, which includes conduct that delays or interrupts litigation, or affects the integrity of the court. *Rogerson Hiller Corp v. Port of Port Angeles*, 96 Wn.App. 918, 928, 982 P.2d 131 (1999), *review denied*, 140 Wn.2d 1010, 999 P.2d 1259 (2000). Clearly, Appellant's counsel's conduct unnecessarily delayed and interrupted settlement. And, there is no question about the enforceability of the CR 2A settlement agreement. Therefore, the trial Court did not abuse its discretion in entering its August 19, 2011, Order enforcing the Settlement Agreement.

Appellant showed no abuse of discretion regarding the award of the CR 11 sanctions. Appellant also fails to show that the inherent power to do so was arbitrary and capricious, or contrary to law. Therefore, the Trial Court's decision should be affirmed. As a result, if this Court upholds the trial court's finding, the monetary sanctions imposed by the trial court should be deemed proper without further examination.

(1)(C) APPELLANT MISSTATES THE LAW IN *STATE v. SH*, 102 Wn.App 468, P.3d 1058 (2000) IN APPELLANT'S BRIEF.

Appellant asserts that in an order awarding sanctions the court must make "express findings of bad faith." This statement by Appellant affirms that this is the only way for an award to be made by a court. "When a trial court awards sanctions under its inherent authority to sanction litigation conduct, it must make express findings of bad faith". (Appellant's Brief p. 34). Appellant then takes this analysis and narrowly applies it to the present case. (Appellant's Brief p. 35 ln 15).

"Pursuant to *State v. SH.*, supra, this court should be constrained to require the high threshold of an express finding of bad faith." (Appellant's Brief p. 35, ln 15). "None of the findings entered by Judge Benton mention the existence of 'bad faith' on the part of Mr. Kombol or Mrs. Van Hoof." (Appellant's Brief p. 35 ln 15).

Appellant omitted a fundamental portion of the broader holding in *State v. SH*, which discusses at length bad faith and actions tantamount to bad faith: "This court has held that a finding of 'inappropriate and improper' is tantamount to a finding of bad faith." *State v. S.H.*, 102 Wn. App 468 ,475, 8 P.3d 1058 (2000). The case further cites a Ninth Circuit case which concluded that remand was not necessary where, "the record was 'replete with evidence of tactical maneuvers undertaken in bad faith.'" *Id.* (citing *Optyl Eyewear Fashion Int'l Corp. Style Cos., Ltd.*, 760 F.2d 1045, 1051 (9th Cir. 1985)).

In the present case, Conclusions of Law Number three explicitly stated, "The Initial Order signed by the Court Granted fees for unreasonable and repeated delay **which is tantamount to bad faith under CR 11.**" (CP 279, lns 23-29) (emphasis added). Clearly, Appellant's met the requirements for bad faith even under Appellant's own cited case law.

(1)(D) BARRY KOMBOL AND RAINER LEGAL CENTER, INC., P.S. ARE NOT APPELLANTS HAVING FAILED TO TIMELY APPEAL REGARDING THE AUGUST 19, 2011, AND SEPTEMBER 23, 2011 ORDERS, JUDGMENTS, FINDINGS OF FACTS & CONCLUSIONS OF LAW.

A party seeking review of the trial court decision reviewable as a matter of right must file a Notice of Appeal. RAP 5.1(a). Each Notice must be filed within the time provided in Rule 5.2. *See also* RAP 5.1(a). Pursuant to Rule 5.2(a), a Notice of Appeal must be filed within thirty (30) days after the entry of the trial court's decision that the filing party wants reviewed. RAP 5.2(a). On December 28, 2011, the trial court rendered

its judgment in the underlying case. (CP 279-282). Accordingly, the deadline for a timely Notice of Appeal was January 27, 2012. No appeal was filed by Barry Kombol (Appellant's counsel) or Rainier Legal Center, Inc., P.S., regarding this case.

Appellant, Delores Van Hoof, is the sole Appellant. RAP 5.3 requires that the Notice of the Appeal includes "the party or parties seeking the review." The Notice of Appeal filed by the Appellant in this case included Ms. Van Hoof and stated: "Dolores R. Van Hoof, pursuant to Title 5 of the Rules of Appellate Procedure, hereby Appeals..." (CP 287, lns 26-27).

Yet, when Appellant's counsel filed Appellant's Opening Brief it was inappropriately titled: "Brief of Appellants **Barry Kombol** and Dolores Van Hoof." (emphasis in original). This was an attempt to include Appellant's counsel and errors not itemized in the Notice of Appeal, contrary to RAP 5.2 and 5.3.

