

NO. 71413-9-I

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

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In re the Marriage of:

Robin Maelee Hitz  
Respondent

v.

Eric James Hitz  
Appellant

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REVIEW FROM THE SUPERIOR COURT  
FOR WHATCOM COUNTY  
The Honorable Ira Uhrig

RESPONDENT'S BRIEF

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**I. SUMMARY OF ARGUMENT.**

Eric Hitz will stop at nothing to prevent the property division ordered by the trial court almost three years ago. Litigation has been ongoing in Whatcom County Superior Court, US Bankruptcy Court, and now in this Court. In every single case, Eric<sup>1</sup> has one goal – to prevent Robin Hitz from managing, marshalling, and selling the marital assets as required by the Decree of Dissolution. Eric did not appeal the November 17, 2011, Decree. Instead he immediately began his campaign to stop Robin from discharging her responsibilities and enjoying the property she should have received.

This appeal is Eric's latest tactic. Eric, and his attorney, T. Renihard G. Wolff (hereafter "Wolff"), argue that the trial judge, Judge Ira Uhrig, lacked the authority to enter and post-Decree enforcement orders. Yet, Eric and Wolff know their claims are completely frivolous and utterly without merit. They present no facts, make no meaningful legal argument, and cite no legal authority to support the errors they assert. This appeal is nothing more than a gross misuse of the legal process designed to harm Robin. The appeal should be summarily dismissed, Robin should be

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<sup>1</sup> This brief will refer to the parties by their first names only for clarity.

awarded all of her fees on appeal under RAP 18.9(a), and CR 11 sanctions should be imposed upon both Eric and Wolff.

## **II. STATEMENT OF THE CASE.**

On November 17, 2011, following a nine day trial in August and September 2011, the trial court, Judge Ira Uhrig, entered a Decree of Dissolution dissolving Robin and Eric's twenty year marriage. CP 73-94. The Decree of Dissolution swept all of the parties' assets, primarily consisting of a business, Northwest Chip and Grind, and real estate, into one marital estate and gave Robin the responsibility of managing and liquidating them. Once the assets were liquidated, and all debt paid, the parties were to equally divide the proceeds. CP 79-83. The trial court retained jurisdiction to hear any disputes regarding the liquidation, payment of creditors, and disbursement to the parties. CP 83. During the course of the trial, Judge Uhrig disclosed to both parties and their attorneys that his family corporation had an account and a loan at the Bank of the Pacific, one of the parties' major creditors. Both parties waive any potential conflict<sup>2</sup>. 4/11/2012 RP 4-5. Eric did not appeal the trial court's final orders.

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<sup>2</sup> To the extent the Appellant's brief cites different facts at pages 13-14 that are not supported by any citations to the record (and not supported anywhere in the record) they should be disregarded.

On March 1, 2012, Eric filed the first of what would be several post-decree enforcement motions seeking relief from Judge Uhrig. 3 CP \_\_\_\_, (Sub. 215, Motion for Order to Show Cause Re: Contempt); 3 CP \_\_\_\_, (Sub. 216, Order to Show Cause); 3 CP \_\_\_\_ (Sub. 217, Motion for Enforcement of Decree of Dissolution); 3 CP \_\_\_\_ (Sub. 218, Note for Motion). Robin responded on March 9, 2012, also seeking affirmative relief from Judge Uhrig. 3 CP \_\_\_\_ (Sub. 224, Responsive Declaration of Robin Hitz); 4 CP \_\_\_\_ (Sub. 235, Supplemental Declaration of Robin Hitz.).

These post-decree motions arose after Eric's attorney, Eric Weight, filed an attorney fee lien on February 3, 2012, that clouded title to all of the properties Robin was ordered to sell, and, when the sale of the marital residence closed, Mr. Weight received and held sale proceeds of \$592,408.00 in his trust account. On February 9, 2012, Eric's parents, Eric's parents, James and Carol Hitz, sued Robin and Eric for nonpayment of an unsecured promissory under Whatcom County Causes No. 12-2-00359-5 and shut off water rights to property where the parties' business was operating. 4/11/12 RP 7-8; 3 CP \_\_\_\_ (Sub. 215, Motion for Order to Show Cause). In addition, the Bank of the Pacific declared the parties in default of the business loans because Eric refused to provide additional collateral for loans and refused to cooperate with sales that would have

paid the debt<sup>3</sup>. See CP 227 (letter from David Chylinski of Bank of the Pacific).

Both parties' motions were heard on March 30, 2012, and Judge Uhrig ordered the sales transactions to go forward, all sale proceeds to be paid to the Bank of the Pacific (the primary secured creditor), and the removal of Mr. Weight's attorney lien. For some reason, no order was entered on this date. CP 110.

On April 11, 2012, Robin and Eric again appeared before Judge Uhrig. The sole purpose of this hearing was to enter an agreed order regarding disbursement of sales proceeds between the parties, James and Carol Hitz, the Bank of the Pacific, and Mr. Weight. 4/11/12 RP 7. At the beginning of the hearing, Judge Uhrig explained that he voluntarily recused himself in the case between Eric's parents and Robin and Eric under Cause No. 12-2-00359-5 because the Bank of Pacific was directly involved in that case as a creditor. 4/11/12 RP 4-7. Judge Uhrig clarified that he did not disqualify himself in the dissolution action between the parties, and that any potential conflict of interest because of his family's corporate relationship with Bank of Pacific had been fully disclosed and waived by all parties and their counsel during the dissolution trial.

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<sup>3</sup> Ultimately, the Bank of the Pacific sued Eric, Robin, and their business entities on May 16, 2012, under Whatcom County Case No. 12-2-01309-4, because of the loan default

4/11/12 RP 4; see also CP 284-85 (April 10, 2012 letter from Judge Uhrig to all counsel in response to letter from Mr. Weight<sup>4</sup>). Following Judge Uhrig's statements, Mr. Weight stated:

Thank you for the further information, Your Honor. And what we are presenting now is an agreed order. So whatever issues you have raised, I think are moot with respect to this order since it's agreed. We want to put it on the record because this is an order that flows from the Hitz v. Hitz case [12-2-00359-5] from which you did disqualify yourself, and this order was read into the record [in that case], but it's effective in this case because it disposes of dissolution funds. And also to be clear, it slightly modifies your oral ruling of March 30<sup>th</sup>; however, it is consistent with both prior negotiations of the parties and I believe the colloquy of the court at various times.

