899946-7

SUPREME COURT CAUSE No.
(Former 84758-4)
COURT OF APPEALS CAUSE No. 44120-9-II

COWLITZ COUNTY SUPERIOR COURT CAUSE No. 10-200211-2
SKAMANIA COUNTY SUPERIOR COURT CAUSE NO. 09-2-00161-0
CLARK COUNTY SUPERIOR COURT CAUSE No. 08-2-09112-4

IN THE SUPREME COURT OF THE STATE WASHINGTON

Lance W. Burton, Pro Se

Petitioner,

Vs.

Honorable Superior Court Judge Robert L. Harris and Mary Jo Harris, husband and wife, and their marital community.
The Board of the Clark County Commissioners (Betty Sue Morris, Mark Boldt and Steve Stuart) for and on the behalf of Clark County.

Respondents

PETITION FOR REVIEW
Pursuant to RAP 13.5 & 17.3

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360-513-0251

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APPENDIX

A.

IDENTITY OF PETITIONER

(1) LANCE BURTON, a sixty-nine year old single man, a natural born citizen of these United States and citizen of the State of Washington, is requesting that the Washington State Supreme Court having been granted by the Congress of these United States, under Art. III, § 1 and 2, judicial power that extends to all cases... to hear such petition.

B.

CITATION TO THE COURT OF APPEALS DECISION

(2) This is an appeal of the Appellate Court Division II decision (Exhibit 1) to deny Petitioner, Lance Burton's a Motion to Modify on January 29, 2014.

(3) Petitioner for reason cited herein and according to RAP 13.4, seeks discretionary review based upon the Court of Appeals incomplete/inaccurate and prejudiced decision of January 29, 2014 (Exhibit 2)

C.

ISSUES PRESENTED FOR REVIEW:

(4) Petitioner is requesting this Court to reverse the Appellate Court Commissioners decision of October 30, 2013 for numerous issues, but none so important than the avoidance of Petitioners Constitutional Right under Article IV,

Sect. 7 to have had a jurisdictional and authoritative superior court judge decide the issues of the Burton/Harris matter.

THE WASHINGTON STATE CONSTITUTION OF ARTICLE IV, SECTION 7 and THE SUPREME COURT RULE Say's...

The judge of any superior court may hold a superior court in any county at the *request* of the judge of the superior court thereof, and upon the *request* of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. *The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge* pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement. [**AMENDMENT 94**, 2001 Engrossed Senate Joint Resolution No. 8208, p 2327. Approved November6, 2001.]

FIRST ISSUE: The Emergence of New Evidence - Probable Error.
Burton's motion should not have been denied by the Court Commissioner because such motion met each of the five (5) conditions as quoted by the defense in *Go2Net, Inc.* 115 Wn. App. 73, 88,60 P.3d 1245 (2003); *Holaday v. Merceri*, 49Wn.App. 321, 330,742 P.2d 127, review denied, 108 Wn.2d 1035 (1987).

SECOND ISSUE: Lack of Standing - Violation of the Constitution – Obvious Error.

Burton has always asserted that Cowlitz County's Superior Court Judge Stephen Warning was not only unapproved by Burton, (See exhibit 3, Affidavit to CR60 (b) Motion of 7-30-2012), but had never been *requested* by Skamania County government officials, been *requested* by the governor of this state or appointed by the Supreme Court. And contrary to the opinion of the Court Commissioner, this issue has never been decided upon.

Failing to recognize and act upon Judge Warning's failure of compliance to the Constitutional laws is an "obvious error" that is prejudicial.

Prejudice is a bias, a leaning toward one-party in a lawsuit; a prejudging of the case; "an opinion or judgment formed beforehand or ***without due examination***, 232 P.2d 949, 958.

THIRD ISSUE: Case Doctrine – Departure from Judicial Proceedings

The Appellate Court Commissioner improperly cited that a appellate holding once made applies to subsequent stages.

FOURTH ISSUE: One-Year Timeline: Obvious Procedural Error

Petitioner disagrees with the Commissioners rendition of the applicability of Petitioners CR 60 (b) timeline as being of one (1) year. (Crt. App ruling,1-29-14) page 6, first ¶).

