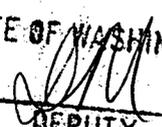


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

NO. 45729-6-II

IN THE WASHINGTON COURT OF APPEALS, DIVISION TWO

In re the matter of the Estate of CHARLES CRESS EICKHOFF,
Deceased

BRIAN CHARLES EICKHOFF and
CATHY NEGELSPACH
Petitioners, and
DAVID BUSTAMANTE
v.

DIANE EICKHOFF,
As Executrix and Personal
Representative of the Estate; and

DIANE EICKHOFF,
Individually,
Respondent

APPELLANTS' REPLY BRIEF

David Bustamante, WSBA #30668
Attorney for Petitioners
227 Bellevue Way NE #30
Bellevue, WA 98004-5721
Phone: (360) 362-0262
Email: david_bustamante@live.com

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I. STATEMENT OF FACTS RELATING TO REPLY BRIEF

In Respondent's Brief, it is asserted that Petitioners' counsel did not attempt to contact the attorney who drafted the 1988 Oregon Will. Respondent's Brief at 3. In fact Appellant's attorney made several attempts to contact James Darr. *See* Declaration of David Bustamante in Opposition to Summary Judgment. CP 443-445; 446. These efforts included conversations with Diane Eickhoff, Frank Franciscovich, and Curtis Janhunen. *Id.* None of these was able to provide a telephone contact number for Mr. Darr. *Id.* The telephone number listed on the Oregon Bar Association website went to the law office that took over Mr. Darr's law practice. CP 444-5. Appellants' attorney left messages at this number more than once; but Darr never returned any of his phone calls. CP 445. Appellant's also checked the internet for an alternate phone number for Mr. Darr. CP 447. The number found through a Google search was the same number listed on the Oregon Bar Association website. *Id.* Appellants hired a private investigator who also experienced difficulty in contacting Mr. Darr. CP 445.

Prior to filing the Will contest, Appellants researched the laws pertaining to notary requirements as they existed in Oregon at the time the 1988 Will was executed. *See* Petition for Will Contest, CP 8. Appellants

attached a copy of the law [ORS 194.045] to their Petition. CP 17.

Respondent did not provide legal authority that the embossed notary seal, in and of itself, was a legal form of notarizing a document. Instead, Respondent submitted a declaration containing a layperson's opinion. *See* Declaration of Darla Biggar, CP 490-493.

In Respondent's Brief, Diane Eickhoff alleged that Appellants' motion to disqualify Mr. Janhunen was denied "on several occasions." The truth is that the Appellants filed one and only one motion to disqualify Mr. Janhunen on April 3, 2012. CP 51-58. This was exactly one day after Mr. Janhunen filed his notice of appearance of April 2, 2012. CP 40-41. Appellants later filed a motion for reconsideration after it was learned that Curtis Janhunen was still the attorney of record for Petitioner Brian Eickhoff. CP 149-169. Thus, the superior court denied the motion to disqualify Janhunen, at most, on two occasions, May 21, 2012, and June 21, 2012, not on "several occasions" as the Respondent's Brief suggests. *See* VRP 5/21/12; VRP 6/21/12.

The Appellants took care, in noting their motion to disqualify Mr. Janhunen, and in noting their motion for reconsideration, to place these matters on the dockets on days in which other matters relating to the case would be heard. For example, the initial motion to disqualify Mr. Janhunen was placed on the calendar on the same day as a status hearing

on the pending motions to consolidate claims; the subpoena duces tecum for medical records; and the request to set the latter matter on for a fact-finding hearing. *See* Note for Civil Motion Docket. CP 96-97. Similarly, the Appellants set their motion for reconsideration to be heard on June 21, 2012, at the same time as entry of orders had already been scheduled; and at the same time as Petitioners' motion for subpoena duces tecum for medical records and Respondent's motion for protection order. *See* Note for Civil Motion Docket. CP 188-189.

When the Appellant's successfully moved the court to continue the summary judgment hearing, on July 15, 2013, the court ordered that Appellant's pay terms for the continuance, over Appellant's objections. VRP 07/15/2013 at 30-33. Respondent's attorney subsequently submitted a cost bill in the amount of \$1,365.26. *See* Statement of Account, attached herewith as Appendix B. This cost bill included the following charges:

07/09/2013	Partial Review of File	
07/12/2013	Office conference with Diane regarding her concerns about Motion for Summary Judgment	
07/16/2013	Preparation and transmittal of Notice of Hearing; Ordered WIP; Preparation and transmittal of correspondence to Virginia Leach, Pacific County Clerk; Reviewed WIP, deleted time not spent preparing for July 15 hearing; Prepare bill.	
07/29/2013	Travel to Montesano. Court appearance; Order entered; Return travel to Aberdeen.	
	SUBTOTAL LEGAL SERVICES THIS PERIOD	\$1,350.00
07/15/2013	EXPENSE INCURRED: Travel – Round trip mileage to Junction City for court appearance.	2.83