Later, Appellant's counsel admitted he is not an Appellant in his Appellant's Reply to Respondent's Objection/Opposition to Van Hoof's Motion to File a Separate Opening Brief.² There Appellant stated: "Mr. Kombol's reference to himself as appellant along with Mrs. Van Hoof was done **simply for purposes of clarity**. Mrs. Van Hoof is the appellant." (Appellant's Reply to Respondent's Objection/Opposition to Van Hoof's Motion to File Separate Opening Brief p. 3). (emphasis added). Any argument suggesting the existence of appellants other than Ms. Van Hoof is inconsistent with her prior statement to this Court.

Appellant can appeal on her behalf but lacks standing to appeal on the behalf of her counsel, Mr. Kombol. "A lawyer who is sanctioned by a court becomes a party to an

² The Motion to File a Second Brief filed by Appellants was subsequently denied by this Court.

action and thus may appeal as an aggrieved party." *Breda v. B.P.O Elks Lake City 1800*, 120 Wn.App 351, 353, 90 P.3d 1079, 1081 (2004). Neither Appellant's counsel and/or Rainier Legal Center, Inc., P.S., filed an appeal. As a result, Appellant's counsel and Rainier Legal Center, Inc., P.S., waived and failed to timely preserve any appeal rights on their own behalf.

Therefore, the Judgments against Mr. Komobl [Appellant's counsel] and rainier Legal Center, Inc., P.S., must stand. *See State v. Gaut*, 111, Wn. App 875, 881, 46 P.3d 832 (2002). Further, Barry Kombol and Rainier Legal Center, Inc., P.S., waived the right to seek review of the judgment or any other issue brought before this court. In that regard, the Order and Judgment pertaining to September 23, 2011, is solely against Barry Kombol and Rainier Legal Center, Inc., P.S. and is time barred. Nonetheless, in an abundance of caution, Respondent chooses to respond to the argument without waiving his objections.

(1)(E) THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING CR 11 SANCTIONS AGAINST BARRY KOMBOL AND RAINIER LEGAL CENTER, INC., P.S.

Should the Court decide to review the Order of August 19, 2011, the review should be for abuse of discretion. *State v. SH*, 102 Wn.App 468, 8 P.3d 1058 (2000). Appellant filed a Motion for Reconsideration/Motion for Relief in the underlying case on September 07, 2011, nineteen (19) days following the entry of the Order on August 19, 2011. (CP 178) Because Court Rules state: "A motion for a new trial or for reconsideration shall be filed not later than ten (10) days after the entry of the judgment, order, or other decision" this filing is untimely CR 59.

Appellant's counsel provided no case law, no legal analysis, and provided only the following legal authority:

The relief being requested in this Motion is based upon the provisions of CR 59(a)(5); 59(c) based upon the Court's own initiative in the Order it entered on August 24, 2011; CR 59(e)(2) based upon the Note for Presentation of Judgment filed herein this day; CR 60(b)(1); CR 60(b)(9).

(CP 179, lns 1-4).

Therefore, the trial court's decision should be affirmed.

At the hearing on September 23, 2011, Appellants delivered their arguments for the Motion for Reconsideration/Motion for Relief. However, Appellant's counsel provided no legal argument and provided no reason for the application of the civil rules cited in his brief under CR 60 and CR 59. Unsurprisingly, the Court denied the motion, and granted attorney's fees for the frivolous motion. (CR 199-200).

Now, Appellant's Brief states, "Mr. Kombol believed the Court wanted the parties' attorneys to discuss the matters described in the Court's order of **August 24th which ordered both to appear.**" (Appellant's Brief p. 36 lns 10-12) (emphasis added). The order referenced was the Order filed by Mr. Kombol seeking review of Respondent's counsel's conduct. (CP 42, lns 11-17). Yet, the relief sought by Appellant's counsel is never mentioned in the Order of August 24, 2011. Instead, it states "Defendant requests that the Court vacate its Order of August 19, 2011 on CR2A Settlement." (CP 178, lns 25-26).

The Appellate Court defers to the trial of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). And, an

appellate court may not substitute its evaluation of the evidence for that made by the trier of fact. *Goodman v. Boeing Co.*, 75 Wn.App 60, 82-83, 877 P.2d 703 (1994). "The substantial evidence standard is deferential and requires the appellate court to view all evidence and inference in the light most favorable to the prevailing party." *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006). Judge Benton acted within her discretion in awarding CR 11 sanctions for the frivolous motion. Further, Judge Benton acted reasonably, not act arbitrarily, capricious, or contrary to law in choosing to award terms for Respondent's defense of Appellant's frivolous motion.

