COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON
No. 330389

Robert W. Critchlow

Appellant

v.

Dex Media West Inc.

Respondent

RESPONDENT DEX MEDIA WEST, INC.'S RESPONSE TO APPELLANT ROBERT W. CRITCHLOW'S OPENING BRIEF

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I. INTRODUCTION & RELIEF REQUESTED

Appellant brought this appeal not based on the underlying merits of his lawsuit, but based on two procedural issues which two separate judges made. Appellant Robert W. Critchlow ("Critchlow"), a Washington attorney, filed this appeal because: (1) Judge Annette Plese recused herself without notice to either party; and because (2) Judge Michael Price dismissed Critchlow's lawsuit with prejudice for Critchlow's refusal to appear at a status conference and a subsequent show cause hearing.

Critchlow filed the underlying action against Dex Media West, Inc. ("Dex"), alleging various damages arising from the furnishing of advertising and telephone services provided by Dex to Critchlow. Dex denied liability. The case was originally assigned to Judge Plese, who recused herself *sua sponte*. Judge Plese did not provide any specific reasons for her recusal in the Recusal Order. Upon her recusal, the presiding judge issued an order reassigning the matter to Judge Michael Price. The status conference date initially set for October 10, 2014 remained unchanged from the initial assignment when Critchlow filed this action on July 11, 2014. Prior to that status conference, Dex served an Offer of Judgment which Critchlow accepted. The parties had not agreed to a form of judgment to be entered prior to the status conference.

Critchlow, representing himself and represented by two other attorneys, Alan McNeil and Richard Lee, did not attend the status conference with Judge Price on October 10, 2014. Dex's counsel attended the status conference before Judge Price. At the status conference, Judge Price issued a Show Cause Order and set a hearing on that Order. In Judge Price's Order, he explicitly states that if Critchlow and/or his counsel failed to attend the hearing, the matter would be dismissed with prejudice. Neither Critchlow nor his counsel attended the show cause hearing, and Judge Price entered the Dismissal Order. At no time after the status conference and before the show cause hearing did Critchlow or his counsel attempt to work with Dex's counsel to enter a judgment and avoid dismissal.

While dismissal orders are severe in nature, Critchlow and his two attorneys had every opportunity to avoid the same and have judgment entered. Critchlow, an attorney, defied a series of trial court orders on the basis of a self-serving contention that Judge Plese's Recusal Order was null and void, and, therefore, all the orders following the Recusal Order were also null and void. Critchlow challenges Judge Price's authority to enter a dismissal after an offer of judgment and acceptance.

Critchlow's appeal is a fishing expedition to discover why Judge Plese recused herself. The trial court was correct in dismissing Critchlow's case for

willfully failing to follow the Court orders. Dex, therefore, respectfully requests that the Court affirm the trial court's decision.

II. RESTATEMENT OF THE ISSUES PRESENTED

A. A trial court judge is permitted to use her discretion to recuse herself as provided in the Code of Judicial Conduct. Judge Plese exercised her discretion and recused herself prior to any hearing or filings in the underlying case. The case was reassigned to Judge Price without delay or prejudice to either party and without a single change except the named Judge in the Court's pre-existing Case Assignment Notice and Order. Did the trial court err when Judge Plese recused herself, where:

1. Judge Plese did not give the parties notice and an opportunity to be heard on her recusal;

2. Judge Plese did not provide a reason for her recusal decision; and

3. Judge Plese issued a *sua sponte* recusal order?

B. A trial court judge is granted broad discretion to enter orders, including orders dismissing an action. Critchlow, an attorney and a party, was represented by two other attorneys and himself. No one on Critchlow's behalf attended the required Case Status Conference and/or the Show Cause hearing. Spokane County Superior Court Local Administrative Rule ("LAR") 0.4.1(g)

explicitly permits the Court "on its own initiative" to order an attorney or party to show cause why sanctions should not be imposed for failing to comply with Case Assignment Notices and Case Schedule Orders, including dismissal. LAR 0.4.1(g)(1) - (4). Counsel in Spokane County proceedings seeking entry of a judgment are "responsible to see that all pertinent papers are filed" with the Court pursuant to LCR 54(f)(1). Did the trial court err in dismissing Critchlow's lawsuit against Dex as a result of Critchlow's willful refusal to attend two Court hearings, where:

1. Judge Price issued a Show Cause Order because Critchlow failed to attend a status conference;

2. Judge Price entered a dismissal of Critchlow's lawsuit for failing to attend the show cause hearing;

3. Judge Price failed to enter a judgment pursuant to CR 68 when neither party had presented a proposed or stipulated judgment to the Clerk or to Judge Price pursuant to CR 68;