So we don't anticipate any other, um, unique changes, and, frankly, this order will go a long way towards resolving a number of the issues that you heard at the last hearing [on March 30, 2012].

4/11/12 RP 7. Before signing the agreed order, Judge Uhrig confirmed with all counsel that no one had any objection to him signing the agreed order given the discussion about his recusal in the civil case. 4/11/12 RP 9. Given no objection, Judge Uhrig entered the agreed order in the dissolution case so the \$592,408.11 Mr. Weight had been holding in his trust account could be disbursed as follows: \$95,955.00 to Eric's parents for satisfaction of the judgment against Eric and Robin under Cause No.

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when Robin couldn't make payments as a result of Eric's refusal to cooperate with sales.  
<sup>4</sup> Page 6 of the Appellant's brief purports to describe this letter. Contrary to Appellant's claim, it is not part of the record in the trial court. For reasons later described herein, Robin is not objecting to this Court's consideration of this letter on appeal.

12-2-00359-5; \$200,000.00 to the Bank of the Pacific; \$149,226.56 to Robin; and \$149,226.55 to Eric. This order also required Eric's parents to restore water rights to the parties' properties. 3 CP \_\_\_ (Sub. 245, Agreed Order For Distribution of Trust Funds).

On May 24, 2012, Robin filed another motion seeking to force Eric's cooperation with real estate sales and the sale of the business and requesting a specific process to disburse funds so she could avoid being forced to enter into agreed orders like the April 11, 2012, order when properties were sold. 3 CP \_\_\_ (Sub. 248, Motion and Declaration For Order Regarding Real Estate Sales). On May 29, 2012, Wolff substituted in as counsel for Eric. 3 CP \_\_\_ (Sub. 250, Notice of Withdrawal and Substitution); 3 CP \_\_\_ (Sub. 251, Notice of Appearance). On June 1, 2012, Wolff filed a motion/response seeking to vacate the March 30, 2012, minute entry, and prevent the sale of the business. CP 101-142. In that motion, Wolff stated "Judge Uhrig recused himself from these proceedings on April 11, 2012," but never raised it as an affirmative issue. CP 101, 104-105; see also CP 125 (April 11 clerk's minute entry). Eric's June 1, 2012, declaration in support of his motion makes no reference to the recusal. CP 144-145. Both parties' motions were scheduled for hearings on June 8, 2012.

On the morning of the June 8 hearing, Wolff filed a formal motion asking Judge Uhrig to recuse himself citing Judge Uhrig's relationship with the Bank of the Pacific and Judge Uhrig's decision to disqualify himself the civil case involving Bank of the Pacific, Cause No. 12-2-01309-4. CP 157-168. Eric's declaration in support of that motion states

in light of the...conflict with the Bank of Pacific and the [sic] Judge Uhrig's stated disqualification he should recuse himself from any further involvement with this matter.

CP 155. At the commencement of the hearing, Judge Uhrig advised both parties he was not going to hear the motion to recuse because it was not timely filed. 6/8/12 RP 3. Judge Uhrig and Wolff then had the following colloquy:

THE COURT: ...on the minute entry of April 11<sup>th</sup>, that's the subject of the [Respondent's] motion [to vacate], um, and counsel has pointed out that the clerk's minute entry says, court stated it will voluntarily disqualify from matter, from, F-R-O-M M-A-T-T-E-R. ...A review of the transcript, and I don't know, Mr. Wolff, if you have had a chance to review it.

MR. WOLFF: I haven't seen the transcript, Your Honor.

THE COURT: I have and looked at it carefully and I can tell you that anybody present in court that day knows quite clearly that the notation of April 11<sup>th</sup> refers to the other matter bearing – it's the other Hitz versus Hitz, cause number starting 12. It's a 2012 filing. I believe you go the memo that I sent out to counsel earlier on in that case. I think some of the counsel hadn't received it by the time of the hearing on the 11<sup>th</sup>, and I have the transcript that I did recuse earlier on.

Before the hearing, because of a decision that came down from the judicial conduct commission, it was determined that I would not have had to recuse because I have no financial interest whatsoever, and that decision said that a de minimus financial

interest is not grounds for recusal. But, I maintained my recusal... and, then, I invited anyone who had a concern to properly note up and set a hearing on the issue of whether or not I would recuse from the dissolution matter, the 2010 filing. I do not believe – did not believe at that time, either, that there was a reason to do so. But you have filed a motion and you can note that up for hearing and I'm happy to –

MR. WOLFF: Your Honor, if I may, I got on this case – I haven't been even on it ten days.

...

MR. WOLFF: ...I sincerely apologize to the court for just kind of getting [the recusal motion] in before the deadline. I will note it up.

...

THE COURT: That's all right. And, again, I am not sure, first of all, the court's minute entries do not indicate what the law of the case is. They do not modify a decree or any order of the court.

I also question, as I stated, whether the court can modify a minute entry. But, I would note, and if you get a transcript of the March 30<sup>th</sup> hearing, you might find this to be the case as well, I got a transcript yesterday from my court reporter and if you get a transcript, I don' know if yours will be numbered the same as mine, but on the transcript I received, the minute entry of March 30<sup>th</sup> seems entirely consistent with page 38, line 16 and 17, page 39, line 6 and 7, and page 48, line 25. But you can explore that at your leisure and determine if you agree or disagree with that, certainly.

MR. WOLFF: I would like – I'll order a copy of [the transcript].

6/8/12 RP 4-7; See also CP 125 (April 11, 2012, minute entry). The hearing on Robin's motion then went forward without any further objection or request for continuance. After hearing argument, Judge Uhrig granted Robin's motion. CP 169-70.