07/29/2013	EXPENSE INCURRED: Travel –Round trip mileage to Montesano for court appearance.	12.43
	SUBTOTAL: EXPENSES INCURRED DURING BILLING PERIOD	15.26
	TOTAL CURRENT CHARGES:	1,365.26
	PREVIOUS BALANCE	\$ 213.75
07/11/2013	Payment on account	- 213.75
	BALANCE DUE:	<u>\$1,365.26</u>

This exact sum of \$1,365.25 was incorporated in the court’s order for terms dated July 29, 2013. *See* Order for Continuance for Hearing and for Terms. CP 389-390. *See also* second page of Order, Appendix C. Appellants paid this exact amount as “Terms” and filed a declaration of compliance with said order on September 12, 2013, documenting the payment of exactly \$1,365.26. CP 462-465.

After the granting of the summary judgment motion, Respondent filed an Affidavit Re: Attorney Fees on November 12, 2013. CP 519-521. Page 4 of the accompanying attachment lists the very same charges that were ordered by the court as “terms” on July 29, 2014; yet the court included these very same charges as “attorneys fees” and ordered Appellant’s to pay them again on December 9, 2014. Prior to the December 9th hearing, Petitioners filed their written objections to the proposed findings. CP 532-539. Under Objection Number 9, Petitioner’s took exception to the court’s “failure to adjust the amount ordered to be paid to account for sums previously advanced in the form of sanctions for

Petitioners' motion for continuance which were ordered on July 15 (orally) and on July 29 (in writing), resulting in double billing." CP 534.

Appellants also objected orally at the December 9th hearing. VRP 12/9/13 at 87. The court never addressed these objections and proceeded to order the "attorney fees" without making any findings as to whether they were separate from the "terms" which had previously been ordered. Respondent never offered any evidence that the charges submitted on December 9th had not previously been paid by the Appellants.

That same day, the court entered two separate sets of "findings." CP 540-543; CP 544 et seq. Appellants objected to all of these findings before they were entered. Petitioners objected in writing to:

1. "The proposed finding that Petitioners' effort to disqualify attorney Curtis Janhunen was made in bad faith and without legal basis. There is no evidence in the record that Petitioners or their attorney acted with an improper purpose."
2. "The proposed finding that the actions of the Petitioners and their attorney were intended to harass and to cause unnecessary delay and/or to needlessly increase the cost of litigation."
4. "The finding that the actions of the Petitioners and their attorney were taken without a reasonable inquiry and investigation."
6. "The finding that the actions of the Petitioners and their attorney were not taken in good faith. There is no evidence in the record that would support such findings."
7. "The finding (in the Order Granting Respondent's Summary Judgment Awarding Costs and Attorney Fees) that the actions of the Petitioners were without probable cause and without good faith."

II. ARGUMENT

A. Findings of fact are superfluous in summary judgment proceedings and carry no weight on appeal.

Findings of fact are superfluous in summary judgment proceedings and carry no weight on appeal. *Donald v. Vancouver*, 43 Wash.App. 880, 883, 719 P.2d 966 (1986); *Hamilton v. Huggins*, 70 Wash. App. 842, 848-49, 855 P.2d 1216, 1220 (1993) citing *Chelan Cy. Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wash.2d 282, 294 n. 6, 745 P.2d 1 (1987). A litigant need not assign error to superfluous findings. *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wash. App. 408, 413, 814 P.2d 243, 245 (1991). In *Duckworth v. Bonney Lake*, 91 Wash.2d 19, 21-22, 586 P.2d 860 (1978), the court stated:

The function of a summary judgment proceeding is to *determine whether a genuine issue of material fact exists*. It is *not*, as appears to have happened here, *to resolve issues of fact or to arrive at conclusions based thereon*. *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 424-25, 367 P.2d 985 (1962). Consequently, the findings of fact and conclusions of law entered here are superfluous and may not be considered to the prejudice of the City. *Washington Optometric Ass'n v. County of Pierce*, 73 Wn.2d 445, 438 P.2d 861 (1968).

Any findings of fact or conclusions of law entered by the trial court as part of a summary judgment proceeding are superfluous and do not affect the inquiry on appeal. *Skimming v. Boxer*, 119 Wn.App. 748, 755, 82 P.3d 707, *review denied*, 152 Wn.2d 1016 (2004). In *Skimming*, as here, the parties seeking sanctions directed the appellate court's attention

to extensive findings of fact and conclusions of law filed as part of the summary judgment to support their argument for sanctions. *Id.* at 755. The Court observed, “Those findings, like any findings in an order granting summary judgment, are gratuitous, superfluous, and of no consequence here on appeal.” *Skimming v. Boxer*, 119 Wash. App. at 755.

B. There is no automatic deficiency in the assignments of error when challenged findings of fact are not identified by number.