The Constitution specifically denotes that the application of one-year only applies when category CR60 (b)(11) is applied and then only to items 1, 2, & 3.

The Commissioner erred by failing to observe that the petitioner's CR 60(b) Motion also cited (4) fraud or (5) a judgment that is void and other categories.

OTHER ISSUE: Probable Violations of RPC's

The defense and its counsel endorsement and presentation of orders to Judge Warning were intended to influence him, unfairly towards Burton.

D.

STATEMENT OF THE CASE

(5) At expense, Petitioner by law of RCW 4.16.080(6) filed a civil cause of action in Clark County against respondent(s), a retired judicial officer, et al.
For reasons of bias moved the case to Skamania County.

(6) On October 1, 2009 Skamania County's sole Superior Court Judge, E. Thompson Reynolds (the presiding judge) exercised his lawful right to recuse himself from this action. (CP 7) This resulted in one of three pro temp judges being appointed. Judge Brian Altman of Klickitat County was selected however he recused himself too. None of the other two pro temp judges were offered.

(7) Instead, and on January 28, 2010 the defense through counsel presented an order to Judge Stephen Warning of Cowlitz County to take command of the Burton/Harris case of which Burton had previously and numerously opposed (Exhibit 4, top of Pg. 2 Petition for Review of July 3, 2010).
Burton, at the same time had been seeking assistance from Skamania County authorities (Exhibit 2 Petition for Review of July 3, 2010), the Office of Washington Courts, and the State Supreme Court to appoint another judge, including Ret. Judge Thomas Lodge other than Warning. Those attempts were met with ignorance, lack of effort or otherwise denial.

(8) Burton had argued that Warning had not complied with the lawful obligations as enumerated in this states Constitution, then took command of the case, which resulted in its dismissal. Burton has repeatedly pleaded to the lack of lawful standing of Warning, but courts have ignored his pleas. The later acquisition of evidence now verifying Judge Warning's lack of standing, caused Burton to file a CR 60(b) Motion with trailing sub-headings of which Burton seeks this court to

examine such evidence and render a decision, reversing the defense's Motion on the Merits.

NOTE:

This Court is encouraged to examine Burton's *Petition for Review*, of October 14, 2011, page 4, top 2 paragraphs and page 5 last paragraph.

Burton's *Summary of Pleadings* which accompanied this Petition for Review, and the failing to abide by the Constitutional terms of Art. 4, Sect 7 the judge should have stepped down, page 2, *Statement of Grounds*, line 4 through 9, another assertion missed, and overlooked by the Court of Appeals.

E.

THE ARGUMENTS

Argument One: First Issue, Emergence of New Evidence...

(9) The five (5) part descriptive analysis of the Commissioners rendition of the construction of a CR 60(b) motion on page 4 and 5 clearly affirms Burton's motion. It has shown factually, that the new evidence demonstrates that Judge Warning lacked Constitutional authority on the Burton case. That lacking such authority would "change" (1) the result of the trial, that in fact there would not have been a trial in Cowlitz County with Judge Warning. That the new evidence was discovered and offered to Burton "after" (2) the trial. And Burton's pursuit of such evidence had been blocked, unfiled or ignored which "prevented" (3) Burton from discovery of such evidence. That the evidence when eventually presented by a government agent to Burton was only fulfilled when Burton made additional effort under the "Public Disclosure Act," that required governmental compliance to do so.

(10) The evidence is "material" (4) and not cumulative, nor was it ended to "impeach" (5) Judge Warning from his role within Cowlitz County in managing a superior court. Rather, it was to reveal that Warning had failed to acquire jurisdiction and authority as required under the Washington State Constitution of Art. 4, Sect. 2(a) and/or Art. 4, Sect. 7 in and for the Burton/Harris case only.