4. It was not error for Judge Price to enter a dismissal order after the parties had been given notice and an opportunity to be heard, and Critchlow and his counsel willingly failed to avail themselves of that opportunity;

5. Judge Price did not err when entering a dismissal order because CR 41 provides that the Court has the power to dismiss an action; and

6. Judge Price had the authority to decide that Critchlow's case was inactive when neither Critchlow, an attorney-party, nor his two attorneys appeared at the Court hearings to advise Judge Price as to the case status; and Critchlow failed to submit a proposed or agreed judgment for Judge Price's entry?

III. STATEMENT OF FACTS

A. On July 11, 2014, Critchlow Filed Suit Against Dex, and The Case was Assigned to Judge Plese.

On July 11, 2014, Critchlow, with the assistance of his attorney McNeil, filed his Summons and Complaint against Dex. CP 7. In that Case Assignment Notice and Order, signed by Presiding Judge Salvatore F. Cozza, the parties were advised that they were "required to attend a Case Status Conference before [their] assigned judge on the date also noted above" - October 10, 2014 at 8:30 a.m. *Id.*

B. Judge Plese Recused Herself *Sua Sponte* Prior to Any Hearing or Activity in the Matter, and The Case was Reassigned to Judge Price.

On July 15, 2014, Judge Plese entered a *sua sponte* Order of Recusal. CP 8. On that same date, Presiding Judge Cozza entered an order reassigning the case to Judge Price. CP 9. No preset dates or times were changed by this Order.

Id. The record is not clear whether that reassignment Order was mailed by the Clerk's Office to the parties. CP 28-29. On September 8, 2014, attorney Lee filed his Notice of Association of Counsel to assist Critchlow and McNeil in this action. CP 10.

C. Prior to Any Hearing in this Matter, Dex Served Critchlow an Offer of Judgment, Which Critchlow Accepted.

On September 15, 2014, Dex served Critchlow with an Offer of Judgment. CP 18-21. On September 25, 2014, Dex filed its Answer to Critchlow's Complaint. CP 12-17. On October 2, 2014, Critchlow served and filed his Acceptance of Dex's Offer of Judgment. CP 18-21.

D. Dex's Counsel Served The Order of Recusal and Reassignment on Critchlow Via Email on October 8, 2014.

On October 8, 2014, following a conversation between Critchlow and Dex's counsel, Dex's counsel served the Order of Recusal and the Order of Pre-assignment via email to Critchlow. Commissioner's Ruling (hereafter "CR") at Exhibit 1. In a letter dated October 8, 2014, the same date, Critchlow writes to Judge Plese, acknowledging receipt of the documents from Dex's counsel and questioning the Judge's recusal order. CR at Exhibit 2. At no time did Critchlow or his two attorneys file a Motion for Reconsideration or seek an interlocutory appeal of Judge Plese's recusal order.

E. Critchlow Failed to Appear at October 10, 2014 Status Conference, and Judge Price Issued an Order to Show Cause.

On October 10, 2014, neither Critchlow, nor either of his attorneys, appeared at the scheduled status conference before Judge Price. CP 22-23. On that date, the Judge entered an Order to Show Cause, requiring all the parties to appear on November 7, 2014 to show cause why the case should not be dismissed. *Id.* Judge Price's order explicitly provided that if either party "or any attorney on their behalf" failed to attend the hearing, the matter would be dismissed. *Id.* To further his point, the Judge's Order stated, "**FAILURE TO COMPLY WITH THIS ORDER WILL RESULT IN DISMISSAL WITH PREJUDICE.**" *Id.* (emphasis in original).

On October 17, 2014, Dex's counsel provided via email to Critchlow a revised draft Judgment to be entered by the Court to end the matter. CR at Exhibit 3. In addition, Dex's counsel advised Critchlow of the show cause hearing and attached Judge's Price's order to that same email. *Id.* On October 21, 2014, Judge Plese sent and filed a letter to Critchlow and Dex's counsel, clearly advising Critchlow that his reasoning regarding her sua sponte recusal was flawed, and, "[t]he Court does not have to give a reason for the recusal, and Counsel does not get to object to this order." CP 28-29. She further advised counsel that the case was assigned to Judge Price. *Id.*

F. Critchlow and His Counsel Failed to Attend the Show Cause Hearing, and Judge Price Dismissed Critchlow's Claims With Prejudice.