A party is generally required to assign error to each and every error the party believes the trial court committed. RAP 10.3(a)(4). However, the failure to file an assignment of error is not necessarily fatal to a party's case. “The appellate court will only review a claimed error which is included in an assignment of error *or clearly disclosed in the associated issue* pertaining thereto.” RAP 10.3(g) (emphasis added). *Menzie v. Webster & Frey, P.L.L.C.*, 149 Wn. App. 1029 (2009). *Union Elevator & Warehouse Co., Inc. v. State*, 144 Wash.App. 593, 601 (2008).

Here the assigned errors pertaining to sanctions were: (1) The Court erred in ruling that Petitioners’ motion to disqualify Curtis Janhunen was frivolous, and in ordering Petitioners and their attorney to pay sanctions; (2) When ordering sanctions, the Court erred for failing to take into account the conduct of Respondent and her attorney which contributed to the costs and the delays in the case and which showed either negligence or

bad faith; (3) The court erred in taking judicial notice of “the demeanor of all of the parties” throughout the proceedings in deciding that Petitioners had acted in bad faith and that the action had been brought solely for purposes of harassment; (4) Judge Godfrey erred in not recusing himself from hearing the case, after it was pointed out that he conducted independent fact-finding, was biased in favor of the Respondent and her attorney, and that he had violated the appearance of fairness doctrine; (11) The court erred in finding that Petitioners had an improper purpose in bringing this cause of action; to wit, that Petitioners were greedy, selfish, vengeful, or vindictive, or attempting to harass the Respondent by bringing this action. These assignments of error, taken together with the associated issues presented, sufficiently identify the challenged findings.

The associated issues presented included the following: (1) Was Petitioners’ motion to disqualify Curtis Janhunen a frivolous motion within the meaning of CR 11; (2) Did Judge Godfrey violate the judicial canons by reviewing a sealed court file in camera without prior notice, and did he violate the appearance of fairness doctrine by openly disfavoring Petitioners and their attorney and by expressing sympathy for Respondent and her attorney (3) Did the court abuse its discretion by taking judicial

notice of the demeanor of the parties throughout the proceedings in deciding that Petitioners had acted in bad faith?

A reviewing court will waive technical violations of the appellate rules to reach the merits when the briefing makes the nature of the challenge clear, the violation is minor, there is no prejudice to the opposing party, and there is minimal inconvenience to the appellate court. *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dep't of Transp.*, 144 Wn. App. 593, 601, 183 P.3d 1097, 1101 (2008), *citing* RAP 1.2(a); *State v. Neeley*, 113 Wash.App. 100, 105, 52 P.3d 539 (2002).

Here, the Appellants' briefing makes clear the decisions of the trial court that they challenge. The Respondent's brief demonstrates that she understands the nature of the Appellants' challenges and the findings at issue. For example, as to Appellant's claim that the court erred by considering "the demeanor of all the parties" in deciding that the Appellants had acted in bad faith, Respondent addressed this very argument on Page 13 of the Respondent's Brief. Similarly, as to the argument that the court erred in reviewing the sealed paternity file in deciding that the motion to disqualify Mr. Janhunen was frivolous, Respondent addresses this argument on page 14 of her brief, again demonstrating that she has no difficulty responding to the issue.

“When a brief clearly discloses what action is considered erroneous and the opposing party has had no difficulty responding to the issue, an appellate court may consider the party's argument.” *Vanderhoof v. Mills*, 175 Wn. App. 1050 (2013) citing *Honegger v. Yoke's Wash. Foods, Inc.*, 83 Wash.App. 293, 295 n. 2, (1996) (citing *Podiatry Ins. Co. of Am. v. Isham*, 65 Wash.App. 266, 268 (1992)).

Furthermore, the Appellants had disclosed in advance their opposition to the trial court's findings when they lodged written and oral objections to the findings of fact and conclusions of law at the December 9th hearing. And furthermore, the Appellant's also outlined the issues they would raise on appeal when they filed their Statement of Arrangements in this matter. *See* Statement of Arrangements, filed on February 4, 2014. Because the Statement of Arrangement placed the Respondent on notice of the issues that would likely be raised on appeal, Respondent cannot now claim tht she is prejudiced by any failure to properly assign error to the trial court's findings of fact by specific number.

C. Many of the trial court's findings, while denominated as “findings of fact” are actually “conclusions of law.”

Conclusions of law that are mistakenly characterized as findings of fact are reviewed de novo. *Sloan v. Horizon Credit Union*, 167 Wash. App. 514, 518 *rev denied*, 174 Wash. 2d 1019 (2012) *citing Local Union*

1296, *Int'l Ass'n of Firefighters v. City of Kennewick*, 86 Wash.2d 156, 161–62, (1975); *In re Disciplinary Proceeding Against VanDerbeek*, 153 Wash.2d 64, 73 n. 5, (2004).

