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WASHINGTON STATE SUPREME COURT  
COURT OF APPEALS, DIVISION I No. 69996-2-I

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RODOLFO APOSTOL, Petitioner

v.

RONALD WASTEWATER DISTRICT, Respondent

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RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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## INTRODUCTION

Petitioner Rodolfo Apostol (“Apostol”) petitions this Court for the second time regarding his baseless wrongful termination claims. After his wrongful termination lawsuit was dismissed on summary judgment in April 2010 he appealed – lost, and then petitioned this Court for review – which he also lost.

Several years later he made a motion to vacate the summary judgment dismissal of his case under CR 60(b)(11). He argued that he was “mentally disabled” and/or “mentally incompetent” while his original wrongful termination suit was pending. His motion to vacate was denied by the trial court<sup>1</sup>, which had the opportunity to observe Apostol throughout the earlier proceedings. Again Apostol appealed, and again he lost. He now returns as petitioner for a second time.

In his Petition, Apostol appears to argue two grounds justifying review under RAP 13.4(b). First, that

“Washington Courts have not addressed the circumstances in which a pro se litigant’s mental disabilities and financial hardship can constitute grounds for vacating a judgment under 60(b)(11).”

This argument appears to suggest that Apostol is seeking discretionary review under RAP 13.4(b)(4), as “involv[ing] an issue of

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<sup>1</sup> The Honorary Judge Jeffrey Ramsdell.

substantial public interest that should be determined by the Supreme Court.”

Second, Apostol appears to argue that review is warranted on the issue of:

“Whether constitutional rights were violated when the trial judge strike [sic] Apostol’s demand for a jury trial and determine damages.”

Thus, his second ground for seeking discretionary review appears to be based on RAP 13.4(b)(3) because “a significant question of law under the Constitution of the State of Washington or of the United States is involved.”

## **ARGUMENT**

### **I. No Grounds Exist for Discretionary Review Under RAP 13.4(b).**

Under RAP 13.4(b), a petition for review will be granted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with the decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involve; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Apostol has failed to demonstrate any grounds for review under RAP 13.4(b).

A. Apostol's "Public Interest" Argument that Washington Courts Have Failed to Consider Whether a Pro Se Litigant's Mental Disabilities Can Constitute Grounds for Vacating a Judgment Under 60(b)(11) is Misguided.

Apostol first seeks discretionary review on the specific question of whether a "*pro se* litigant's mental disabilities" can constitute grounds for vacating a judgment under 60(b)(11).<sup>2</sup> This is unnecessary. CR 60(b)(11) is a "catch all" provision authorizing judgments to be vacated for "any other reason justifying relief." It is reserved for "extraordinary circumstances not covered by any other section of the rule (i.e., subsections 1-10). *Summers v. Dept. of Revenue*, 104 Wn.App. 87, 14 P.3d 902 (Div. 1, 2001).

Both the trial court and the Court of Appeal considered Apostol's argument in his motion to vacate that the underlying judgment should be vacated because of his "mental incompetence" while he pursued his wrongful termination claims *pro se*. Neither Court decided "whether" a *pro se* litigant's mental incompetence could be grounds for vacating a

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<sup>2</sup> Petition at p.2, heading "D."

judgment under Rule 60(b)(11). Instead, both courts found that he failed to provide any evidence of his legal incompetence when representing himself during the time he brought his wrongful termination suit against the District.

It is important to recognize here that Apostol was fully represented by counsel when he made his Motion to Vacate in January 2013. His counsel submitted the declarations in support of Apostol's motion, briefed the law he deemed applicable, and argued the motion in front of the trial judge. The lower courts ruled against Apostol based on existing Washington authority as to the test for competency of witnesses and litigants. In its unpublished opinion, p. 4, the Court of Appeals set forth Washington case law that (1) litigants are presumed to be competent,<sup>3</sup> (2) the role of the trial court in assessing the competence of a litigant,<sup>4</sup> and (3) the applicable test for assessing the competence of a litigant.<sup>5</sup> After carefully considering the evidence put forward by Apostol as to his alleged incompetence, the Court of Appeals affirmed the trial court holding that "Apostol did not submit any evidence that established his alleged incompetence."<sup>6</sup>

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<sup>3</sup> *Vo v. Pham*, 81 Wn. App. 781, 784 (1996)

<sup>4</sup> *Id.* at 785 and 790

<sup>5</sup> *Vo*, 81 Wn. App. at 790, quoting *Graham v. Graham*, 40 Wn.2d 64, 66-67 (1952)

<sup>6</sup> Opinion, p.1.

In his petition, Apostol cites two cases to argue that this Court should review his motion to vacate on the grounds of his “*pro se* mental disabilities.” Both are distinguishable. In *Barr v. McGuigan*, 119 Wn.App. 43 (2003), the Court of Appeals affirmed a motion to vacate after a trial court dismissed the plaintiff’s claim for failing to answer discovery responses. The trial court granted the motion to vacate after the plaintiff’s lawyer “dropped the ball,” and failed to comply with the Court’s discovery order. It was later learned that the attorney suffered from “severe clinical depression,” which caused him to neglect his practice.

