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No. 44120-9-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

LANCE W. BURTON

Appellant

Vs.

HON. SUPERIOR COURT JUDGE (Ret) ROBT. HARRIS ET AL

Respondent's

Appeal from the Superior Court of Washington for Cowlitz County

Appellant's Brief

CORRECTED

Lance W. Burton, Pro Se
13819 SE 19th Street
Vancouver, WA 98683
360-513-0251

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DIVISION II
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TABLE OF CONTENTS

<u>Description</u>	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
No. 1 Defense Failed to Submit	
No. 2 Defense Failed to Appear	
No. 3 Judge Lacked Authority	
No. 4 Judge Barred	
No. 5 Improper Decision and Imposition	
No. 6 Acted Under Presumed Color of Law	
Issues Pertaining to Assignmts.	
No. 1 Defense Ignored CR 8(b) and (d)	
No. 2 Defense's Ignorance is an Admission CR 60(d)	
No. 3 Defense's Unwillingness to Violate RPC	
No. 4 Judge Scoffed at Requirement to Step Down	
No. 5 Judge Violated RCW 21.28.030	
No. 6 Judge Violated Const. R. of Due Process and	
B. STATEMENTS OF THE CASE	2
C. ARGUMENTS	5
1. Question of Jurisdiction	5
2. Search for New Evidence	5
3. Rules and Duties of Supr. Court Judge	6
4. Discovery of New Evidence	7
5. Case Development	9
6. Appellant Provides Evidence	9
7. Search for the Truth	12
8. Response Denied and Unfulfilled	12
9. Patternization	14
10. Denial of Constitutional Rights	14
11. Case Authority	15
D. RELIEF SOUGHT	16
E. CONCLUSION	22

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APPENDIXES

- 1. Letter-Lewis County Prosecutor Response
- 2. Various Rules & Laws
- 3. MISTRUTH Serialized Motion document 8(a)

CLERKS PAPERS (CP)

- 1. CP-15 2
- 2. CP-43 New Evidence 6,7,8
- 3. CP-44 3,7
- 4. CP-45 7
- 5. CP-58, page 9, line 18 – 25 4,5,

VERBATIM REPORT OF PROCEEDINGS

- VRP Page 1, line 5 Filing of CR 60(b) Motion 3
- VRP Page 1, line 8 Non-Response or Attendance 4, 21
- VRP Page 2, line 11 & 21-24 Notice of Fed. CRT. Proceeding 4
- VRP Page 3, Denial of CR 60 Motion 4

EXHIBITS

- 1. Letter to Beth Hermansen – Ska. CRT. Adm. 10
- 2. Mr. Gerry Alexander, Supreme CRT. – Letter 10
- 3. Appellant's Refusal to Sign- Agremt. To Move to Cowl. 11

TABLE OF AUTHORITIES

Washington Cases

- Burton vs. Harris, No. 415-21-6-11@ footnote 9; 2
- Clark v. State, 717 N.E. 2d 18, transferred 15
- denied 741 N.E. 2d 1247(2000)
- Piersol v. Stipak, III, 140 Wn.2d @306. 18
- State v. Hawkins, Lack of Jurisdiction 9,12,13

- Moore v. Com, 527 S.E. 2d 406, 259 Va 431 (2000) 15
- Penn v. Com, 528 S.E. 2d. 179, 32 Va. App, 422 (2000) 15

- Barron's Law Dictionary – Official Duty and Wrongful Act 17

Federal Cases, 97 S.E. 2d 33, 42,	17
Fedr. Case "Proceeding" against Warning	4

UNITED STATES CONSTITUTION

1. Const. Art. 1 § 3 - Deprivation - Due Process	14
2. Const. Art. 4 § 10 - Without Delay	14

WASHINGTON STATE CONSTITUTION

1. W.S. Const. Art 4, § 7 – Officials Fail to Obey	6
2. W.S. Const. Art 1, § 29 – Mandatory	6
3. W.S. Const. Art 1, § 3 - Deprivation – Due Process	14
4. W.S. Const. Art 1, § 10 – Without Delay	14

STATUTES

1. RCW 2.28.030 Judicial Officer Disqualified	18
2. RCW 2.32.050 Duties of Court Clerk	8
3. RCW 9a.80.010(1)(a)(b)	18
4. RCW 36.23.030 Records of Court Clerk	12

CIVIL RULES

1. CR 8(d) - Failure to Respond, is an admission	3
2. CR 60	3, 4, 7, 8, 21, 23
3. CR 60(e)(2)	3
4. CR 8(a)	16
5. CR 12(b) – Every defense shall be asserted	21
6. CR 59	4