In situations in which findings are conclusions of law or mixed findings of fact and conclusions of law, appellate courts review the factual components under the substantial evidence standard and the conclusions of law, including those mistakenly characterized as findings of fact, *de novo*. *In re Welfare of L.N.B.-L.*, 157 Wash.App. 215, 243 & n. 27 (2010); *In re Estate of Haviland*, 162 Wash. App. 548, 561, (2011).

In CP 540-543, the trial court states in part: “There is nothing in the record to indicate that Mr. Janhunen gained any information from his representation of the Petitioner that would have required the Court to disqualify him as the attorney for the Personal Representative and Estate.” CP 541. This is at best a mixed finding of fact and law. The court goes on to state: “On the contrary, the Court finds that the Petitioners’ effort to disqualify attorney Janhunen was made in bad faith and without legal basis, there being no substantial relationship between the 2003 custody matter and the validity of the 1988 Will.” Again, the court here makes a mixed finding, but predominantly a string of conclusions of law regarding the issue of whether there was a substantial relationship between the 2003 custody matter and the contest of the 1988 Will.

It should be noted that Petitioners never claimed that there was a literally a “substantial relationship” between the 1988 Will and the 2003 custody matter. The phrase “substantial relationship” is a term of art that has a special meaning within the context of RPC 1.9. As explained in *Hunsaker*, there are two different versions of what it means for two matters to be “substantially related.” “The first version, adopted by a majority of the courts, compares the “matters” or “factual contexts” of the prior and present representations. The Tenth Circuit has followed this majority rule. ‘Substantiality is present if the factual contexts of the two representations are similar or related.’ ” *State v. Hunsaker*, 74 Wash. App. 38, 43 (1994), citing *Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir.1985) (quoting *Trust Corp. v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir.1983) (quoting *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir.1980))). *Hunsaker* ultimately decided that the “factual context” approach is the one most consistent with Washington’s RPC 1.9, observing that our Supreme Court appears to have utilized the factual context analysis in *State v. Stenger*, 111 Wash.2d 516 (1988). *Hunsaker* at 45. As the comment to RPC 1.9 states, “Matters are ‘substantially related’ if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.”

1. Additional mixed findings of fact and law

The court states: “The actions of the Petitioners and their attorney were intended to harass and to cause unnecessary delay and/or to needlessly increase the cost of litigation.” Finding No. 2, CP 541. The operative words here are “unnecessary” and “needlessly” which reveal that this statement is really a mixed finding of fact and law. The court, not showing an understanding of the basis of the motion to disqualify counsel, naturally finds that the resultant delay and cost associated with the motion are both “unnecessary” and “needless.” Consequently, there could be no other objective purpose, in the court’s view, except to harass.

The findings contained in CP 544-547 are similarly problematic. Here, the court makes two findings, A and B, without designating either one as a finding of fact. Under finding A, the court writes, “The actions of the Petitioners were without probable cause and without good faith, and further that, considering all factors, there was no benefit to the Estate by the Petitioners’ actions.” Clearly this is also a mixed finding. The premise that the Petitioners’ actions were without probable cause is a legal conclusion. The conclusion that Petitioners did not act in good faith appears to be wholly bound up with the conclusion that there was no probable cause for the actions in the first place. That is a conclusion at summary judgment that is entirely superfluous on appellate review. The

conclusion that there was no benefit to the estate is one reached through the benefit of hindsight, the court having decided that the Petitioners' claims were without merit. "No benefit to the Estate" is entirely a legal conclusion, since a diametrically opposite conclusion would have been reached had the Petitioners managed to prevail on any of their claims.

Furthermore, the court applies the wrong test in awarding legal fees. The question is not whether the action defended against benefitted the estate; but rather, whether the defense against that action, by the personal representative, substantially benefits the estate. The court made no such finding. "A personal representative's successful defense of its position, without more, does not entitle it to attorney fees from the estate. Rather, the trial court must weigh the benefit of that defense, pursuant to RCW 11.96.140, to determine if it was substantial." *Matter of Estate of Morris*, 89 Wash. App. 431, 435 (1998).

D. The court abused its discretion in granting summary judgment.

The court's primary rationale in granting the motion for summary judgment appears to have been its conclusion that, because Brian Eickhoff and Cathy Negelspach were both barred from giving evidence by the Deadman's Statute, there was "no evidence" that Charles had ever revoked his 1988 Will; "no evidence" that the estate was in possession of

firearms or other property belonging to Petitioners; and “no evidence” that Charles lacked testamentary capacity at the time the community property agreement was entered into.

As stated in Appellant’s Opening Brief, at 43-50, the court erred by not finding that Respondent had waived the protections of the Deadman’s Statute and by not adhering to the rule requiring the court to accept non-moving parties’ affidavits as true unless it is unreasonable to do so.

Here it would not have been unreasonable to accept the declarations of Cathy Negelspach and Brian Eickhoff as true. They both stated under penalty of perjury that they were shown a new will sometime around the year 2000 that was signed by the testator and two witnesses, and which revoked all prior wills.