On November 7, 2014, neither Critchlow nor his counsel appeared at the show cause hearing. CP 30-31; CR at Appendix B. Judge Price's Show Cause Order clearly advised that Judge Price would dismiss the case with prejudice. CP30-31. Critchlow's counsel, McNeil, contrary to the Judge's ruling, suggested that he was unable to get into Judge Price's courtroom with a self-serving letter to the Judge after entry of the dismissal order. CR at Appendix A. Further, McNeil did not indicate in his letter any attempt to confirm on that date at the Courthouse that Judge Price was not present or the hearing was not being held. *Id.* In fact, McNeil waits 12 full days after issuance of Judge Price's Order of Dismissal to communicate with the Judge via letter. *Id.* As of November 19, 2014, McNeil's letter indicated that the parties still had not reached agreement on the form of judgment to be entered. *Id.; see also,* CR at Appendix B. At no time did Critchlow, or any of his attorneys, file a Motion for Reconsideration or a Motion for Relief from Judgment or Order under CR 59 or 60 after entry of the November 7, 2014 Order.

IV. STATEMENT OF CASE

This appeal focuses on two issues: (1) whether Judge Plese was permitted to recuse herself without stating specific reasons; and (2) whether Judge Price

could dismiss Critchlow's claims against Dex for Critchlow's failure to follow specific Court Orders. Judge Plese was appropriately within her sound discretion to recuse herself, particularly when such recusal was well before any hearing or ruling was made in the action and when such recusal could not possibly have prejudiced either party. Further, Judge Price was well within his sound discretion to dismiss Critchlow's claim due to his willful refusal to obey Court orders.

A. Critchlow Willfully Chose to Ignore Judge Plese's Recusal Order.

Accepting as true Critchlow's contention that he did not receive the Recusal Order until Dex's counsel emailed it to him on October 8, 2014, Critchlow and his two attorneys chose to take no formal action to seek reconsideration or interlocutory appeal of the recusal. CR at Exhibit 1; CP 28-29. Instead, he explicitly told Judge Plese in his October 8 letter that he did not plan to be present at the status conference, in willful defiance of the Presiding Judge's Scheduling Order. CR at Exhibit 2. This was a strategic decision on Critchlow's part and not, as he mischaracterizes in his opening brief, a lack of knowledge. "Neither Appellant nor his attorney received a copy of Judge Plese's Motion and Order for Recusal nor did they receive a copy of Judge Cozza's order reassigning the case to Judge Price." Critchlow Brief at 24. Critchlow's contention that "Judge Plese's Memorandum letter dated October 21, 2014 was the first written notice

Mr. Critchlow was given that Judge Price was assigned to his case" is at best a play on the word "written" and at worst a lie. *Id.* at 9, fn. 2.

B. Critchlow and His Counsel Willingly Chose Not to Attend the October 10, 2014 Scheduling Conference, in Defiance of a Court Order.

On October 8, 2014, two days before the status conference, Critchlow expressly advised Judge Plese that he would not attend the October 10, 2014 status conference, which he was ordered to attend on July 11, 2014. CR at Exhibit 2; CP 7. True to his word, On October 10, 2014, neither Critchlow nor his two attorneys attended the status conference with Judge Price and Dex's counsel. CP at 22 - 23. As of the date of the status conference, the parties had not agreed to the form of judgment for Dex's Offer of Judgment, so the matter had not been closed. CR at Appendices A and B.

No proposed judgment was provided to Judge Plese, Judge Price, or the Clerk to close the matter. *Id.*

C. Critchlow and His Counsel Willingly Chose to Ignore Judge Price's Show Cause Order, and Critchlow's Claims were Dismissed with Prejudice.

Judge Price entered and served his Show Cause Order on that same date, October 10, 2014, requiring the parties and/or their counsel to attend a hearing on November 7, 2014 to be heard as to the status of the pending matter. *Id.* The Order was explicit that failure to comply would result in a dismissal with

prejudice. *Id.* Neither Critchlow nor either of his attorneys attended the Show Cause hearing. CP 30-31. As Judge Price clearly advised in his Show Cause Order served almost a month before, Judge Price dismissed Critchlow's claims with prejudice. *Id.*

Twelve days after entry of the Dismissal Order, Critchlow's attorney McNeil filed a self-serving letter to Judge Price, alleging he was present, but the courtroom was locked. CR at Appendix A. McNeil provides no explanation as to why: (1) he did not contact Judge Price's court or the Court clerk or anyone on November 7 regarding the allegedly locked courtroom; (2) Critchlow and his counsel waited twelve (12) days to inform the Court about the allegedly locked courtroom; (3) Dex's counsel was able to get into the allegedly locked courtroom; and (4) Critchlow and his counsel did not seek reconsideration or relief from judgment of Judge Price's dismissal pursuant to CR 59 or 60. *Id.*