The sale as contemplated by the petitioner and as arranged by the petitioner seem to me to be entirely in keeping with the court's prior rulings, indeed the court ordered that matters would be brought before the court if there were disagreements and that's

why we are here now. So I think the relief sought by the petitioner is appropriate. I will appoint Brian Hansen as a special master for [respondent's] signature. ...

6/8/12 RP 21. Judge Uhrig reserved Robin's request for attorney fees so her attorney could file the appropriate fee affidavit. *Id.* Wolff requested Judge Uhrig delay the effectiveness of his decision for five days so Wolff could file a motion for discretionary review in this Court. Judge Uhrig denied this request. *Id.* at 22-23. Wolff did not seek discretionary review.

Instead, five days later, on June 13, 2012, Eric, through Wolff, filed another civil suit against Robin under Whatcom County Cause No. 12-2-01555-1 seeking an account. In conjunction with this new suit, Eric a Lis Pendens clouding title to every property Judge Uhrig ordered sold on June 8. CP 193. While this new civil case was pending before Judge Mura, Robin filed a motion and fee affidavit in the dissolution case on June 22, requesting attorney fees from the June 8 hearing. Robin scheduled her motion for July 27, 2012. CP 172-182; 3 CP \_\_\_ (Sub. 262, Motion and Affidavit/Declaration for Attorney Fees); 3 CP \_\_\_ (Sub. 264, Note for Motion). Eric did not respond to Robin's motion.

Instead, on July 9, 2012, Eric filed another motion asking Judge Uhrig to recuse himself citing RCW 4.12.050. CP 183. In his declaration, Eric argues that Judge Uhrig's disqualification in the civil case brought by the Bank of the Pacific, Cause No. 12-2-01309-4, extended to all related

cases. CP 184. Again, this motion was never noted for a hearing. On July 26, 2012, the day before Robin's hearing regarding attorney fees, Wolff filed a motion requesting a 30 day continuance of all pending motions. 3 CP \_\_\_ (Sub. 267, Motion and Declaration for Order of Continuance).

In light of Wolff's request for a continuance, Robin voluntarily re-noted her motion for attorney's fees. On August 21, 2012, Robin filed yet another enforcement motion to force Eric to sign documents to comply with government regulations concerning a project to develop a wetland restoration area on the parties' business properties. Eric refused to execute the document and Robin could not execute it because the project was filed under Eric's social security number. 3 CP \_\_\_ (Sub. 271, Motion and Declaration for Signature on CCC-931 and Title for Bombadier). Robin noted her new enforcement motion along with her motion for fees for hearing on September 7, 2012. 3 CP \_\_\_ (Sub. 269, Note for Motion Docket); CP 186. The motions were not heard on that date because Eric found a new way to stop Robin – through the bankruptcy court.

Robin filed a Motion to Dismiss the civil case Eric filed against her under Cause No. 12-2-01555-1. That hearing was scheduled for August 24, 2012. Unbeknownst to Robin, Eric filed for Chapter 7 bankruptcy on August 23, 2012, and listed the parties personal and business assets in his

bankruptcy petition. On August 24, 2012, Judge Mura dismissed Eric's civil lawsuit against Robin, terminated all lis pendens, and ordered Eric to pay attorney fees in the amount of \$1,459.00. Eric did not appear or file any response to Robin's motion to dismiss. CP 193, 199-200, 205. Because of the automatic bankruptcy stay, Robin could not proceed with any of her motions in the dissolution case. Eric felt invincible.

On August 28, 2012, Eric's parents, with his support, turned off the water to Robin and Eric's properties in violation of the April 11, 2012, agreed order disbursing funds that was entered by agreement in the dissolution case. Robin had to engage another attorney, Tom Flattery, to bring an emergency motion on shortened time to restore the water. Judge Uhrig granted Robin's motion to shorten time and set a hearing for September 13, 2012. 3 CP \_\_\_ (Sub. 279, Motion to Shorten Time); 3 CP \_\_\_ (Sub. 280, Order Shortening Time); 3 CP \_\_\_ (Sub. 285, Motion to Enforce Agreed Order). Robin's motion sought relief against only Eric's parents because Eric was hiding behind the protection afforded through the bankruptcy court. CP 189-90; See also 9/13/12 RP 13-16 (discussion of separate civil suit and lis pendens; CP 187 (attorney fee affidavit for motion to dismiss civil case)).

On September 13, 2012, Eric appeared with Wolff, and Robin appeared with Mr. Flattery before Judge Uhrig<sup>5</sup>. Eric's parents did not appear. Judge Uhrig questioned whether he could appropriately grant Robin's motion when it sought relief against Eric's parents, who were not parties to the dissolution case. 9/13/12 RP 4-9. Specifically, Judge Uhrig again discussed the procedural events leading to the April 11, 2012, agreed order:

...the [April 11] order that was signed uses the terms 'the parties', and from the context of the entire document, it's not clear if the term 'the parties' refers to all signatories of the document or just the parties to the dissolution, because in some parts it sounds like it could mean one and in some parts sounds like it could mean the other.

I was surprised, in fact, I thought that Judge Mura's court reporter would not be available yesterday, but I found him in his office and I was able to get a brief transcript – I should say a full transcript in a short amount of time of what was stated in the record when that order was read into the record, and it was read pretty much verbatim in the record in Judge Mura's courtroom. Again, it talks about 'the parties' and it talks about the additional paragraph that relates the water rights and that's why we are here.

...

For reasons that I still do not understand, it was brought up to this court for signature or for entry, and the cause number was change, the heading was changed [from 12-2-00359-5 to 10-3-00638-9]. I don't know if the cause number or heading were changed before the parties signed it. I had recused on [the 12-2-00359-5] case...I found out on the day after I recused that the basis on which I recused was not necessary, but in order to move things along quickly, I let it go down to Judge Mura.