In Respondent’s Brief, she cites a case, *Diel v. Beekman*, 7 Wn.App. 139, 499 P.2d 37 (1972), for the proposition that a spouse, defending a probate action against the estate, does not necessarily waive the protections of the Deadman’s Statute. This case is not on point.

As explained in *Botka v. Estate of Hoerr*, 105 Wash. App. 974, 982, 21 P.3d 723, 727 (2001), *Diel v. Beekman* is a case that answers the question of whether the mere act of responding to discovery requests waives the statute:

In *Diel v. Beekman*, the party in interest introduced the deposition testimony of the adverse party and argued that the bare act of responding to discovery requests waived the statute. The court disagreed, reasoning that “[n]o useful purpose would be served by requiring a party entitled to the protection of RCW 5.60.030 to preserve that protection by resisting discovery until a court order commanded compliance.”

Botka v. Estate of Hoerr, 105 Wash. App. 974, 982, 21 P.3d 723, 727 (2001). Clearly, *Diel v. Beekman* is not on point because this is not a case in which Respondent was called upon to answer a discovery request. Rather, on two separate occasions, and on her own initiative, she executed declarations in which she made sworn testimonial statements directly and factually refuting the Petitioners’ claims. Diane Eickhoff waived the Deadman’s Statute; and this meant that the court was obliged to consider Petitioners’ declarations without regard to credibility determinations.

E. The court abused its discretion in ordering CR 11 sanctions.

CR 11 permits reasonable attorney fees and costs incurred because of a bad faith filing of pleadings for an improper purpose or by filing pleadings that are not grounded in fact or warranted by law. *Wood v. Battle Ground Sch. Dist.*, 107 Wash.App. 550, 574, 27 P.3d 1208 (2001). A reviewing court applies an objective standard to determine whether sanctions are merited. *Skimming v. Boxer*, 119 Wash. App. 748, 754-55 (2004). The threshold for imposition of these sanctions is high. *Id.* The test is whether a reasonable attorney in a like circumstance could believe his or her actions

to be factually and legally justified. *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 220 (1992). “The burden is on the movant to justify the request for sanctions.” *Biggs*, 124 Wash.2d at 202. CR 11 sanctions have a potentially chilling effect. *Skimming v. Boxer*, 119 Wash. App. at 754-55. For this reason, the trial court should impose sanctions only when it is unmistakably clear that a claim has absolutely no chance of success. *In re Cooke*, 93 Wash.App. 526, 529, 969 P.2d 127 (1999). The fact that a complaint does not prevail on its merits is not enough. *Bryant*, 119 Wash.2d at 220.

While the court focused its inquiry on the issue of whether the Will contest pertaining to the 1988 Will was substantially similar to the 2003-2004 paternity representation, Petitioners focused their motion more on the likelihood that Mr. Janhunen obtained the confidences of his client, Brian Eickhoff, during the prior representation. Three WSBA ethics advisory opinions stand for the proposition, in similar situations, that the attorney would be barred from the successive representations due to the likelihood that he had obtained confidences or secrets. These are WSBA Ethics Advisory Opinions 1205, 1380, and 1390. Attached herewith as Appendix D. While these advisory opinions are not cited as binding legal precedent, they certainly illustrate that the Appellant’s attorney’s actions in bringing the motion to disqualify were objectively reasonable.

When Judge Godfrey initially announced that he would impose sanctions, at the May 21, 2012, hearing, he said nothing at that time about the motion being brought for an improper purpose such as delay or the needless increase in the cost of litigation. He could hardly have reasonably believed that Petitioners were motivated by a desire to delay the proceedings when they filed the motion only one day after Curtis Janhunnen filed his notice of appearance. He could hardly have concluded that the motion was calculated to increase the cost of litigation when it was noted to be heard on the same day as two other pending motions in the same case. The reason given by the court was simply that the 2003 paternity action had nothing to do with the 1988 Will; and that the motion for disqualification was “offensive.” Considering that this was only the first hearing that Judge Godfrey presided over, he certainly would not have had sufficient time, nor sufficient evidence from which, to form an objective opinion that the motion was brought out of a desire to harass.

At the hearing of May 21, 2012, not only did Judge Godfrey use the word “offensive” to describe Petitioners’ motion on three separate occasions, (VRP 5/21/2012 at 10, 11, and 12) he also challenged Petitioners twice to appeal his ruling to a higher court if they did not like it. VPR 5/21/2012 at 11 and at 12. Nothing was said about the parties’ demeanor or about acting with intent to harass or to increase the costs.