(11) Burton's arguments are well established in his Brief of June 14, 2013, Pg. 3 which also demonstrates the defense's unwillingness to respond or appear to Burton's Motion for Vacancy, which was filed with the Court on or about August

30, 2012, and served, reveals their decision is a violation of a requirement under CR 60(e) and (2) and CR 8(d). Contrary to Commissioner Bearse ruling concerning CR 8(d) as defined under CR 7(a) the defense was still required to appear at the hearing.

(12) They were given a lawful opportunity consisting of 20 days after August 30 to offer a written response which could have raised numerous arguments for their defense including Commissioner Bearse portrayal of CR 7(a's) application.

(13) Commissioner Bearse proposition that the Respondent's opposed the motion in a memorandum as filed on December 26, 2012, is well beyond the 20 day limit of time to have done so, and does not excuse their lack of a written or testimonial response.

Argument Two: Second Issue, Lack of Standing - Probable Error

(14) Warning a seasoned Superior Court Judge knew or should have known, that he had not met any of the above conditions to have lawfully acquired legal jurisdiction in the Burton/Harris matter.

Circuit Court of Appeals, Sixth Circuit, *Manning v. Ketchum*, 58 F.2d 948 (6th Cir. 1932) "**When a judge acts in the clear absence of all jurisdiction**, i.e., of authority to act officially over the subject-matter in hand, the proceeding is coram non judice. In such a case the judge has lost his judicial function, has become a private person, and is liable as a trespasser for the damages resulting from his unauthorized acts. Such has been the law from the days of the case of The Marshalsea, 10 Coke 68.

In *State ex rel. Egan v. Wolever*, 127 Ind. 306, 26 N.E. 762, 763, the court said: "The converse statement of it is also ancient. **Where there is no jurisdiction at all there is no judge**; the proceeding is as nothing."

Judge Warning could have contacted Skamainia County Judge E. Thompson Reynolds, the presiding judge, and requested his assignment before he signed the order; he also could have contacted the Supreme Court or the Governor of this state under RCW 2.08.140 to have acquired their authority but instead chose not to do so.

(15) Additionally, the defense and/or its counsel could have exercised the same efforts, but they also failed to do so.

(16) The Appellate Court's decision failed to recognize, (1) that certain United and Washington State Constitutional provisions of law were not addressed. (2) That the issue of new evidence demonstrated unequivocally that Superior Court Judge Stephen Warning of Cowlitz County had never held lawful authority or jurisdiction to sign an order to take command of the Burton/Harris case. (3) That by the appellate court/commissioners lack of investigation, discovery and realization that Warning had failed to abide by constitutional provisions of law. That, their lack of fact-finding resulted in a determination that has created conflict with other decisions made by the United States Supreme Court and the Washington State Supreme Court which is of substantial public issue.

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(1) Clark v. State, 717 N.E 2d. 18, transferred denied 741 N.E. 2d. 1247 (2000), states that a **"judgement made when the court lacks subject matter jurisdiction is void"**

(2) Bradley v. Fisher, 80 U.S. 13 Wall, 335 at Pg. 352 (1871), **"Where there is clearly no jurisdiction over subject matter any authority is usurped authority".**

(17) Previous court decision have decreed that when a Judge acts under the color of law, violates a litigants Constitutional Rights, commits a tort, or fails to posses authority and jurisdiction he is in violation of the law. And that all decisions made under this capacity are null or void. (See Affidavit to CR 60 Motion, III New Evidence, page 2, line 15)

(18) Petitioner presented numerous arguments challenging Judge Stephen Warning's authority and jurisdiction over the Burton case (See app. brief Pg. 5) and the effort to obtain new evidence (Pg. 6, 7, 8). On Pg. 9 he presents an "affirmative showing to the contrary" as depicted by this court in State v. Hawkins, *No. 66936-3-I.*

(19) Commissioner Bearse's ruling is devoid of any discussion except not to readdress that issue, (Pg. 5) which as previously discussed is prejudicial.