As of November 19, 2014, Critchlow and Dex had not agreed to the form of a judgment and no proposed judgment had been provided to the Clerk or Judge Price for entry under CR 58 or 5(e). *Id.*

On December 3, 2014, Kimberly Kamel, counsel for Dex, responded to Critchlow's letter with a letter to the Court and Critchlow that stated that she was present in Judge Price's courtroom from 8:15 a.m. to 8:50 a.m. on November 7, 2014, and that neither Critchlow nor anyone on his behalf appeared in the

courtroom. CR at Appendix B. Kamel wrote that at approximately 8:50 a.m., one of Judge Price's clerks walked into the hallway outside his courtroom and called out Mr. Critchlow's name. *Id.* No one answered this call and no one was present in or outside of the courtroom, which was open and unlocked except for Ms. Kamel and the courtroom clerk. *Id.* Ms. Kamel further writes that between 9:00 a.m. and 9:10 a.m. she personally observed Mr. McNeil walking down the hallway, but did not observe Mr. McNeil enter Judge Price's Courtroom. *Id.*

D. Critchlow Took a Timely Appeal.

Critchlow filed a notice of appeal on December 5, 2014. That notice was timely. *See* RAP 5.2.

V. ARGUMENT

A. Judge Plese Did Not Abuse Her Discretion in Entering a *Sua Sponte* Recusal Order.

The standard of review for recusal is abuse of discretion. *State v. Perala,* 132 Wn.App. 98, 111 (Div. III, 2006); Critchlow Brief at 10. The disqualification of a judge is required if the judge's biases against a party or impartiality may be questioned. *Id.* at 110-111. Disqualification is required to satisfy due process, the appearance of fairness, and the Code of Judicial Conduct. *Id.* The decision to recuse lies within the discretion of the trial judge, "and his or her decision will not be disturbed without a clear showing of an abuse of that discretion." *Id.* at 111.

The trial court only abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *Id.* An appellate court reviewing a recusal decision will also review the timeliness of the of recusal decision in reaching its abuse of discretion analysis. *Id.; see also, Kreidler v. Eikenberry,* 111 Wn.2d 828, 832 (1989).

Judge Plese entered her *sua sponte* recusal order on July 15, 2014--just four days after the case was assigned to her and three full months before any hearing date was set. CP 7 & 8. No prejudice or bias to either party could have occurred by this early recusal, and Critchlow cannot point to any. Judge Plese acted well within her sound discretion as quickly as possible, before Dex's deadline to Answer even accrued, to disqualify herself. She likely saved both parties' time and expense in later bringing or responding to a Motion to Recuse under RCW 4.12.040 & .050, which are the statutory provision for a *party* to an action to seek a judge's recusal. Judge Plese was well within her discretion to disqualify herself well before anything occurred in the trial court proceedings.

1. Unlike the circumstances in Perala, Judge Plese was permitted to disqualify herself without a party's motion or opportunity to be heard.

Critchlow's entire argument regarding Judge Plese's recusal focuses on a *party's motion* to remove a judge from a case, usually through an affidavit of prejudice and/or a motion for recusal pursuant to RCW 4.12.040 & .050. *Perala's*

holding simply does not apply to a Judge's *sua sponte* determination that she must disqualify herself and enter a recusal order. *Perala* involves a set of consolidated cases in which the State of Washington, a party to each of the individual cases, sought recusal of several judges via *ex parte* motions without notice to the individual defendants in each action. *Perala*, 132 Wn.App. at 109.

Critchlow is correct that when a *party* moves for recusal, the party must demonstrate the prejudice or impartiality of the Judge. *Id.* at 111; *In re Parentage of J.H.*, 112 Wn.App. 486, 496 (Div. II, 2020). For such a party-motion, the appearance of fairness doctrine requires a hearing to determine whether the alleged impartiality or prejudice of the judge will affect the trial court outcome. *Id.* at 112. When a *party* brings a motion for recusal, notice must be provided to other *parties. Id.; referencing, State ex. rel. Dunham v. Superior Court*, 106 Wn. 507, 509 (1919). The burden is heavy on a *party* to prove bias or impartiality. *Id.* at 114. *Perala* and the countless other Washington decisions regarding a party's motion for recusal simply do not apply.