(2)(A) APPELLANT FAILED TO TIMELY PRESERVE ANY OBJECTIONS REGARDING THE FINDINGS OF FACTS AND CONCLUSIONS OF LAW FOR APPEAL.

A party seeking review before the Court of Appeals must timely preserve the issue for appeal. An appellate court may refuse to review any claim of error, which was not raised at the trial court level. RAP 2.5(A); *Postema v. Postema Enterprises, Inc.*, 118 Wn.App 185, 193, 72 P.3d 1122 (2003).

More specifically, unchallenged Findings of Fact are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Despite lodging no objections as to the Findings of Facts and Conclusions of Law at the trial level, Appellant now appeals numerous Findings of Facts and Conclusions of Law. Because Appellants failed to file any timely objections at the trial court level, the trial court lacked an opportunity to correct any alleged errors. As a result, the Findings of Facts and Conclusions of Laws should be affirmed.

(2)(B) THE TRIAL COURT DETERMINED THAT APPELLANT'S COUNSEL'S FAILURE TO APPEAR FOR THE DECEMBER 16, 2011, PRESENTATION OF JUDGMENTS AND FINDINGS OF FACT AND CONCLUSIONS OF LAW WAS WILLFUL AND ALL OBJECTIONS WERE WAIVED.

All opportunities for Appellant and her counsel to file objections to the Findings of Fact and Conclusions of Law are waived. This is both by Appellant's own failure to act and by the misrepresentations by Appellant's counsel to both Respondent's counsel and the trial court at the hearing on December 16, 2011.

Despite ample opportunity to file objections to the Findings of Fact and Conclusions of Law, Appellant and her counsel failed to do so. Instead, two days before the December 16, 2011, Motion for Presentation of Judgment and Presentation of Findings of Fact and Conclusions of Law, Appellant's counsel faxed Respondents counsel claiming prior commitments. (CP 95, Ins 26-27 and 97, Ins 9-11). Appellants objected to the hearing stating that the prior commitments prevented Appellant's counsel's attendance at the hearing. (CP 95, Ins 26-27 and 97, Ins 9-11).

This objection further alleged that Appellant's counsel never received the Notice for Motion, but states nothing about the other pleadings.³ (CP 95, Ins 26-27 and 97, Ins 9-11). The objection is contradicted by the fact that Respondent's counsel sent the Notes for Motion via both U.S. Mail and email. Pursuant to CR 5(b)(2)(A) service via mail is complete upon the third day after mailing. (CP 262-263). In addition to the Notice, Respondent's counsel also sent two Judgments, and the Findings of Facts and

³Appellant's Brief alluded to the fact that Respondent's counsel made irregularities and referenced a Declaration from Mr. Schonbachler. "please review Michael Schonbachler's declaration of August 19, 2011 reporting the mailing irregularities he had experienced from Ms. Johnson's firm." (Appellant's Brief, p.39). Whereas, Mr. Shonbachler, *pro se*, had a home address and a "rental address." However, the "rental address" was the address he listed with the court on his Notice of Appearance (CP 170). Therefore, Appellant sent documents to that address and tried to send documents to another address as well, as a courtesy.

Conclusions of Law. **All pleadings clearly stated in the upper right hand corner of the first page in bold type, the date and time of the hearing.** (CP 279, 281, 232).

Respondent's counsel timely sent the Notes for Motion and gave Appellant's counsel almost **a month's notice**, although Respondent's counsel admitted filing the Declaration of Mailing for the Notices at a later date. (CP 262-264 and VR. p. 4, lns 17-25, p. 5, lns 1-8, December 16, 2011). The Notes for Motion were mailed on November 21, 2011, and emailed to Appellant's counsel on November 20, 2011. (CP 262, 263). The filing of the Declaration of Mailing in no way prejudiced the Appellant.

Further, on December 05, 2011, Respondent's counsel mailed to Appellant's counsel the transcription of the September 23, 2011, hearing along with the proposed Findings and Conclusions of Law and Judgments. (CP 260). Appellant filed no objections to either.

Appellant's counsel's office argued that, because they received no "Note for Motion," Appellant's counsel could not be present for the December 16, 2011, hearing. (CP 95 lns 26-27, 97 lns 9-11). Initially, Appellant's counsel's paralegal stated in a sworn declaration to the Superior Court that Appellant's counsel needed to be present at a Federal Court case: "Mr. Kombol is not available for any hearing on December 16, 2011, because he is scheduled to appear at a Federal District Court hearing that day." (CP 95, lns 26-27, 97, lns 9-11.).