GENERAL RULES (GR)

1. GR 29(b) - Failure to Comply	6
2. GR (e) - Sole Responsibility	7
3. GR (f)(1) - To Supervise all Cases	7
4. GR (f)(5) - Daily Operation of Court	7, 11,
5. GR (f)(a)(b)(c) - Supervise Personal	7

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|----|---|---|
| 6. | GR (f)(7) Appoint Officer's | 7 |
| 7. | GR (f)(9) Supervise filings and Reports | 7 |

RULES OF PROFESSIONAL CONDUCT (RPC) Excerpt of
Preamble: Lawyers are guardians of the law, are to maintain the highest standards of ethical conduct. A lawyer who...

- | | | |
|----|---|----|
| 1. | RPC 3.3(a)(3)- Fails to disclose to tribunal-cannot | 19 |
| 2. | RPC 3.5(a) – Seeks to influence a judge-should not | 19 |
| 3. | RPC 8.2(a) – Shall not make false statements | 20 |
| 4. | RPC 8.4(a)(b)(c)(d)(e)(f) – Who does, is misconduct | 20 |

JUDICIAL CANNON'S OF ETHICS

- | | | |
|----|--|----|
| 1. | Cannon 2(a) To Respect & Comply with the Law | 21 |
|----|--|----|
- (and should act at all times in a manner that promotes confidence in the integrity and impartiality of the Judiciary)

A. ASSIGNMENT OF ERRORS

1. The defense failed to submit a written defensive response to the Plaintiff's CR 60(b) motion, motion that was based upon the discovery of New Evidence in the Burton case matter.
2. The defense upon receipt of the CR 60(b) motion failed to also abide by CR 60(e)(2) which was a notice by the court to appear and show cause why the relief asked for should not be granted.
3. Did Judge Stephen Warning lack authority to preside over the Plaintiff's case?
4. Was Judge Warning barred from entering any decision other than what the Plaintiff sought?
5. Judge Warning adoption of the defense's late move for sanctions of \$400.00 and dismissal of the Plaintiff's motion was without merit or authority.
6. Judge Warning acted under color of law when he agreed to hear and decide plaintiff's CR 60(b) motion to vacate, but when put upon him the new evidence showing that he had not been "requested" and that the defense had failed to defend their previous position, Warning continued in his role as judge and unlawfully dismissed the tort action which argued for fees, costs, expense's and loss of time, personally inherited these considerations

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR'S

1. The Plaintiff having obtained the newly discovered evidence timely and as Permitted under CR 60 (b) submitted a motion to the trial court in order to vacate the previous judgment and order. The defense however failed to abide by CR 8(b), which required them to enter a written response to their defense.
2. Under the above circumstances, the defense also failed to appear at the motion hearing. Failing to attend and failing to raise averments to the Plaintiff's motion, is an admission to the issues raised under CR 60(d).
3. Having failed to submit a written response and having failed to attend the motion hearing the defense thus admits that the allegations contained in the CR 60(b) motion was true. That Judge Warning had not been lawfully appointed selected or requested to hear the Burton case. The defense knew that any argument to defend Judge Warning at this junction would be exposing them to violating certain Rules of Professional Conduct.
4. When Judge Warning was advised at the motion hearing that a pending legal proceeding had been initiated in federal district court against him, he was barred. from entering any decision other than what the plaintiff had sought and required his stepping down but didn't!
5. Warning's adoption of defense's later requests for sanction of \$400.00 was without merit and authority. Warning disregarded the plaintiff's requests for

judgment at the Sept. 2012 hearing because the defense never offered a written response and failed to attend the hearing. These failures became an admission to the issues raised, Warning lacked authority and power. In addition, by virtue of the “pending proceeding” in federal court, Warning was barred under RCW 2.28.030 from taking any action other than what the plaintiff sought.

6. Judge Warning’s refusal to step down from the Burton matter as the result of “new evidence” and the imposition of a federal “proceeding” violated plaintiffs Constitutional rights of due process, right of petition; the administration of justice and delay.

B. STATEMENT OF THE CASE

A civil case against Retired Superior Court Judge Robert L. Harris et al, began in Clark County, but on plaintiff's motion was moved to Skamania County whereby that county's sole judge also recused himself.

From there defendants counsel administratively acted to move this case to Cowlitz County and to their pre-assigned (CP-15) Judge Stephen Warning.