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<sup>5</sup> The transcript from this hearing erroneously states that Eric appeared with Mr. Weight, Robin appeared with Ms. McCandlis, and that several other attorneys were present. This is not correct. See CP 191 (minute entry indicating that Robin appeared with Mr. Flattery and Eric appeared with Wolff).

Anyway, it came back up here, for reasons I don't understand. But when the order or the agreement was read into the record [in 12-2-00359-5], at the conclusion of the reading, it amount pretty much to a CR 2(a) agreement, it was said, it's our intention to proceed over to Judge Uhrig and present this order over for signature. I'm reading from the transcript. You all can have a look at it. Judge Mura said, this is based upon what? I'm hearing the motion to stricken here and here – is the language that I want to ask you about: You are not a party to this particular cause number [10-3-00638-9], so, this is a separate contractual agreement between the parties that's not enforceable by the court with the exception of any contract action that might arise in failure to perform.

So that's what I'm wondering about. Do we need to have a separate contract action filed here and a, um, perhaps a preliminary injunction requiring that the water service be restored?

9/13/12 RP 7-9; see also 9/13/12 RP 20 (Judge Uhrig noting that Judge Mura was addressing Eric's parents' attorney, Mr. Knutson, and Bank of Pacific's attorney, Mr. Clark, when discussing who was a party to the dissolution case); 3 CP \_\_\_ (Sub. 245, April 11, 2012, Agreed Order).

Judge Uhrig and Mr. Flattery continued to discuss whether Eric's parents, by virtue of signing the April 11 agreed order, subjected themselves to the jurisdiction of the dissolution court. After pointing out that Eric's parents were represented by counsel and executed the agreed order on their behalf, Mr. Flattery went on to argue:

MR. FLATTERY: I just think it is unequivocal on the record that the parents intentionally and voluntarily inserted themselves into this case in order to gain a court order that gave them \$94,000.00.

I also point out to the court that the record is clear, at the time the order was entered, the water supply was located on the parent's property.

THE COURT: Yes. I understand.

MR. FLATTERY: There is no other reason for issuing the order saying turn the water back on unless it was directed to the people that owned the property that controlled the water source. So, to say that there was some uncertainty about the language that says water right[s] should be restored today wasn't directing or ordering them to turn on the water, I think it's not apparent reading [the order].

Id. at 9, 10-11. Wolff appeared on behalf of Eric and attempted to present last minute evidence regarding the legality of the water source. Id. at 15, 17. Wolf also asked for affirmative relief on Eric's behalf:

WOLFF: ...On the procedural side of this, Your Honor, the Hitz – there is only two parties in this lawsuit. It is In Re the Marriage of Hitz and Hitz. And when a notice comes down that tells Mr. Hitz he has to be in court, we cannot ignore that. My client no longer has a dog in this fight.

THE COURT: What said he had to appear in court?

WOLFF: Notice. I got notice that said In Re the Matter of Hitz was coming on. Mr. Hitz – I can't not show up. It's a violation of the [bankruptcy] stay. I'm asking for terms. It costs Mr. Hitz \$1,000 to be here today and I want the court to impose those terms. And if the court isn't going to do that, I'll go to federal court.

THE COURT: I'm not going to impose terms, so, you can go to federal court on that.

Id. at 16. Throughout the proceeding, Wolff did not request Judge Uhrig recuse himself or bring up his earlier motion requesting recusal.

Judge Uhrig declined to grant Robin's motion because of insufficient service on Eric's parents. 9/13/12 RP 20-22. Judge Uhrig also advised Robin the "better course of action would be to proceed

[against Eric's parents] under a separate cause number.<sup>6</sup> *Id.* at 22; CP 191. At this point, Robin was left with no ability to take any action against Eric personally to enforce Decree of Dissolution without express permission from the bankruptcy court. Robin had to hire bankruptcy attorneys to protect her interests.

On April 25, 2013 – 13 months after Eric filed the first post-Decree enforcement motion seeking relief from Judge Uhrig – the bankruptcy court entered the following order clearing the way for both parties to enforce the Decree in superior court:

**ORDERED** that Robin Hitz and Eric Hitz are granted relief from the automatic stay to proceed under the Decree of Dissolution entered in Whatcom County Superior Court on November 17, 2011, cause number 10-3-00638-9. It is further

**ORDERED** that Whatcom County Superior Court may proceed under the Decree of Dissolution and enter judgment and findings regarding any dispute between Robin Hitz and Eric Hitz stemming from the Decree of Dissolution but shall make no changes to the division of community assets, which was fixed as of the [bankruptcy] petition date. It is further

**ORDERED** that the Court retains exclusive jurisdiction to enforce the Whatcom County Superior Court judgments and findings within the context of the underlying bankruptcy case and this adversary proceeding in accordance with the priorities established

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<sup>6</sup> Ultimately, Robin was forced to take that step, and litigation ensued in both the bankruptcy court and the superior court to allow Robin to sell properties as contemplated by the Decree. See CP 194-95 (describing lawsuit against Eric's parents under Whatcom County Cause No. 12-2-02492-4); CP 203 (bankruptcy declaration of Robin Hitz describing state court action against Eric's parents); CP 208-211 (bankruptcy court order lifting stay to allow specific sales to proceed); CP 213-216 (order granting Robin's motion for partial summary judgment against Eric's parents in Whatcom County Cause No. 12-2-02492-4).

by the Bankruptcy Code and the rights of creditors and other parties in interest. ...

CP 226-227, 230-232. On July 18, 2013, Robin filed the motion that ultimately led to the order on reconsideration that is the subject of this appeal.

In her July 18, 2013, motion, Robin sought attorney's fees from the June 8, 2012, hearing; requested restraining orders to prevent Eric from coming on the business properties and interfering with sales; asked for permission to change the listing agent for the real properties (with any necessary approval by the bankruptcy trustee); and sought additional attorney fees. CP 223-232. The hearing was specially set before Judge Uhrig on August 27, 2013. CP 233. In her declaration in support of the motion, Robin outlined the extensive litigation resulting from Eric's actions (or his parents' with his support) in both the superior court and the bankruptcy court that were solely designed to prevent her from fulfilling her obligation to liquidate the parties' assets as set forth in the Decree. CP 193-195; See also Appendix A (Summary Litigation Table).