Argument Three: Third Issue, the Case Doctrine - Probable Error

(20) In referencing the quoted case by Commissioner Bears, i.e. *Roberson v. Perez,* 156, Wn.2d 33, 41, 123 P.3d 844 (2005) at Pg. 5, last paragraph, the Supreme Court stated that the case doctrine is derived from RAP 2.5(a)(2), *that it is a multifaceted doctrine that means different things in different circumstances,* Luthern Day Care Ctr. v. Snohomish County, 119 Wash. 2d 91, 113, 829 P.2d 746 (1992) *and is often confused with other closely related doctrines.*

(21) According to the Supreme Court, the Appellate Court in that case applied discretion in their decision not to invoke the case doctrine, because the county

did not act in a harmful manner at ¶ 2.

(22) Burton has been repeatedly forced to defend himself and his Constitutional Rights at great expense, time and effort largely because the Appellate Court has repeatedly failed to render a court decision on whether Burton's previous and current claims demonstrate Judge Warning's violation of laws under the Wash, Const. of Art. 4, Sect. 7 - to hold a superior court on the Burton/Harris matter. Citing Brief at A (5-2013);App. Resp. Pg. 1 at 5 (9-2013)

(23) Burton moved his case to Skamania County seeking a fair trial but the recusal of two judges found that Skamania County authorities would not engage either of the two remaining pro temp judges, nor would they assist in requesting Judge Thomas Lodge's or any other judicial appointment. Or, act to contact either the governor or a majority of Supreme Court Justice's for their assistance.

(24) Meanwhile, Burton sought aid from the Office of the Washington Courts (Ms. Suzy Cheffler); sought assistance through correspondence to the Supreme Court, those letters however were interceded by the clerk and placed into an unfiled drawer and ignored. Burton pursued another means to justice by corresponding to Skamania County's prosecutor, Mr. Peter Banks, such letter failed to garner any response too.

(25) Ultimately, Burton asks why if the case doctrine is of so importance now, why didn't the defense raise it in their written response to Burton's Motion to Vacate?

(26) And while Burton was fighting for his right to a legitimate judicial process, Judge Stephen Warning was fully aware that he had not complied with the Constitutional requirements to attain the required jurisdiction.

(27) The Supreme Court has further articulated in the above decision at ¶ 23 that the application of the case doctrine may be avoided where the prior decision is clearly erroneous and *would make a manifest injustice to one party*. See, e.g., *First Small Bus. Inv. Co. v. Intercapital Corp. of Or.*, 108 Wash. 2d 324,333, 738 P.2d 263 (1987). Judge Warning's willful violation to the Constitutional laws does not justify Burton's denial of Constitutional Due Process.

Argument Four: Fourth Issue, One Year Timeline - Procedural Error

(28) The Commissioner use of a broad brush to limit all categories of CR 60(b) to a one - year period was an obvious procedural error. The one year application only applies to categories under CR 60 (b)(11) and (1),(2), (3), it does not apply to the remaining categories. Furthermore, under CR 60 (b)(c) it specifically states, that *this rule does not limit the power of a court,* (even this Court) *to entertain an independent action to relieve a party from a judgment, order or proceeding.*

(29) This Court should examine Petitioner's Motion for Order to Vacate of August 2012, on page 2, where he summarily cites on Pg. 2, line12 and Pg. 3, line 13/14 that such motion was filed pursuant to Civil Rule 60 (b)(1)(3)(4 fraud)(5 judgment void) and (11) and (c, other remedies; court is not limited...) and (e).

OTHER Probable Errors: - VIOLATIONS RPC's

(30) Again, the Commissioner fails to respond to the assertions made by the Appellant in his brief on Pg. 19, that the defense violated RPC 3.3 (a)(1)(2)(4)(c)... they made false statements of fact or law; or to offer evidence that the lawyer knew to be false; they failed to disclose that Judge Warning's signatures on the Order and subsequent Orders were in direct violation of Constitutional laws that would have otherwise granted Judge Warning authority if they had been followed.

(31) The defense's failure to disclose its awareness of unlawful jurisdictional attainment by and through the tribunal is a material fact.

(32) Petitioner asserts that the defense and counsel violated rule 3.5(a). Their delivery of the January 28, 2010 Order and all Orders thereafter were intended to influence Judge Warning, even though Judge Warning had not complied with the laws of the Constitution to lawfully decide the Burton/Harris matter.