Here, however, the facts are quite different. Apostol’s claims were dismissed on summary judgment, and on the merits. The summary judgment motions followed first and third party discovery, and four different deposition sessions with Apostol. In other words, the claim was fully litigated, and dismissal was obtained on the merits, not for violation of a discovery order. As the *Barr* court was careful to point out:

“The law favors resolution of cases on their merits ... the merits of Barr’s case have never been addressed.” *Id.* at 47.

In addition, the dismissal vacated in *Barr* was due to the negligence of the plaintiff’s lawyer; i.e., the plaintiff entrusted someone



else with his legal representation, and that lawyer failed him. Here, by contrast, Apostol has no one else to blame, since he acted as his own lawyer. This is after he sought legal representation, but was unable to find a lawyer to represent him on a contingent fee basis.<sup>7</sup>

The second case cited by Apostol, *Randall v. Merrill Lynch*, 820 F.2d 1317 (D.C. Cir., 1987) is also distinguishable. There, the trial court vacated plaintiffs' *voluntary dismissal of their own claims* against their securities broker. Plaintiffs voluntarily dismissed their claims after Mr. Randall "suffered an attack of acute, stress related anxiety disorder" and was certified as fully disabled by the State of California. Plaintiffs were at all times represented by counsel, who warned them of the preclusive effects of a second voluntary dismissal.

Once again, the plaintiffs' claims in the *Randall* case were not dismissed on the merits. In addition, the plaintiff's "disability" there manifested itself during the pendency of the litigation. The court held that the plaintiffs' voluntary dismissal was not "free, calculated, or strategic," but rather was "precipitated by events beyond their control." The court found that vacating the dismissal was warranted

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<sup>7</sup> Petition at p.4: "I found it difficult and impossible to secure legal counsel since no attorney was interested I my case to make it worthwhile for them to take on a contingent fee basis."

under Rule 60(b)(6)<sup>8</sup> given the plaintiff's deterioration of health during the pendency of the litigation and the financial difficulties caused by that deterioration. In particular, the D.C. Circuit Court of Appeals also relied on the fact that vacating the voluntary dismissal would "not unduly prejudice the defendant in that case." Specifically, the court found that

"In the circumstances of this case, particularly given the fact that the previous, abortive litigation can hardly have imposed significant costs on Merrill Lynch, we find that the prospect of future litigation cost does not rise to the level of unfair prejudice."

Here, the facts could not be more different. Like the *Barr* plaintiff, the Randall's claims were not decided on the merits. In addition, the District's prejudice here is already manifest. Not only has the District litigated this case fully through the trial court level obtaining summary judgments of dismissal, but it also succeeded in defending those judgments on appeal. Now, the District is again defending itself against Apostol's Motion to Vacate, having spent over \$200,000 in defense costs. This motion has already caused unfair prejudice to the District, and vacating the judgments would only exacerbate that prejudice.

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<sup>8</sup> FRCP 60(b)(6) is the Federal Rules equivalent of Rule 60(b)(11).

In summary, CR 60(b)(11) functions well as the “catch all” provision it was intended to be. This includes acting as the section under which a *pro se* litigant may challenge an underlying judgment by arguing his “mental incompetence.” Neither of the courts below held that Apostol’s Motion to Vacate was improper because it was based on his claim of “mental incompetence.” Rather, both courts found that the evidence submitted by his counsel in support of his Motion to Vacate failed to establish his mental incompetence during the underlying wrongful termination lawsuit.

B. Apostol’s Claim of Constitutional Violation Lacks Merit Considering His Claims Were Dismissed on Summary Judgment.

Apostol’s second argument supporting his Petition for Review is that he requests the Supreme Court to “determine whether Constitutional rights were violated when the trial judge strike [sic] his demand for a jury trial and determine [his] damages.” This argument<sup>9</sup> seems to be based on Apostol’s mistaken assumption that if he requests a jury trial in a civil action, he is entitled to one. However, Apostol was not denied a jury trial. Rather he failed to present facts sufficient to overcome summary judgment for the District. Accordingly, Apostol’s right to a jury trial was never

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<sup>9</sup> Apostol’s Petition references this as a ground for discretionary review on p. 2 at “D.” He then begins to make this argument beginning on p. 7 of his Petition.

denied, and his claim based on a "Constitutional Violation" is without merit.

**CONCLUSION**

For the reasons set forth above, petitioner Rodolfo Apostol's Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of June,  
2014.

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**DECLARATION OF SERVICE**

I, Meredith M. Klein, a resident of the County of King, declare under penalty of perjury under the laws of the State of Washington that on this date, I caused a true and correct copy of Respondent's Answer to Petition for Review to be placed in the U.S. Mail, first class, postage prepaid, addressed to the appellant as follows:


Rodolfo Apostol  
7936 Union Mills Road SE  
Lacey, Washington 98503

**Appellant, *Pro Se***

DATED at Seattle, Washington this 13<sup>th</sup> day of June,

2014.

LAW OFFICE OF DANIEL P. MALLOVE, PLLC



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Meredith M. Klein, Legal Assistant