On August 14, 2013, without any notice to Robin, Wolff/Eric filed a Motion and Affidavit of Prejudice citing RCW 4.12.050. Eric's declaration states: "Judge Ira Uhrig, before whom the above-entitled action is pending, is prejudiced against me, so that I cannot, have a fair

and impartial trial before said Judge.” CP 234-35. Judge Uhrig summarily denied the motion on August 15, 2013, before Robin became aware of the motion and filed her response on August 20. CP 236<sup>7</sup>, CP 237-239, CP 299. Eric did not seek review of Judge Uhrig’s decision to deny his motion under RCW 4.12.050.

Eric did not file any response to Robin’s substantive motion, and, unlike every hearing before, he did not appear at the hearing on August 27, 2013. Wolff appeared and, contrary to his assertions at pages 12-13 of Appellant’s brief, Wolff argued:

Your Honor, I am not saying that my client, and that this was not a hotly contested divorce, but my client lost and he has surrendered his property interest. He doesn’t have a dog in this fight anymore. It is Mr. Arkison [the bankruptcy trustee] who needs to be here – my client hasn’t done a thing regarding the sale of these properties since he filed his [bankruptcy] petition. So, with the regard to the property aspect of this motion, we don’t have the real party in interest.

Number two, with regard to the restraining order. ... I don’t know of any – there is no personal service on him for the restraining order. There is no authority for post-trial restraining order when he has no property interest. He is basically a stranger to this proceeding.

8/27/13 RP 10. Wolff did not make any argument or raise any issue regarding Judge Uhrig’s authority to hear the case for the reasons he now asserts on appeal. See Appellant’s Brief at pages 12-13.

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<sup>7</sup> The Clerk’s Papers incorrectly designate this as CP 301. This document was Sub. 301 in the superior court file. The correct CP 301 is page 4 of Robin’s Response to Motion

Following argument, Judge Uhrig stated:

...I can't recall ever seeing a couple who seemed to function so well as a team, or the strengths and talents of each party were combined so effectively, um, allowing them to create, to create a prosperous business enterprise. It was remarkable to hear what you have been able to do together, and, sadly, that union ended and I took no pleasure in being the one assigned to preside over trial.

And, it was simply my duty, I guess what was expressed as Mr. Hitz's feelings that he lost. I guess people do feel that they win or lose dissolutions, but I don't – at least all of the judges I know, what we do is we just try and divide the property and the obligations as we see fit, and I don't see it, and I don't think other judges see it, as having one party won or lost. But, I guess it's probably a common way for a party to feel if they didn't get what they were hoping to get out of the dissolution that's finally over and done.

...in roughly the quarter century that I have been serving on the bench, and in the decade or so that I practiced family law as an attorney, I don't believe I have ever seen a dissolution proceeding or any proceeding that has been so faintly injected with needless and unnecessary obfuscation, dilatory conduct and actions and behaviors that, at least from the perspective of the bench, and I do not and would not suggest what motives might absolutely be, but from the perspective of the bench, this all seems designed to generate heat rather than light. It seems designed to create discord and strife, rather than cooperation and harmony. It seems designed to injure rather than heal. And to add to the injury the creation of any scar tissue that can be made.

I don't bear anybody any animosity in this case. I'm sure everyone will be glad when everything is over and one with, and this case, perhaps for the parties, will be just a, just a memory. Not a pleasant memory, but just a memory.

Based on all the fact and circumstances presented and my understanding of the situation is [sic] the documents submitted, I

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for Reconsideration.

believe that the petition is entitled to the relief sought, including the attorneys fees and the other orders.

8/27/13 RP 13-15. In the order granting Robin's motion, Judge Uhrig made the following relevant findings of fact stating:

6. Respondent has engaged in a repeated and systematic effort to prevent Petitioner from effectuating this Court's property division. ...

Respondent's conduct has been both willful and malicious causing injury and damage to the value of the real estate and business assets at issue, and corresponding injury to Petitioner with respect to her interests in those assets.

It is clear restraining orders are necessary to protect the value of the remaining real estate and business assets at issue and to protect Petitioner and her ability to effectuate this Court's Decree. The sanctions requested by Petitioner for any future violations are reasonable and appropriate to deter and/or sanction Respondent should he choose to continue with his historical behavior.

CP 245. The order awarded Robin \$12,813.50 for attorney fees for having to bring the first enforcement motion (heard on June 8, 2012), \$5,000.00 in additional attorney fees for the instant motion, and entered restraining orders preventing Eric from coming on business and residential properties.

CP 243-249.

On September 5, 2013, Eric filed a motion for reconsideration requesting the "court vacate [the August 27, 2013] order holding it a nullity." CP 250. In addition to re-arguing that the Bankruptcy Trustee was the true party in interest, Eric asserted, for the first time, that the Court had no authority to enter restraining orders. Eric also argued Judge

Uhrig lacked the authority to enter any orders, citing the same arguments in his earlier June 8, 2012, motion that he never noted for hearing despite Judge Uhrig's request he do so. CP 250-289. In his declaration in support of the motion, Eric made factual claims that would have properly been made in response to Robin's motion, not on reconsideration. CP 290-293. Eric also made new allegations about Judge Uhrig and his court reporter being personally bias against him. None of these claims had previously been presented in any appropriate motion to remove Judge Uhrig from the case. CP 292. Robin filed a response to the motion on September 27, 2013. CP 298-309.

In her response, Robin sought CR 11 sanctions against Eric and Wolff. Of relevance to this appeal, Robin specifically pointed out that Wolff and Eric had actual knowledge that Judge Uhrig's prior "recusal" was in the civil case involving Eric's parents (cause number 12-2-00359-5) and that none of the prior motions had ever been noted for hearing. CP 303, 317-318. Robin also filed a declaration from the bankruptcy trustee, Peter Arkison. In his declaration, the trustee indicated that the superior court had the authority to hear the motion, that the trustee was not a party in the superior court proceedings, and that Eric's motion was designed to delay the trustee's pending motion in the bankruptcy court that would, if granted, deny Eric's request to discharge his debts through bankruptcy.