E.
CONCLUSION

(33) Any of the issues and arguments listed if affirmed would effectuate a reversal of the Commissioners decision, particularly since the opposition has failed to cite any higher law over the Constitution that would have altered the process in which one judge can replace another.

(34) Nor, has there been demonstrated any case law decision that grants a judge, including Judge Warning the application to issue orders that are not null

and void when jurisdictional authority has been appropriated outside the lawful methods as established by the Washington State Constitution.

(35) The gravaman of this matter is and has always been whether or not Judge Stephen Warning followed the stated laws of this state that would have authorized his status and granted him jurisdiction over the Burton/Harris case.

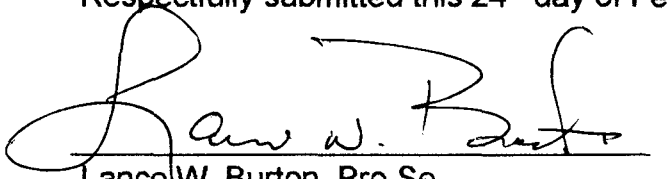
(36) The facts of this case demonstrate that we now fully know that Warning was not *appointed* by the Governor, or *assigned* by a majority of Supreme Court Justice's nor, was he *requested* by any Skamania County government officials to hear and decide the Burton/Harris case.

(37) Warning voluntarily violated his oath of office and the lawful provisions of the Constitution that would have granted him legal standing had he not.

(38) **Case law decisions have stated that any and all orders signed in violation of Constitutional authority and jurisdiction are voided. Thus *erasing all previous orders* and sending this matter back to Skamania County**. Petitioner is also in support of the high court that has original jurisdiction, to appoint a judge other than Warning.

(39) Petitioner Burton prays for this Court to uphold the measures as cited in the Constitution and reverse the Appellate Court Commissioner/Justices decision.

Respectfully submitted this 24th day of February, 2014



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CERTIFICATE OF MAILING

Washington State Court of Appeals
Case No. **44120-9-II** and Cowlitz County
Superior Court Case No. **10-2-00211-2**

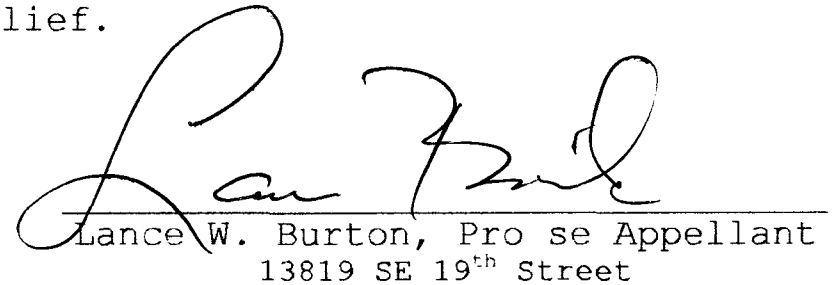
THE UNDERSIGN CERTIFIES AND DECLARES:

1. I Lance Burton, a citizen of Clark County, State of Washington, I am over eighteen years of age.

2. On Monday January 24th 2014 in person, I delivered by U.S. Certified Mail _____ a copy of Petitioners Petition for Review to Mr. Christopher Horne, Clark County Prosecuting Attorney at PO Box 5000, Vancouver, WA 98666-5000.

3. On this day I have also sent by U.S. Postage Certified Mail _____, two complete Petitions for Review to the Court of Appeals, Division II, located at 950 Broadway, suite 300, Tacoma, WA. 98402-4454.

I SWEAR UNDER PENALTY OF PERJURY of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge, information and belief.



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APPENDIX 1

COURT OF APPEALS DECISION

COPY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LANCE W. BURTON,

Appellant,

v.

HON. SUPERIOR COURT JUDGE ROBERT L. HARRIS, AND ROBERT L. HARRIS AND MARY JO HARRIS, as husband and wife,

Respondents.

No. 44120-9-II

RULING GRANTING STATE'S MOTION ON THE MERITS

Lance W. Burton appeals the superior court's denial of his CR 60(b) motion. The State filed a motion on the merits. RAP 18.14. This court affirms.