Washington's Code of Judicial Conduct provides explicitly, under Rule 2.11(A), "A judge **shall** disqualify[1] himself or herself in any proceeding in which the judge's impartiality **might** reasonably be questioned" (emphasis added). The

[1] Washington jurisdictions use the terms recusal and disqualification interchangeably. CJC 2.11, Cmt. 1.

rule provides a non-exhaustive, non-exclusive lists of reasons for a Judge's recusal. *Id.* The official comments to this rule are particularly elucidatory, "Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions [of the rule] apply."

Most importantly, the official comments provide:

> A judge's obligation not to hear or decide matters in which disqualification is required applies **regardless of whether a motion to disqualify is filed**.

CJC Rule 2.11, Cmt. 3 (emphasis added). The onus and ethical obligations arise for a judge to self-disqualify regardless of whether a party has filed a motion. *Id.*

Neither CJC Rule 2.11 nor any statutory provision creates a procedure for the trial court judge to *sua sponte* recuse herself, but the rules for a *party* seeking a motion to recuse or an affidavit of prejudice certainly cannot apply and cannot trump a judge's decision to self-disqualify. Washington courts have continually upheld a trial court's inherent power to make decisions, inherent power being the Court's authority that is not expressly provided by constitution or statue, but which may be exercised to protect itself in the performance of its duties. *Matter of Salary of Juvenile Director*, 87 Wn.2d 232, 245 (1976) (outlining a non-exclusive list of a Court's inherent powers).

Just a year ago in June 2014, this Court has noted, quite clearly, that contested disqualification proceedings and/or those brought by a party's motion are not the same as a judge's *sua sponte* recusal. *State v. Rocha*, 181 Wn.App. 833, 842 (Div. III, 2014). Those recusal proceedings that are "*litigated*" by parties and brought by motion typically occur in open court with notice and opportunity to be heard. *Id.* at 839 (italics in original). This Court distinguishes those recusal from *sua sponte* recusals which are often done in private, without a hearing. *Id.* at 842. This Court explicitly stated that "there was nothing wrong with the practice" of a Judge recusing herself, and added, "the personal experiences of this panel's members are that trial judges frequently recuse, *sua sponte*, in all types of civil and criminal litigation." *Id.* (emphasis added). Taking the matter even further, the Court noted that "every member of this panel is familiar with informal recusal requests occurring outside of the courtroom. Many recusals also are handled administratively, with clerk's offices having lists of conflicts of interest for judges who have named attorneys or parties how cases they will not hear." *Id.* at 839. This Court made it quite clear that it could not "conclude that all recusals take place in the courtroom." *Id.*

The fact that one of the judges in *Kauzlarich v. Yarbrough* chose to advise on the record during a hearing at which she was presiding prior to her *sua sponte* recusal is irrelevant to the facts at hand and do not add any requirement for

a judge to provide information on the record when she self-disqualifies. 105 Wn.App. 632, 654 (Div. II, 2001). In fact, the *Kauzlarich* court makes it quite clear that "judges should be encouraged 'to view the Canons of Judicial Conduct in a broad fashion and to err, if at all, on the side of caution." *Id.* at 653-654, *quoting State v. Graham*, 91 Wn.App. 663, 670 (Div. II, 1998).

Judge Plese had an obligation as a judge to recuse herself if she believed she could not proceed in an unbiased manner due to any reason listed in CJC 2.11 or not. She recused herself mere days after this case was assigned to her. She did not have an obligation to note a hearing for the parties to discuss her reasons to self-disqualify. Such a requirement simply makes no sense and would hinder the efficiency of trial courts as contemplated by the civil rules.

If Critchlow's contention was correct--which it is not--Judge Plese would have to note a motion, draft a motion, and argue to the parties why she thinks she may not be able to be impartial in this matter. It is unlikely that Judge Plese, or any judge, would decide against her own motion to recuse. The parties would have to expend attorney costs and time better served litigating their claims before a judge who does not need to be disqualified. The entire process would be an exercise in futility. Critchlow's fishing expedition into her reasons for recusal and his request that a trial court judge follow the Civil Rules applicable to party litigants is not supported by any statute or case law in this state or any other.

Judge Plese's self-recusal adheres to the decision in *Kauzlarich* on which Critchlow incorrectly relies. She erred on the side of caution, and unlike the judge in that case, did not even have the opportunity to hear any motion, make any ruling, or see any pleading other than the Complaint.