CP 310-314. On November 18, 2013, Judge Uhrig entered a briefing schedule allowing both parties to file and serve supplemental briefs by December 2. CP 316.

Wolff filed an untimely response arguing, for the first time, that the findings in August 27, 2013, order regarding Eric's willful and injurious conduct were "superfluous," "unlitigated," and that Robin's motion should have been denied under CR12(b)(6). CP 325-327; see also CP 328-330 (objection regarding untimeliness). In his untimely supplemental declaration, Eric acknowledged that the purpose for the motion for reconsideration was to affect the outcome in the bankruptcy court. CP 323. On December 13, 2013, Judge Uhrig denied Eric's motion for reconsideration. That order states:

Having reviewed the records and files – including the respondent's late-filed documents – this Court finds that the Motion for Reconsideration is frivolous and was brought without a sound factual or legal basis and concludes that it was brought for the purposes of delay.

The Motion is denied, and the Petitioner is awarded \$5,000.00 in sanctions (against Respondent and Respondent's Counsel) under CR 11 for having had to respond to this Motion.

CP 331. Eric timely appealed this order. 4 CP \_\_\_\_ (Sub. 321, Notice of Intent to Appeal).

**I. ARGUMENT**

**A. STANDARD OF REVIEW.**

Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland, 95 Wn. App. 896, 906, 977 P.2d 639 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. Go2net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 87, 630 P.3d 1245 (2003); Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729), review denied, 157 Wn.2d 1022, 142 P.3d 609 (2006).

**B. JUDGE UHRIG PROPERLY DENIED ERIC'S MOTION FOR RECONSIDERATION BECAUSE ERIC RAISED THE ISSUE REGARDING RECUSAL FOR THE FIRST TIME IN HIS MOTION BECAUSE JUDGE UHRIG PREVIOUSLY RECUSED HIMSELF IN A SEPARATE CIVIL MATTER NOT THE PARTIES' DISSOLUTION.**

Although he was timely served with Robin's July 18, 2014, Motion for Attorney Fees, Eric did not file any responsive pleadings. During oral argument on the motion on August 27, 2014, Wolff argued that the bankruptcy trustee, not Eric, was the real party in interest and that the trial court could not enter any restraining orders because Eric was not personally served. 8/27/14 RP 10. In his motion for reconsideration, and

on appeal, Eric argues, for the first time, that Judge Uhrig lacked the authority to hear the motion because he had previously recused himself in the dissolution case. CP 253.

Motions for Reconsideration are governed by CR 59. This rule does not allow a party to propose a new theory of the case after the entry of an adverse decision. Wilcox v. Lexington Eye Inst., 130 Wn. App at 734. This is exactly what Eric did in his motion for reconsideration. If Eric wanted Judge Uhrig to consider the recusal argument, it was incumbent upon him to raise it in an appropriate response to Robin's motion, or in an affirmative motion, and not in his motion for reconsideration. For this reason alone, this Court should affirm.

In any event, Eric (and Wolff) know the argument that Judge Uhrig could not "reassume jurisdiction" because he had previously recused himself in the "dissolution" case is completely without merit. Eric's singular reliance on Skagit County v. Waldal, 163 Wn. App. 284, 261 P.3d 261 (2011) is misplaced given the facts in this case. In his opening brief, without any citation to the record, Eric argues "there is no dispute that Judge Uhrig voluntarily excused or disqualified himself from the Hitz dissolution." There is no citation to the record because there is none to be found – the argument is completely and intentionally false.

Eric and Wolff know Judge Uhrig never disqualified himself from the dissolution action. Eric personally attended the hearing on April 11, 2012, with his former attorney, Mr. Weight, where Judge Uhrig outlined the reasons he chose to disqualify himself in the civil case brought against Robin and Eric by Eric's parents, not the dissolution case. 3 CP \_\_\_\_ (Sub. 244); 4/11/12 RP 4-6. Eric also heard Mr. Weight advise Judge Uhrig that the disqualification issue Mr. Weight initially raised was moot because all parties were presenting an *agreed* order. 4/11/12 RP 7.

When Wolff substituted in as counsel for Mr. Weight in late May, he filed the first of his "recusal" motions alleging Judge Uhrig had previously recused himself in the dissolution case. CP 157-168. This motion is attached as Exhibit A to the Appellant's brief. At the June 8, 2012, hearing, Judge Uhrig again explained the reasons he disqualified himself in the civil case involving Eric's parents. Uhrig specifically invited Wolff to review the transcript from the April 11, 2012 hearing so he could familiarize himself with the facts surrounding the disqualification in the civil case and then decide whether to note the appropriate motion in the dissolution case if he felt it warranted. 6/8/12 RP 4-6. Eric was also present at this hearing. CP 171.

At best, Wolff ignored Judge Uhrig's invitation to review the April 11, 2012 transcript. At worst, Wolff read and completely ignored what the transcript says. What is clear from the transcript is that Judge Uhrig voluntarily disqualified himself from the civil litigation brought against Robin and Eric by Eric's parents under cause no. 12-2-00359-5 because of Judge Uhrig's family's corporation's financial accounts with the Bank of the Pacific who sought to intervene in the civil case. 4/11/12 RP 4-6. What is also clear from the transcript is that Eric and Robin previously waived any potential conflict of interest on these grounds *after* Judge Uhrig fully disclosed the same facts to them during their dissolution trial. Id. Once waived, Eric is precluded from challenging Judge Uhrig's continuing jurisdiction on these grounds. See State v. Hansen, 107 Wn.2d 331, 334, 782 P.2d 593 (1986) (party cannot now assert right to change of judge after knowingly and voluntarily surrendered such right).