FACTS

In 2009, Burton sued Judge Robert Harris in Clark County Superior Court for several actions taken by the court during a malpractice suit filed by Burton that Judge Harris had dismissed.[1] Burton moved for a change of venue to Skamania County. Clark County transferred the action but Skamania Superior Court Judge E. Thompson Reynolds recused from the matter. Burton asserts that he requested a retired Clark

[1] The background of the present appeal is taken from the recitation of facts in the unpublished appeal of *Burton v. Harris*, 164 Wn. App. 1002 (2011), *review denied*, 173 Wn.2d 1023 (2012).

County judge, Thomas Lodge, be appointed as a pro tem judge after a second active judge recused, but court staff wrongfully blocked this request. *Burton v. Harris*, 164 Wn. App. 1002 n.4 (2011), *review denied*, 173 Wn.2d 1023 (2012). The Skamania Superior Court instead transferred the matter to Cowlitz County before Judge Stephen Warning. Burton objected to the transfer. Judge Warning granted summary judgment against Burton. He denied a motion for reconsideration on May 28, 2010.

Burton appealed, arguing that Judge Lodge should have heard the case, that Judge Warning should have recused himself, and various court administrators and judges erred when they refused to help him locate Judge Lodge, charged him venue transfer fees, and later failed to move the case to Pierce County. He also challenged the grant of summary judgment. Our court affirmed in an unpublished opinion on September 20, 2011, and our Supreme Court denied review. *Burton*, 164 Wn. App. 1002.

On August 30, 2012, Burton moved to vacate judgment pursuant to CR 60(b). He appeared to argue that the judgment should be set aside due to mistake, CR 60(b)(1), because "Skamania County government officials were either cohearsed [sic] or otherwise obligated to the pressure, influence, suggestion and motivation by the defendant's and counsel to transfer this civil action to Cowlitz County." Clerk's Papers (CP) at 3. He additionally contended that newly discovered evidence, in the form of a January 11, 2012 letter from Skamania Prosecuting Attorney Adam N. Kick, responding to Burton's December 2011 public records request and stating that no documents exist

related to Burton's case outside of the official court file and there is no email or written correspondence sent to Judge Warning. CP at 19, Supp. CP at 49 (Kick letter).

Judge Warning held a hearing on the CR 60(b) motion. At the hearing, Burton argued that Judge Warning could not hear the motion pursuant to RCW 2.28.030(1)[2] because Burton had filed suit against Judge Warning in federal district court. Report of Proceedings (RP) Sep. 21, 2012 at 2. Judge Warning rejected this argument and denied the CR 60(b) motion, stating, "we're way past the point of vacating my order." RP Sep. 21, 2013 at 1. Judge Warning entered a written order dismissing the motion on January 9, 2013, stating that Burton's motion duplicated issues previously raised. 2nd Supp. CP at 94-95 (Jan. 9, 2013 Order Motion for Relief Under CR 60). He also

---

[2] RCW 2.28.030 provides:

> A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he or she is a member in any of the following cases:
>
> (1) In an action, suit, or proceeding to which he or she is a party, or in which he or she is directly interested.
>
> (2) When he or she was not present and sitting as a member of the court at the hearing of a matter submitted for its decision.
>
> (3) When he or she is related to either party by consanguinity or affinity within the third degree. The degree shall be ascertained and computed by ascending from the judge to the common ancestor and descending to the party, counting a degree for each person in both lines, including the judge and party and excluding the common ancestor.
>
> (4) when he or she has been attorney in the action, suit, or proceeding in question for either party; but this section does not apply to an application to change the place of trial, or the regulation of the order of business in court.
>
> In the cases specified in subsections (3) and (4) of this section, the disqualification may be waived by the parties, and except in the supreme court and the court of appeals shall be deemed to be waived unless an application for a change of the place of trial be made as provided by law.

denied a motion to reconsider on January 10, 2013. Clerk's Spindle. Burton appeals. The State filed a motion on the merits to affirm and requests sanctions.