The second time Judge Godfrey considered the motion to disqualify Janhunen, on June 21, 2012, he again failed to mention anything about the parties' demeanor or about the motion being brought for purposes of delay or to increase the cost of litigation. Instead, he noted that, after reviewing the paternity file, it was clear to him that Petitioners' attorney had not conducted a proper investigation into the paternity file, and that this supported his view that the motion was frivolous. VRP 06/21/2012 at 9, 11, 14, 17, and 19. Once again, neither at the May 21, 2012, hearing, nor at the June 21, 2012, hearing, did Judge Godfrey make any mention of having observed in the demeanor of the parties an intent to harass or delay or drive up the cost of litigation.

An order for CR 11 sanctions must be based on objective facts:

The reasonableness of an attorney's inquiry is evaluated by an objective standard. *Miller*, 51 Wash.App. at 299–300, 753 P.2d 530. CR 11 imposes a standard of “reasonableness under the circumstances”. Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 198; *see also Miller* at 301, 753 P.2d 530. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted. *See* Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 199. The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified. *Spokane & Inland Empire Blood Bank*, 55 Wash.App. at 111, 780 P.2d 853 (quoting *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.1987)).

Bryant v. Joseph Tree, Inc., 119 Wash. 2d 210, 220-21, 829 P.2d 1099, 1105 (1992) (emphasis added). See also, *Biggs v. Vail*, 124 Wash. 2d 193, 197, 876 P.2d 448, 451 (1994).

The record in this case raises significant doubts as to whether the trial judge applied an objective standard. One troublesome aspect is the constantly shifting reasons given for why the motion at issue is deemed to be frivolous and as to why sanctions should be appropriate. On May 21, 2012, the motion to disqualify was frivolous because the presiding judge found it to be offensive; and practically in the the same breath, the judge challenged Petitioners to appeal his ruling.

On June 21, 2012, it was frivolous because Petitioner’s counsel had not conducted a sufficient inquiry into a sealed paternity file.

On July 15, 2013, Judge Godfrey, after having challenged the Petitioners to appeal his ruling, now expressed a willingness to impose costs of attorney fees “for the delay of going up to the Court of Appeals and for the higher courts to properly resolve these matters.” VRP 07/15/2013 at 27. Then, at the September 25, 2012, summary judgment hearing, a new basis for awarding CR 11 sanctions was announced:

The issue of frivolity and sanctions was over the motion to have [Mr. Janhunen] removed, and I’m going to sanction it. I want to know the cost of that specific response to that specific motion and the hearing for that date, and that sanction, there was absolutely no basis for bringing that matter. It was, in my opinion, nothing more

than harassment in this litigation. There was no reason to it. It merely ran up the cost of this estate matter, it merely caused great antagonism to the parties and there was no reason for it, factually or legally. And I believe it's rather demeaning under that type of a situation to make those type of claims regarding the conduct of an attorney, their professional reputation under rules of professional conduct. There was no basis for it. And if Mr. Janhunen had made that claim against Mr. Bustamante for the same thing, I would be ruling the same way. There's no basis for it and I'm still offended as I indicated earlier. VRP 08/25/2013 at 80-81.

This is the first mention by the trial court that the motion to disqualify was a form of harassment. As before, in the earlier hearings, there is no objective fact or circumstance that the court makes reference to which might justify a conclusion that Petitioners or their attorney brought the motion to disqualify Mr. Janhunen out of a desire to harass anyone. Significantly, the mention of "harassment" and running up the cost of the litigation is interwoven with the comments about there being no basis for the motion and the comments about it being demeaning for someone to make such claims against an attorney in Mr. Janhunen's position.

The court abused its discretion because the award of sanctions was not based on an objective analysis of the reasonableness of the attorney's action at the time it was taken. Rather, the record indicates that Judge Godfrey's ruling was based on emotion; indignation; and hindsight.

F. The error was not harmless

An error is harmless where it is reasonably probable that the evidence did not affect the result of the case. *State v. Gonzalez–Hernandez*, 122 Wn.App. 53, 59–60 (2004). Conversely, a trial court commits reversible error where it is reasonably probable that the outcome of the trial was materially affected. *State v. Ray*, 116 Wash.2d 531, 546 (1991).

The issue in this case is whether the court committed error during a summary judgment proceeding rather than during a trial. But the notion of harmless error is still applicable anytime the trier of fact considers as part of the decision-making process evidence that should not have been considered. In this case, the impermissible evidence would consist of the court’s review of the sealed paternity file, together with the resulting determination that counsel had not conducted a proper inquiry into said file; the court’s observations of the demeanor of all the parties in the case, from which he concluded, on December 9, 2013, that Petitioners had acted in bad faith; and also, Judge Godfrey’s apparently emotional reaction to the motion, both at the time the motion was brought, when he stated repeatedly that he found the motion to be offensive, and again more than a year later, when Judge Godfrey stated that he was “still offended.”

In deciding whether the court’s error was harmless, this Court should look at the objective evidence in the record in deciding whether the improperly considered evidence likely affected the outcome of the

proceeding. There is virtually no objective evidence in the record supporting CR 11 sanctions once those impermissible considerations are removed from the equation; hence the error was not harmless.