Thereafter, Respondent's counsel contacted the U.S. District Court and learned that the scheduled hearing requiring Appellant's counsel was **without oral argument** and informed Appellants she would not continue the motion. (CP 103, lns 13-17).

Then, on December 15, 2011, at 4:30 PM, the day before the Presentation of Judgments and Findings of Facts and Conclusions of Law, Appellant's counsel further objected stating Mr. Kombol needed to attend four hearings scheduled in Pierce County Superior Court on December 16, 2011. (VR p. 6, lns 18-29, December 16, 2011). Respondent's counsel informed the Court regarding these four hearings.

MS. JOHNSON: The first case, Cause No 06-4-01183-2, was a show cause hearing for an estate that was filed in 2006, requiring a notice of completion. That completion was filed yesterday, so -- my understanding from the Court is, he didn't need to show up for that.

(VR p. 7, lns 9-13, December 16, 2011).

MS. JOHNSON: The second case, Guardianship of Trevor Kane, which is Cause No. 07-4-00824-4, was a guardianship, which is a simple accounting, which is at 9:00 this morning, before Judge Serko. My appearances before Judge Serko have been such that guardianships always go first, and a simple accounting could have brought him here on time.

(VR p. 7, lns 24-25 and p. 8. lns 1-4, December 16, 2011).

The third one, Shannon Atkinson vs. Jerry Edward Atkinson, Cause No. 09-3-04059-1, this was-- this was the most disturbing to me. Mr. Kombol actually filed this motion on December 12th, with an order to show cause-- or an order to shorten time to have it scheduled today, which I thought was very unfair.

And the--the fourth one, Cause No. 11-2-08534-7, Baja Properties vs. SDC Homes, was an order of default entered on September 30th, 2011. All that Mr. Komol had to do in that case was file a declaration supporting his order of default. And if he did not do so by today, then a review hearing was done-- was required for today. He didn't do so, so a review hearing was required for today.

(VR p. 8, lns 5-18, December 16, 2011).

After hearing about the Federal Case and the Pierce County cases, Judge Benton stated: "...You know, in other words, I'm not satisfied that his failure to appear is anything but willful, so I'm going forward as though he's --he's forfeited any objection." (VR p. 11, Ins 13-16, December 16, 2011). Therefore, **Appellant waived any objections** by their intentional and repeated misrepresentations to the court in the form of a declaration.

The Court normally will not vacate a verdict and grant a new trial for errors of law if the party seeking a new trial failed to object to or invited the error. *In re K. R.* 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). As a result, in all instances Appellant waived the right to review of the Findings of Fact and Conclusions of Law and the Judgments at the Appellate level. No party appealed any decision made at the December 16, 2011, hearing.

Moreover, the Appellate Court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Boeing Co. v. Heidi*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). Any issues regarding credibility and conflicting testimony regarding the testimony offered on December 16, 2011, should be deferred to Honorable Judge Benton.

(3) APPELLANT WAIVED ANY RIGHT TO ASSERT ERROR FOR APPEARANCE OF BIAS AND PREJUDICE.

Appellant raised no issue of bias and prejudice at the trial level nor in her Notice of Appeal and, therefore, is time barred. (CP 287-307). Further, under RAP 2.5(a), the Appellate Court may "...refuse to review any claim of error which was not raised in the trial court... The doctrine of waiver applies to bias and appearance of fairness claims."

State v. Morgensen, 148 Wn.App 81, 91, 197 P.3d 715 (2008). As a result, this claim is waived.

If the Court chooses to review a claim of bias, it should acknowledge the Appellant provided no evidence to support any such claim of partiality. A trial court is presumed to perform its functions regularly and properly without bias or prejudice. *In re Marriage of Meredith*, 148 Wn.App 887, 903, 201 P.3d 1056 (2009). In order to show bias, "evidence of a judge's actual or potential bias is required." *Id.*

Respondent addresses this issue without waiving the aforementioned arguments and objections. The Appellant first argues bias occurred when Respondent won motions before the court based on the Appellant's counsel's lack of timeliness and failure to provide any legal basis for a Motion for Reconsideration. Appellant's counsel then argues that the hearing set for August 24, 2011, was inexplicably stricken. The alleged purpose of this hearing was set for his motion to review Respondent's counsel's conduct. The reasons for the hearing being stricken are outside of the record. Neither of these issues provide basis for bias and prejudice.

Judge Benton advised Appellant's counsel that he was headed down the wrong path, a path that was potentially leading Appellant's counsel to the Washington State Bar Association via a complaint. This was a statement of fact, not an "implied threat" to "compel Mr. Kombol to buckle under Mr. Matson's attorney's fees demands" as suggested by Appellant's counsel. (VR p. 16, lns 13-14, September 23, 2011 and VR p. 9, lns 5-7 December 16, 2011). (Appellant's brief p. 42).