Further, the invited error doctrine prevents the injustice of a party benefiting from an error that he caused or should have prevented. State v. Recuenco, 154 Wn.2d 156, 163, 110 P.3d 188 (2005), rev'd on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); State v. Erickson, 146 Wn. App. 200, 189 P.3d 245 (2008). In determining whether the doctrine bars review, courts consider whether the party asserting error affirmatively assented to it, materially

contributed to it, or benefited from it. State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321 (2009), cert. denied, Momah v. Washington, 131 S. Ct. 160, 178 L. Ed. 2d 40, 2010 U.S. LEXIS 5879 (2010).

Here, it is clear Eric knew of any potential conflict arising from Judge Uhrig's attenuated financial relationship with the Bank of the Pacific during the dissolution. He expressly waived that conflict, filed the first post-decree enforcement motion in March 2012, financially benefited from orders signed by Judge Uhrig in April 2012, and requested affirmative relief from Judge Uhrig in July 2012 after filing his first recusal motion in June 2012. See 4/11/12 RP 4 (waiver of conflict in dissolution trial); 3 CP \_\_\_\_ (Sub. 215 Contempt Motion); 3 CP \_\_\_\_ (Sub. 217 Motion to Enforce); 3 CP \_\_\_\_ (Motion for Continuance); CP 169-170. Eric's continuing argument that Judge Uhrig lacked jurisdiction because he previously "recused" himself in the dissolution case is ridiculous. Judge Uhrig properly denied his motion for reconsideration on these grounds.

**C. JUDGE UHRIG PROPERLY DENIED ERIC'S MOTION FOR RECUSAL UNDER RCW 4.12.050 BECAUSE ROBIN'S ENFORCEMENT MOTION AFTER THE BANKRUPTCY COURT LIFTED THE STAY WAS NOT A NEW PROCEEDING.**

Eric argues Judge Uhrig was required to recuse himself under RCW 4.12.050 because

upon remand from the US Bankruptcy [C]ourt there had been a sufficient change of circumstances in the case to render it a new proceeding requiring personal service and renewing his right to file an affidavit of prejudice as a matter of right.

Appellant's Brief, page 17. Although it is not entirely clear because of the lack of citation to the record, Eric appears to be referring to his August 14, 2013, motion and affidavit of prejudice. CP 234-235.

RCW 4.12.050(1) provides in relevant part:

Any party to or any attorney appearing in any action or *proceeding* in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case... .

RCW 4.12.050(1) (emphasis added). Timely exercised, the statutory right deprives that particular judge of jurisdiction. Marine Power & Equip. Co. v. Department of Transp., 102 Wn.2d 457, 463, 687 P.2d 202 (1984).

Eric argues that Robin's July 2013 motion after the bankruptcy stay was a "new" proceeding entitling him to exercise his automatic right under RCW 4.12.050. He provides no authority for this argument and his bare citation to the Mauerman<sup>8</sup> case is not persuasive. In Mauerman, the

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<sup>8</sup> The Appellant's brief does not contain the correct citation for this case. The correct citation is State ex re Mauerman v. Superior Court for Thurston County, 44 Wn.2d 828, 271 P.2d 435 (1954).

Washington Supreme Court specifically distinguished a modification of an prior decree from the enforcement of the decree, holding the former is a new proceeding while the latter is not. See Mauerman, 44 Wn.2d at 830 (a modification presents new issues arising out of new facts, it is not ancillary to or in aid of enforcement).

“Washington courts have the power to enforce executory provisions of a decree of dissolution provided that in so doing they do not modify the decree.” In re Marriage of Greenlee, 65 Wn. App. 703, 710, 829 P.2d 1120, review denied, 120 Wn.2d 1002, 838 P.2d 1143 (1992) (citing Goodsell v. Goodsell, 38 Wn.2d 135, 138, 228 P.2d 155 (1951)). Robin’s July motion after the bankruptcy stay was lifted was specifically designed to enforce the provisions of the Decree, not modify them. She did not seek to change the property division – if she had done so, she would have been in violation of the bankruptcy court’s order expressly limited Robin’s ability to enforcement proceedings only. CP 231.

The restraining orders were enforcement tools designed to allow Robin to proceed with her obligation to marshal and liquidate the parties’ assets without any further interference from Eric. Eric makes no argument that the restraining orders were not proper enforcement tools. Because Robin did not seek to modify the Decree, Eric was not entitled to affidavit

Judge Uhrig under RCW 4.12.050. Judge Uhrig properly denied Eric's motion for reconsideration on this ground.

**D. ROBIN SHOULD BE AWARDED ATTORNEYS FEES AND SANCTIONS UNDER RAP 18.9(a) AND CR 11 BECAUSE THIS APPEAL IS COMPLETELY FRIVOLOUS.**

RAP 18.9(a) allows this Court to consider and impose sanctions for frivolous appeals. The rule provides:

[t]he appellate court...may order a party or counsel...who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

RAP 18.9(a). A frivolous appeal is one which, when all doubts are resolved in favor of the appellant, is so devoid of merit that there is no chance of reversal. In re Guardianship of Cobb, 172 Wn. App. 393, 406, 292 P.3d 772 (2012), review denied, 177 Wn.2d 1017, 304 P.3d 114 (2013).

RAP 18.7 makes CR 11 applicable to appeals. In re Guardianship of Lasky, 54 Wn. App. 841, 856, 776 P.2d 695 (1989), citing Rhinehart v. Seattle Times Co., 51 Wn. App. 561, 580-81, 754 P.2d 1243 (1988). CR 11 provides, in pertinent part:

[t]he signature of a party or of an attorney constitutes a certificate by him that he has read the pleading, motion, or legal memorandum; that to the best of his knowledge, information, and belief, *formed after reasonable inquiry it is well grounded in fact* and is warranted by existing law or a good faith argument for the

extension, modification, or reversal of existing law, and that 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. . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative *shall 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.

CR 11 (emphasis added).

In this case, the trial court awarded CR 11 sanctions against both Eric and Wolff finding “the Motion for Reconsideration was frivolous and was brought without a sound factual or legal basis and concluded it was brought for purposes of delay.” CP 331. This finding is not challenged on appeal.