An error in admitting evidence in a bench proceeding mandates a re-hearing where there is insufficient additional evidence to support the findings or the findings appear to be based on the inadmissible evidence.

State v. Chavez, 134 Wn. App. 657, 668 (2006) *aff'd*, 163 Wn.2d 262 (2008) *citing State v. Bell*, 59 Wash. 2d 338, 365 (1962) . See also *State v. Ryan*, 48 Wash.2d 304, 308 (1956):

Where a case is heard by a judge without a jury, a new trial should not be granted for error in the admission of evidence, if there remains substantial admissible evidence to support the findings, unless it appears that the findings are based on the evidence which should have been excluded.

The court's findings here were based in significant part on evidence and considerations that should have been excluded. And it does appear that there was insufficient admissible evidence to support the court's legal or factual conclusions. Therefore, the judgment matter should be vacated and the matter remanded for a re-hearing by a different magistrate.

DATED this 11th day of December, 2014.



David Bustamante, WSBA #30668
Attorney for Petitioners

APPENDIX A

Declaration of Service

CERTIFICATE OF SERVICE

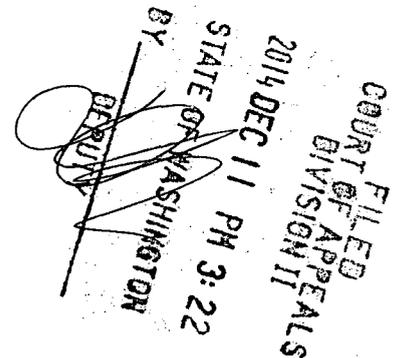
I, David Bustamante, do solemnly swear and affirm under penalty of perjury, under the laws of the State of Washington, that the following is true:

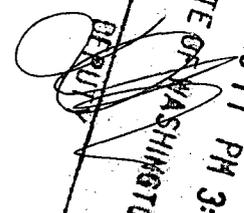
I served the attached Appellant's Reply Brief, by mailing a true copy to the offices of the attorney of record for the Respondent, Mr. Curtis M. Janhunen, Brown, Lewis, Janhunen & Spencer, at 101 South Main Street, P.O. Box 111, Montesano, WA 98563.

Signed at Ephrata, Washington, this ^{11th} ~~10th~~ day of ^{Dec.} ~~November~~, 2014.



David Bustamante
Declarant



FILED
COURT OF APPEALS
DIVISION II
2014 DEC 11 PM 3:22
STATE OF WASHINGTON
BY 

APPENDIX B

Statement of Account Used for Calculating "Terms"

BROWN LEWIS JANHUNEN & SPENCER

A PROFESSIONAL SERVICE CORPORATION

ATTORNEYS AT LAW

SEATTLE FIRST NATIONAL BANK BUILDING

101 EAST MARKET STREET, SUITE 501

POST OFFICE BOX 1806

ABERDEEN, WASHINGTON 98520

(360) 533-1600 OR 532-1960

FAX (360) 532-4116

MONTESANO OFFICE

101 SOUTH MAIN STREET

POST OFFICE BOX 111

MONTESANO, WASHINGTON 98563

(360) 249-4800

FAX (360) 249-6222

THOMAS A BROWN
ABERDEEN OFFICE
CURTIS M JANHUNEN
ABERDEEN OFFICE
DOUGLAS C LEWIS
MONTESANO OFFICE
MICHAEL G SPENCER
ABERDEEN OFFICE

STATEMENT OF ACCOUNT

DIANE EICKHOFF
PO BOX 444
GRAYLAND WA 98547

Page: 1
07/19/2013
Account No. 4930-000M
13

RE: ESTATE OF CHARLES EICKHOFF
FILE NO. 12-181-J

07/09/2013	CMJ	Partial review of file.	
07/12/2013	CMJ	Office conference with Diane regarding her concerns about Motion for Summary Judgment.	
07/15/2013	CMJ	Prepare for CR11 hearing; Motion for Summary Judgment; Review of file; Prepare timeline; Review Court Rules and Court of Appeals decision; Travel to Junction City; Bustamonte late; Court appearance before Judge Godfrey; Hearing continued; Return travel to Aberdeen.	
07/16/2013	CMJ	Preparation and transmittal of Notice of Hearing; Ordered WIP; Preparation and transmittal of correspondence to Virginia Leach, Pacific County Clerk; Reviewed WIP, deleted time not spent preparing for July 15 hearing; Prepare bill.	
07/29/2013	CMJ	Travel to Montesano; Court appearance; Order entered; Return travel to Aberdeen.	
		SUBTOTAL: LEGAL SERVICES THIS BILLING PERIOD	1,350.00
		Identification of Billing Personnel	
		CMJ-Curtis M. Janhunen-Attorney	
07/15/2013		EXPENSE INCURRED: Travel -- Round trip mileage to Junction City for court appearance.	2.83
07/29/2013		EXPENSE INCURRED: Travel -- Round trip mileage to Montesano for court appearance.	12.43

DIANE EICKHOFF

Page: 2
07/19/2013
Account No. 4930-000M
13

RE: ESTATE OF CHARLES EICKHOFF
FILE NO. 12-181-J

	SUBTOTAL: EXPENSES INCURRED THIS BILLING PERIOD	<u>15.26</u>
	TOTAL CURRENT CHARGES:	1,365.26
	PREVIOUS BALANCE:	\$213.75
07/11/2013	Payment on account	-213.75
	BALANCE DUE:	<u>\$1,365.26</u>

The firm reserves the right to charge interest at the rate of 12% per annum on balances not paid within 30 days of this statement.