ANALYSIS

Although Burton argues that the judgment should be vacated due to mistake, CR 60(b)(1), he primarily argues that the Skamania letter, CP at 19 and Supp. CP at 49, is new evidence warranting vacation of his judgment because it shows that "**no request** [sic] were made . . . granting [Judge Warning's] appointment, **which confirms that he lacked jurisdiction and authority**." Br. of Appellant at 16 (emphasis in original); CR 60(b)(3).[3]

CR 60(b)(1) allows the trial court to vacate a judgment due to mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment. CR 60(b)(3) provides relief when a party presents newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial. Evidence is

[3] Burton filed a reply brief, which was rejected on August 28, 2013, for attaching documents to the reply brief that appeared to be outside the record on appeal. This court allowed Burton time to correct the brief. Burton then filed a response on September 13, 2013, to address the documents. Although it is unclear from the response whether Burton fully complied with the August 28 letter from this court, to prevent further delay and to allow for a complete analysis of Burton's issues, this court accepts the previously rejected reply brief. In his reply brief, Burton relies on CR 60(b)(11), which provides for vacation of judgment for "[a]ny other reason justifying relief." Reply Br. at 5-6. His CR 60(b)(11) argument, however, is predicated on the discovery of new evidence that supports his argument under CR 60(b)(3). Reply Br. at 5-6. CR 60(b)(11) is a "catch-all" provision of CR 60(b). *Tatham v. Rogers*, 170 Wn. App. 76, 100, 283 P.3d 583 (2012). It, however is confined to situations "not covered by any other section of the rule." *Flannagan v. Flannagan,* 42 Wn. App. 214, 221, 709 P.2d 1247 (1985), *review denied,* 105 Wn.2d 1005 (1986). Because CR 60(b)(3) governs new evidence as a ground for vacating a judgment, this court will not reach Burton's request to apply CR 60(b)(11).

newly discovered for purposes of CR 60(b)(3) only if it (1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). A motion based on newly discovered evidence must be denied if any one of the five factors is not satisfied. *Holaday v. Merceri*, 49 Wn. App. 321, 330, 742 P.2d 127, *review denied*, 108 Wn.2d 1035 (1987). Motions for relief based on CR 60(b)(1) or CR 60(b)(3) must be filed within a reasonable time and not more than one year from the date of the challenged order or judgment. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 310, 989 P.2d 1144 (1999), *review denied*, 140 Wn.2d 1026 (2000). The standard of review for a decision granting or denying a motion to vacate under CR 60(b) is abuse of discretion. *Lindgren v. Lindgren*, 58 Wn. App. 588, 594–95, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009 (1991).

The merits of Burton's instant appeal (and his CR 60 motion) focus on issues previously decided by this court in his original appeal. *E.g.*, Br. of Appellant at 5, 11, 16 (Judge Warning and Cowlitz County did not have jurisdiction), 6-7 (Judge Reynolds failed to properly promote a replacement judge). These issues will not be readdressed herein, as this court is bound by the law of the case. "In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005); RAP 12.2. Accordingly, Judge Warning did not abuse his discretion in denying Burton's

find a case reversal to this opinion

motion for this reason. 2nd Supp. CP at 94-95 (Jan. 9, 2013 Order Motion for Relief Under CR 60, noting "duplicative" arguments).

Moreover, at the CR 60 hearing, Judge Warning found that Burton's CR 60(b) motion was untimely. RP Sep. 21, 2013 at 1 (stating "we're way past the point of vacating my order"). Although the date on which Judge Warning originally granted summary judgment is unclear from the record, on May 28, 2010, Judge Warning denied Burton's motion for reconsideration. Burton filed his CR 60(b) motion on August 30, 2012, over two years later. CR 60(b) requires that a motion to vacate on the grounds of mistake or due to new evidence be filed "*not more than 1 year after the judgment*, order, or proceeding was entered or taken." CR 60(b) (emphasis added). Consequently, Judge Warning correctly denied Burton's motion.[4]

Burton further argues that Judge Warning was disqualified from hearing the motion due to the pending federal action Burton filed against him. Because of the potential of abuse by litigants, the mere filing of a lawsuit against a sitting judge will not disqualify him when it appears that the plaintiff will "sue any judge who might become connected with this case." *Filan v. Martin*, 38 Wn. App. 91, 96, 684 P.2d 769 (1984) (citing rule of necessity). Here, Burton initially sued Judge Harris and has now sued Judge Warning. Consequently, Judge Warning did not err in considering Burton's motion.