There is no doubt further sanctions under RAP 18.9(a) and CR 11 are appropriate on appeal. The issues presented in this appeal are completely without merit – there is absolutely no chance of reversal. More importantly, it is clear from the transcripts Robin provided to this Court that Wolff and Eric both knew that Judge Uhrig did not recuse himself from the dissolution case. Wolff’s statement of fact at page 15 – “there is no dispute that Judge Uhrig voluntarily disqualified himself from the dissolution case” – is completely false given the trial court record.

Perhaps this is the reason Wolff intentionally chose not to provide the Court with a complete record or the transcripts from the relevant hearings.

Wolff also fails to meet the very basic requirements for an appeal. He fails to fails to provide citations to the record and he fails to provide meaningful argument. He violates RAP 9.11 and places new material before this Court that is not part of the record anywhere below. The Appellant's brief contain the purported April 10, 2012, letter from Eric Weight to Judge Uhrig. The Appellant's brief notes this letter "did not make its way into the file except as an Appendix to a subsequent motion." Appellant's brief, pages 6-7. The undersigned counsel has diligently searched all of the documents filed between April 2012 and present, and this letter is not part of any appendix to any pleadings. Nonetheless, what is really astonishing about the inclusion of this letter is that it provides additional support for the conclusion that Judge Uhrig recused himself from the civil case involving Eric's parents, not the dissolution case between Robin and Eric. This internal inconsistency, coupled with the fact that Judge Uhrig told Wolff to read the April 11, 2012, transcript, demonstrates that Wolff has intentionally chosen to ignore the facts of this case when bringing this appeal.

Eric sought reconsideration of Judge Uhrig's August 13, 2013, order as a means to delay the bankruptcy proceedings. CP 312-313. This

appeal is simply another delay tactic – again sanctioned by Wolff who also has his own problems with the bankruptcy court. See CP 195 (bankruptcy trustee files adversarial case against Wolff to recover monies paid as a preference).

Courts impose sanctions under CR 11 “to deter, to punish, to compensate and to educate.” Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 356, 858 P.2d 1054 (1993). Here, sanctions are appropriate. Eric and Wolff both had prior warning the arguments they advance now on appeal were frivolous through the trial court’s imposition of CR 11 sanctions. This court should award Robin all of her fees and costs on appeal under RAP 18.9(a), and an additional sum of \$10,000.00 under CR 11, against both Eric and Wolff.

#### IV. CONCLUSION.

No reasonable mind could reach a different result – Judge Uhrig properly exercised his discretion and denied Eric’s reconsideration motion. To quote from Judge Uhrig:

I don’t believe I have ever seen a dissolution proceeding or any proceeding that has been so faintly injected with needless and unnecessary obfuscation, dilatory conduct and actions and behaviors that...from the perspective of the bench...seems designed to generate heat rather than light. It seems designed to create discord and strife, rather than cooperation and harmony. It seems designed to injure rather than heal. And to add to the injury the creation of any scar tissue that can be made.

Eric has proven he will stop at nothing to keep Robin from effectuating the property division in the Decree. This Court should impose the requested sanctions under RAP 18.9(a) and CR 11 to compensate Robin and to deter Eric and Wolff from similar conduct.

Respectfully submitted this 19 day of September, 2014.

**BREWE LAYMAN P.S.**  
Attorneys at Law

By   
\_\_\_\_\_  
Karen D. Moore, WSBA 21328  
Attorney for Respondent

**HITZ V. HITZ  
SUMMARY LITIGATION TABLE**

<u>Parties</u>	<u>Cause Number</u>	<u>Court</u>	<u>Date Filed</u>
James Hitz and Carol Hitz v. Eric Hitz and Robin Hitz	12-2-00359-5	Whatcom County Superior	2/9/2012
Bank of Pacific v. Northwest Chip and Grind Inc.; E and R Lands LLC; Eric Hitz and Robin Hitz	12-2-01309-4	Whatcom County Superior	5/16/2012
Eric Hitz v. Robin Hitz and John Doe 1-10	12-2-01555-1	Whatcom County Superior	6/13/2012
In re Eric James Hitz, Debtor	12-18740-KAO	US Bankruptcy Court	8/23/2012
Robin Hitz v. James Hitz; James Hitz Irrevocable Trust; Carol Hitz; Carol Hitz Irrecovable Trust	12-2-02492-4	Whatcom County Superior	9/18/2012
Robin Hitz v. Eric Hitz	Adv. Proc. No 12-02028-KAO	US Bankruptcy Court	11/23/2012
Robin Hitz v. James Hitz; James Hitz Irrevocable Trust; Carol Hitz; Carol Hitz Irrecovable Trust	Adv. Proc. No 13-01239-KAO	US Bankruptcy Court	4/26/2013
Peter J. Arkinson v. James Hitz and Carol Hitz	Adv. Proc. No. 13-01290-KAO	US Bankruptcy Court	5/16/2013
Peter J. Arkinson v. T. Reinhard G Ron Wolff	Adv. Proc. No. 13-01291-KAO	US Bankruptcy Court	5/16/2013

CERTIFICATE OF SERVICE

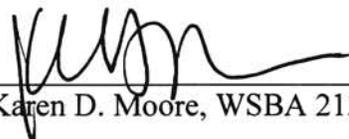
I hereby certify under penalty of perjury under the laws of the State of Washington that on the 19 day of September, 2014, I caused a true and correct original along with one copy of the foregoing document to be delivered by US mail to the following:

Richard D. Johnson  
Court Administrator  
The Court of Appeals of the State of Washington  
Division I  
One Union Square  
600 University Street  
Seattle, Washington 98101-4170

I also caused a true and correct copy of the foregoing document to be delivered to the following:

Attorney for Appellant  
T. R. G. Wolff  
P.O. Box 558  
Conway, WA 98238  
BY: US Mail

Dated this 19 day of September, 2014, at Everett, Washington.

  
\_\_\_\_\_  
Karen D. Moore, WSBA 21328