Please write your account number (4930.000) on your check. Thank you.

CREDIT CARDS ACCEPTED

**PAYMENTS RECEIVED OR SERVICES RENDERED AFTER THIS
STATEMENT DATE WILL NOT SHOW UNTIL NEXT STATEMENT**

Our Federal Tax ID No. is 91-0885366.

APPENDIX C

Second Page of Order for Continuance and Terms (CP 390)

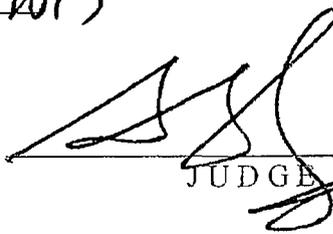
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IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Petitioners did not respond to the Respondents' Motions, but rather asked the Court for a continuance, which Motion was set on the day set for the hearings on the summary judgment motion and the CR 11 motion. The Court granted the Motion to continue the hearings on condition that the Petitioners pay terms in the amount of \$ 1365.26. This amount is to be paid within 7 days of ~~this Order.~~ *the motion on summary judgment hearing.*

2. The Respondents' Motion for Summary Judgment and Motion for CR 11 Sanctions will be heard by this Court on ~~August~~ *September 25 @ 8:30 AM*, 2013. The Petitioners shall respond to the Respondents' Motions by SEPT 11, 2013 (11 days before hearing).

DATED: July 29, 2013



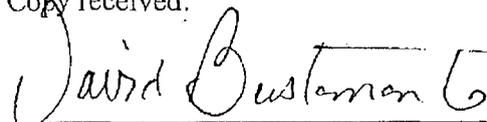
JUDGE

Presented by:

BROWN LEWIS JANHUNEN & SPENCER
Attorneys for Respondents

By 
CURTIS M. JANHUNEN, WSB #4168

Copy received:


DAVID BUSTAMANTE, WSBA #30668
Attorney for Petitioners

APPENDIX D

WSBA Ethics Advisory Opinions 1205, 1380, and 1390



Advisory Opinion: 1205

Year Issued: 1988

RPC(s): RPC 1.9

Subject: Conflict of interest; client confidences and secrets; lawyer who wrote wills for both husband and wife wishes to represent husband in dissolution

The Committee considered your inquiry concerning whether you may undertake to represent a husband in a dissolution proceeding where you wrote wills for both the husband and wife in 1975. The Committee was of the opinion that in drafting the wills you necessarily obtained confidences and secrets from both clients and therefore, you could not now undertake to represent the husband adversely to the wife without complying with RPC 1.9.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.



Advisory Opinion: 1380

Year Issued: 1990

RPC(s): RPC 1.9

Subject: Conflict of interest; lawyer who was consulted by husband in wife's presence regarding criminal case could not later represent wife in dissolution

The Committee reviewed your inquiry concerning a situation wherein you had been consulted by a man regarding possible representation in a criminal case, during which interview with you he was accompanied by his wife. Subsequently, you undertook to represent the wife in a marriage dissolution proceeding. The husband alleged that he had been a client of yours and therefore felt you should withdraw from representing the wife, which to avoid difficulty you did.

The Committee was of the opinion that you were correct to withdraw in the circumstances as you described them. The Committee was of the opinion that the husband had disclosed confidences and secrets to you which RPC 1.9 would prohibit you from using in now representing the wife. The Committee was of the opinion that this situation was not changed by the fact that you had allowed the wife to be present when the husband was disclosing confidences or secrets.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.



Advisory Opinion: 1390

Year Issued: 1991

RPC(s): RPC 1.7(b); 1.9(a); 1.9(b)

Subject: Conflict of interest; representation adverse to former client; substantially related matters

The law firm previously represented a husband and wife in business matters and on a speeding ticket. The law firm now represents the defendant's insurance carrier in a personal injury case brought by the former clients. The Committee was of the opinion that, based upon the facts presented in your inquiry concerning the representation by your law firm of the husband and wife clients, and the facts of the present litigation, the matters may be substantially related and if so, you would need to withdraw pursuant to RPC 1.9(a). The Committee was further of the opinion that if the matters were not substantially related, you would still be required to withdraw pursuant RPC 1.9(b) and RPC 1.7(b).

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.