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[4] CR 60(b)(11) does not contain the one year limitation, but still requires action be taken within a "reasonable time." *See Flannagan*, 42 Wn. App. at 221-22. Because Burton relies on new evidence to support the application of CR 60(b)(11), however, the time limit in CR 60(b)(3) applies. *See supra* note 3.

Burton also argues that because "the defense . . . failed to appear at the motion hearing," the opposing party admitted to the issues raised in his CR 60(b) motion. Br. of Appellant at 1a. He argues that CR 60(e)(2) directs the opposing party to appear to oppose the motion and CR 8(d) "dictates admission when responsive pleading is required, but not made." Br. of Appellant at 3 (italics omitted). CR 8(d), however, applies to "pleadings," which are defined in CR 7(a). Motions under CR 60 are not included within the definition. Moreover, the State opposed the CR 60(b) motion in a memorandum in opposition, filed December 26, 2012. Respondent's Motion on the Merits, App. 4.[5] Thus, Burton's argument lacks merit.

Judge Warning's written order imposed sanctions on Burton for filing a frivolous motion. 2nd Supp. CP at 94-95 (Jan. 9, 2013 Order Motion for Relief Under CR 60). Burton appeals the imposition of sanctions. Br. of Appellant at 1. The State moves for sanctions before this court pursuant to RAP 18.9(a) because Burton's appeal is frivolous and merely reargues the prior case. Br. of Respondent at 6. RAP 18.9(a) allows an appellate court on its own initiative to order a party who files a frivolous appeal to pay terms to another party.

An appeal is frivolous if, considering the entire record, and resolving all doubts in favor of the appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that appeal is so devoid of merit

[5] Judge Warning held a hearing on the motion in September 2012. He entered a written order on January 9, 2013. 2nd Supp. CP at 94-95 (Jan. 9, 2013 Order Motion for Relief Under CR 60).

that there is no possibility of reversal *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 119 P.3d 325 (2005).

Upon review, this court concludes that the superior court did not err in imposing sanctions on Burton. He filed an untimely motion for relief pursuant to CR 60(b)(1) and (3) that largely attempted to reargue the issues decided in his original suit and appeal therefrom. For the same reasons, this court will grant the State's motion for an award of attorney fees on appeal. The parties are directed to follow the procedure set out in RAP 18.1. Accordingly, it is hereby

ORDERED that the State's motion on the merits to affirm is granted and sanctions are imposed.

DATED this 30th day of October, 2013.

Aurora R. Bearse
Court Commissioner

cc: Lance W. Burton, Pro Se
Christopher Horne
Hon. Stephen Warning

APPENDIX 2

MOTION TO MODIFY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LANCE W. BURTON,

Appellant,

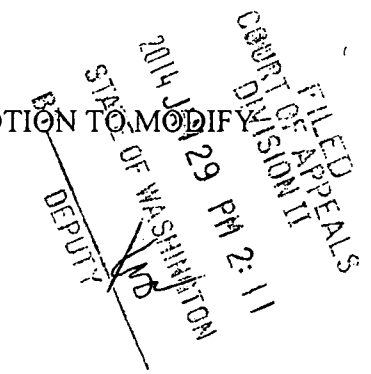
v.

HON. ROBERT L. HARRIS, et ux, et al.,

Respondents.

No. 44120-9-II

ORDER DENYING MOTION TO MODIFY



APPELLANT filed a motion to modify a Commissioner's ruling dated October 30, 2013, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 29th day of January, 2014.

PANEL: Jj. Worswick, Penoyar, Johanson

FOR THE COURT:

Johanson, A.C.J.

ACTING CHIEF JUDGE

Lance W. Burton
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