2. *Even if Judge Plese's sua sponte Recusal Order were entered improperly, which it was not, Critchlow's appropriate response was not to ignore that or any subsequent orders.*

Critchlow and his counsel knew at least by October 8, 2014 that Judge Plese had recused herself and that the case had been assigned to Judge Price. CR at Exhibit 1.[2] Critchlow and his counsel made a self-serving determination that Judge Plese's order was "null and void" and willfully refused to obey any Court Order entered before or after it. CR at Exhibit 2; CP at 28-29. Critchlow seems to rely on an outdated case related to a Receivership Statute that no longer exists in Washington on the premise that he can choose to ignore an order or else he acquiesces in it. *See Ganoung v. Chinto Mining Co.*, 26 Wn.2d 566, 577 (1946).[3]

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[2] There is some dispute as to whether or not Critchlow received a copy of the July 15, 2014 Recusal Order when entered. CP at 28-29. There is no dispute that as of October 8, 2014, Critchlow had received a copy of that Order and the Re-Assignment Order from Dex's counsel. CR at Exhibit 2. Critchlow makes some contentious and unfounded arguments about whether he could trust the orders sent by Dex's counsel, but he clearly made no affirmative decision other than to disobey them. CR at Exhibit 2.

[3] Washington adopted a new, comprehensive Receivership Act in 2004. *See* RCW 7.60, *et seq.*

In *Ganoung*, the Court ruled an *ex parte* entry of a receivership order was null and void. *Id.* at 568-569. On appeal, a party that never objected to the appointment of the Receiver and never sought appeal of that appointment and "stood silently" was deemed to have acquiesced in the order. *Id.* at 571-572. Critchlow and his counsel take that to mean that Critchlow's letter to Judge Plese after her recusal order was his "objection" and that he could simply ignore her recusal order and every subsequent order until he got his way.

While a letter *may* have worked for a *pro se* litigant, Critchlow is an attorney licensed to practice in Washington for almost 28 years. He represented himself and had two other attorneys, McNeil and Lee, representing him. Neither Critchlow nor his attorneys filed a Motion for Reconsideration pursuant to CR 59(a), which permits a party by motion (not letter) to seek an order to be reconsidered and vacated for any decision made by the trial court. The reconsideration motion may be brought under a number of grounds including "irregularity in the proceedings...or abuse of discretion." CR 59(a)(1). Critchlow and his two attorneys did not file a motion for reconsideration. Nor did they seek relief from an order under CR 60 or move for discretionary review of the recusal order under RAP 2.3.

A ruling that is unfavorable is not the basis under any law or case to ignore future orders and not participate in the trial court process. Interestingly,

Critchlow believes that he could, and he did, disobey an order entered before Judge Plese's recusal--the Case Assignment Order and Notice entered by presiding Judge Cozza that dictated that he was "required" to attend a Case Status Conference on October 10, 2014. CP at 7. Even if Critchlow believed that Plese was still the correct Judge, he could have appeared in her courtroom on October 10, but he did not.

Critchlow's "null and void" argument is just that, null and void and not the basis to support his willing decision to intentionally disobey a set of court orders that led to dismissal of his claims.

B. Judge Price Did Not Abuse His Discretion in Dismissing Critchlow's Claims Against Dex due to Critchlow's Defiance of Court Orders.

The standard of review for a trial court's dismissal of a case for non-compliance with court orders is reviewed for abuse of discretion. *Apostolis v. Seattle*, 101 Wn.App. 300, 303 (Div. I, 2000). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* The Civil Rules provide the trial court the ability to dismiss an action for the failure of a plaintiff to comply with the civil rules or any order of the court. CR 41(b). The grounds for dismissal in CR 41 "are not a limitation upon any other power that the court may have to dismiss any action "upon motion or otherwise." CR 41(b)(2)(D).

The *Apostolis* Court made quite clear that dismissal is:

> [J]ustified when a party acts in willful and deliberate disregard of reasonable and necessary court orders, the other party is prejudiced as a result, and the efficient administration of justice is impaired. Disregard of a court order without reasonable excuse or justification is deemed willful.

Id. at 304.

The *Apostolis* facts are particularly relevant. Counsel for *Apostolis* made a conscious decision to file a brief late on counsel's own (mistaken) belief that the judge did not care if filings were timely. *Id.* The Court found that excuse "grossly unacceptable." Counsel also made some excuse about lost documents, but indicated that counsel made no efforts of his own to contact the clerk's office regarding the alleged missing documents. *Id.* at 304-305. The Court found that although dismissal should not be resorted to lightly, the attorney's conduct was willful and deliberate, as opposed to merely inadvertent. *Id.* at 305.