Appellant's assertion that Judge Benton "twice raised the specter of a bar referral without having heard any argument by opposing counsel that anything Mr. Kombol did

was unethical" is clearly erroneous. (Appellant's brief, p. 42). Any attempt to raise bias as an issue is devoid of merit.

(4) APPELLANT'S *QUASI* ASSERTION OF ERROR REGARDING THE DUPLICATION OF JUDGMENTS IS FRIVOLOUS. APPELLANT COULD HAVE REMEDIED THIS CLERICAL ERROR UNDER CR 60(a) AT THE SUPERIOR COURT.

Appellant attempts to raise an error by implication, an issue regarding the signing of a second set of judgments on January 03, 2012. However, this clerical error could have been remedied under CR 60(a).

Clerical Mistakes. Clerical mistakes **in judgments**, orders or other parts of the record and errors therein arising from **oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party** and after such notice, if any, as the court orders.

Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(emphasis added). Further, Appellant failed to file a motion or bring the issue of duplicate Judgments to the attention of Respondent's counsel prior to filing this Appeal. Additionally, Appellant's counsel remains remiss in seeking correction of this issue pursuant to RAP 7.2(e). Therefore, this issue is waived.

(5) APPELLANT'S REQUEST FOR CR 11 IS DEVOID OF MERIT AND IS FRIVOLOUS.

Appellant's request for CR 11 is devoid of merit. Appellant argues that a Notice of Unavailability filed by Respondent's counsel, which indicated her absence on the date of December 16, 2011, misled Appellant's counsel. However, Appellant fails to disclose that four days after the initial Notice of Unavailability, Respondent filed an Amended Notice indicating her unavailability started on December 17, 2011. (CP 224, ln 27).

Appellant's other arguments include citing scrivener's errors in Appellant's pleadings. This is devoid of any merit, as scrivener's errors were in no way intended to harass or cause increase in the cost of litigation.

(6) THIS APPEAL IS FRIVOLOUS AND THE COURT SHOULD SANCTION APPELLANT AND APPELLANT'S COUNSEL PURSUANT TO THE RULES OF APPELLATE PROCEDURE 18.9(a), and CR 11.

An appeal is frivolous if, considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised. *Johnson v. Jones*, 91 Wn. App 127, 137, 955 P.2d 826 (1988). Pursuant to 18.9(a), this Court's sanctions against Appellant and Appellant's attorney may include an award of "terms or compensatory damages" (such attorney's fees and costs) to "any other party who has been harmed" by Appellant and Appellant's counsel.

Appellant's appeal is so devoid of merit that it is frivolous. Reasonable minds could not differ that his complaint lacked merit and that the Trial Court properly imposed CR 11 sanctions. Because there is no reasonable basis to argue that the Trial Court abused its discretion, the Respondents respectfully ask for sanctions in the amount of a reasonable attorney's fees and costs on behalf of Respondent and his law firm, Acebedo & Johnson, LLC.

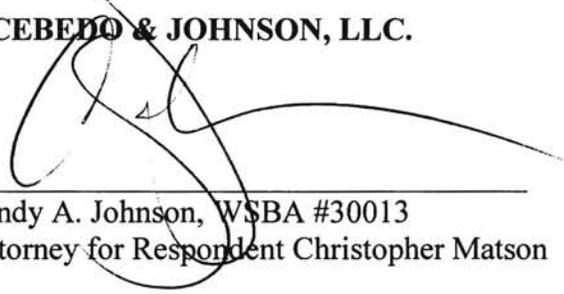
If this court issues an opinion in favor of Respondent, then pursuant to RAP 14.2, the court should award him costs. Costs may be awarded to a party prevailing on appeal. *N.W. Television Club, Inc. v. Gross Seattle, Inc.*, 96 Wn.2d 973, 640 P.2d 710 (1981).

V. CONCLUSION

The Respondent Christopher Matson respectfully requests that this Court AFFIRM the trial court's decision, strike any reference to any claim made by Barry Kombol or Rainier Legal Center, Inc., P.S., and provide reasonable fees and attorney's fees and costs pursuant to CR 11, RAP 14.2, and RAP 18.9

RESPECTFULLY SUBMITTED THIS 5th DAY OF NOVEMBER, 2012

ACEBEDO & JOHNSON, LLC.



Cindy A. Johnson, WSBA #30013
Attorney for Respondent Christopher Matson