Here Critchlow, an attorney, and his counsel willfully disobeyed four Court orders:

(1) The Case Assignment Notice and Order Setting a Required Conference on October 10, 2014;

(2) Judge Plese's Recusal Order;

(3) Presiding Judge Cozza's Re-Assignment Order, assigning the matter to Judge Price; and

(4) Judge Price's Show Cause Order.

See CR at Exhibit 2; CP 7, 8, 9, and 30-31. Critchlow's willful disregard was based on his own mistaken belief that Judge Plese's recusal order was null and void and that he needed notice and an opportunity to be heard. Judge Price offered him and his counsel notice and opportunity to be heard at the Show Cause hearing set for November 10, 2014. If Critchlow's attorney McNeil is to be believed that Judge Price's courtroom was locked (which is a contention only supported by self-serving statements), McNeil could have made some effort that day to call the Judge or his assistant, or seek assistance from the Court Clerk, Court security, or the Spokane County Bar Office located in the courthouse. The record only shows that Critchlow and McNeil waited 19 days to send a letter to Judge Price about the hearing. CR at Appendix A. This is not the era of the pony express. Other more efficient means were available on that day to address the courtroom issue and in the following 19 days.

Critchlow's actions have prejudiced Dex by requiring its counsel to attend two unnecessary hearing and to respond to this appeal. Had Critchlow not blatantly ignored Court orders, he or one of his two attorneys could have attended the October 10, 2014 status conference wherein the parties could have attempted to reach an agreed form of judgment for Judge Price to enter. Instead, as of November 19, 2014, nineteen days after this matter was dismissed, the parties had

still not agreed to the form of a judgment and none had been presented to the Court for entry. *Id.*

1. Spokane County Local Rules Gave Judge Price the Authority to Dismiss Critchlow's Claims for Failure to Attend the Status Conference and Show Cause Hearing.

Civil Rule 83 permits counties to adopt local Civil Rules. CR 83(a). Spokane County has adopted such local rules. Spokane County Local Administrative Rule 0.4.1 governs the Case Schedule Order and Assignment of Civil Cases for matters in Spokane County Superior Court. SCLAR 0.4.1. SCLAR 0.4.1(b) provides for a Case Assignment and setting of a status conference upon filing of an initial pleading. All attorneys of record and pro se parties are required to attend the status conference on the date and time designated in the Case Assignment Notice. SCLAR 0.4.1(d). The trial judge will monitor cases to determine compliance with these rules and failure to comply with such rules is grounds for sanctions, including dismissal. SCLAR 0.4.1(f) & (g)(1). The Court may, on its own initiative, order an attorney or party to show cause why sanctions or terms should not apply for failure to comply with the Case Assignment, Status Conference, and Scheduling Order requirements. SCLAR 0.4.1(g)(2).

Critchlow and his attorneys willfully ignored the Case Assignment Order issued by Presiding Judge Cozza on July 7, 2014, which set a status conference

for October 10, 2014. Judge Price, well within his discretion under the Court's inherent powers and SCLAR 0.4.1 issued a show cause order and offered Critchlow and his counsel both Notice and an Opportunity to be heard as to why they did not attend the Status Conference, in defiance of a Court Order. CP at 22-23. When Critchlow and his counsel willfully refused to or otherwise failed to attend that show cause hearing, in defiance of yet another properly issued court order, Judge Price acted within his discretion under local rules and CR 41 to dismiss this action.

Judge Price did not have the opportunity to provide "on the record" his decision to dismiss Critchlow's claims, as Critchlow never appeared. Neither CR 41 nor SCLAR 0.4.1 require a Judge to identify in his dismissal order the other sanctions he considered in choosing dismissal as a sanction for willful and deliberate non-compliance.

2. Judge Price Could Not Enter a Judgment As One Had Not Been Provided to Him.

While Critchlow is correct that a strict reading of CR 68 requires a court to enter judgment upon filing of the offer and notice of acceptance, the Civil Rules cannot be read in a vacuum and Judge Price did not have a judgment to enter. CR 68. Critchlow's own attorney admits that as of November 19, 2014, a full nineteen days after entry of the dismissal order, the parties had not agreed to the

form of a judgment. CR at Appendix A. Just like with statutory construction, interpretation of a single provision must be read as a whole. Intent cannot be ascertained from a single sentence. *State v Fenter*, 89Wn.2d 57, 59-60 (1977). Each provision must be harmonized with other provisions to "insure proper construction of every provision." *In re Estate of Black*, 153 Wn.2d 152, 163 (2004).

While CR 68 mentions entry of judgment, CR 58 provides the procedure of entry of judgment, which requires judgment to be entered when they are signed by the Court; and CR 5(e) provides that pleadings and other papers must be filed with the clerk or directly with the judge, if the judge so permits. A clerk may refuse any filing that does not adhere to local rules. CR 5(e). Spokane County Local Civil rule directs that "local counsel" presenting a judgment "shall be responsible to see that all pertinent papers are filed and that the court file is provided to the judge." SCLCR 54(f)(1).

It is the duty of the parties, not of the judge, to present judgments for entry by the Judge. At no time did either party, including Critchlow, present Judge Price, Judge Plese, or any other Judge with a proposed judgment for entry following Critchlow's acceptance of Dex' CR 68 offer of judgment. The record is silent, and Critchlow provided no justification why he and his attorneys did not attend the status conference to advise Judge Price that a judgment was

forthcoming nor did Critchlow or his attorneys attend the show cause hearing to advise that the parties were working on the form of a judgment.

Entry of judgment is not ministerial in nature. The cases Critchlow cited in his brief related to formal entry by a court clerk after a judge has signed Finding and Orders that were presented and prepared by parties to an action or by an arbitrator. *See State of Washington v. Eldridge Shelby*, 69 Wn.2d 295 (1966) and *Cinebar Coal and Coke Co. v. George Robison*, 1 Wn.2d 620 (1939). None of these cases require a judge to draft and enter a judgment *sua sponte*.

Drafting a judgment and entry of a judgment are two different things, and the drafting of such--which Critchlow contends Judge Price should have done--is not ministerial. Crafting the document judgment does require discretion, which is certainly evidenced by the fact that the parties could not agree to the form and language of a judgment two full months after Critchlow accepted Dex's offer. Had Judge Price been presented with a proposed judgment for entry and had he not entered it, that would be in contradiction of CR 68.

With no judgment before him, Judge Price properly exercised his discretion by refraining from drafting a judgment in this case. Particularly, when neither Critchlow nor his attorneys had appeared or otherwise communicated with his court in any way until after entry of the dismissal order.

VII. CONCLUSION

This appeal is not about Dex. Nothing in the appeal relates to the actions or inactions of Dex in the underlying action. Dex is merely a bystander in Critchlow's crusade against the decisions of two trial court judges.

Like a party facing the civil contempt sanction of imprisonment, Critchlow "carried the keys of his prison in his own pocket" and could have let himself out of this dismissal and avoided this appeal "simply by obeying the court order[s]." *In re Marriage of Didier*, 134 Wn.App. 490, 501-502 (Div. II, 2006), *quoting In re Interests of M.B.*, 101 Wn.App. 425, 439 (Div. I, 2000). Critchlow willfully chose to ignore four court orders and decided to use a letter to a judge as his chosen method of objecting to a *sua sponte* recusal order. Critchlow is an attorney who represented himself and was represented by two other attorneys. His due process rights have not been violated. He had opportunities at his disposal to be heard, including to a pre-scheduled status conference and a show cause hearing, but he made a strategic decision to ignore the Court's Orders.

Neither Judge Plese nor Judge Price abused their discretion in recusal and dismissing Critchlow's lawsuit. For the foregoing reasons, Critchlow's appeal should be denied and the decisions of the trial court should be upheld.

RESPECTFULLY SUBMITTED, this 1st day of July, 2015.

WITHERSPOON • KELLEY

By: _____

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CERTIFICATE OF SERVICE

On the 1st day of July, 2015, I caused to be served a true and correct copy of the within document described as Respondent Dex Media West, Inc.'s Motion to Supplement the Record on all interested parties to this action as follows:

Robert W. Critchlow Attorney at Law 208 E. Rockwell Ave. Spokane, WA 99207 Petitioner	Via United States Mail Via Federal Express Via Hand Delivery Via Facsimile Via Electronic Mail	[X] [ ] [ ] [ ] [X]
Alan McNeil Attorney at Law 421 W. Riverside Ave., Ste. 660 Spokane, WA 99201 Co-Counsel for Petitioner	Via United States Mail Via Federal Express Via Hand Delivery Via Facsimile Via Electronic Mail	[X] [ ] [ ] [ ] [X]
Richard F. Lee Attorney at Law P. O. Box 7550 Spokane, WA 99207 Co-Counsel for Petitioner	Via United States Mail Via Federal Express Via Hand Delivery Via Facsimile Via Electronic Mail	[X] [ ] [ ] [ ] [X]

Emily Schilperoort

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