Plaintiff objected, arguing that Judge Warning's later dismissal of the case was void because Judge Warning had not been requested or appointed to hear the case under Art. IV, Sect VII of this state's Constitution. Citing Burton v. Harris, No. 10-2-00211-2.

NOW within the governance of time and having obtained new evidence that affirmed Burton's announcement that Warning's lacked jurisdiction, this Plaintiff filed a CR 60(b) motion (VRP Pg. 1, line 5) and served notice of the cited hearing (CP-44) upon the defendants/respondent's. (VRP pg. 1, Line 6-8)

The defendant's however, never responded to the plaintiff's motion; never attended the hearing. These errors have abridged CR 60(e)(2) and CR 8(d).

CR 60(e)(2) requires all parties *to an action or proceeding to appear and show cause why the relief asked for should not be granted.*

CR 8(d) *dictates admission when responsive pleading is required, but not made.*

These facts were also stated in Plaintiff's Brief for Reconsideration, Pg. 2, and line 1, CP-58.

On September 21st 2012 the hearing was held; the plaintiff requested the granting of his motion (VRP Pg. 1, line 8) due to the defendant's non-response and non-appearance.

The Plaintiff also disclosed to the court that a civil proceeding against Judge Warning was pending in Federal District Court (VRP Pg. 2, line 11 and line 21, 22, 23 and 24) that he was statutorily prohibited from acting as a judge in this case or "**proceeding**". (12-35732 3:12-cv-05686-RJB) under RCW 2.28.030.

Judge Warning scoffed at this announcement (VRP Pg. 3) and then denied Plaintiff's CR 60(b) motion. And again of the Plaintiff's CR 59 Motion for Reconsideration even though CP 58, pg. 2, line 18 - 25. The Plaintiff Appealed.

C. ARGUMENTS

1. Question of Jurisdiction

Of the many issues raised, the single most important issue was whether or not Judge Warning and Cowlitz County had lawful jurisdiction over this case.

This issue was noted in the Appellant's Reply Br. (Suprme Crt. 84758-4) Pg. 2 @ 3 and 4; at page 3 @ 7 **but the Court stated that Burton failed to provide factual allegations in their unpublished opinion of 9/20/2011.** See Westlaw Report as included in CP 58(brief) exhibit 4.

2. Search for New Evidence

The appellant suspecting his civil rights had been abused began his quest to correct what he considered a grievous error by filing several "Requests for Information" with the newly elected Skamania County Prosecuting Attorney, Mr. Adam Kick.

Mr. Kicks, response CP 43 and its exhibit 4 revealed that official's of Skamania County had never adhered to the Constitutional provisions of Art. IV, § VII which are mandatory under Article 1, Section 29.

3. Rules and Duties of Superior Court Judges
Skamania County's Superior Court Judge E. Thompson Reynolds was well within his right to have recused himself. But failed to promote another replacement judge to hold a superior court in his absence under Art. IV, Sect. VII, of this state's Constitution.

General Rule 29 and (b)

Enhancing the judicial problem was Judge Reynolds **failure to comply** with the duties of being the "Presiding" Judge of Skamania County.

Under subsection (e) of this rule, Judge Reynolds as the **sole** superior court judge became **responsible** for leading the management and administration of the court's business including the resolution of disputes.

Under (f) he was (1) to **supervise** all cases (5) *the daily operation of the court; its (a,b,c) personal. Appoint* (7) *standing and special committees of judicial officer's* and (9) *supervise the preparation and filing of reports.*

Yet, the evidence shows that in this case it hadn't been done.

4. Discovery of New Evidence

Upon the discovery of the new evidence the appellant filed a lawful and timely CR60(b) motion in Cowlitz County to vacate Judge Warning's previous decision of summary judgment CP 43,44,45 and 58.

Civil Rule 60: RELIEF FROM JUDGMENT OR ORDER, as stated under (b) Mistake; Inadvertence; Excusable Neglect; (1) Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party ... from a final judgments, order, or proceeding for the following reasons, which include items 1 through 11. Plaintiff's Motion for Order to vacate CP clearly defines the criteria presented to the court and those who inspired it, which include "New Evidence".

The new evidence listed under the CR 60 Motion to Vacate (August 30/31, 2012) is Clerks Paper 43, and its Exhibit 4. **This evidence demonstrated that Judge Warning had not *(MISTRUTH, see Append 3) received any correspondence including a request to decide the Burton/Harris case from Judge Reynolds, his law clerk, Court Administrator or the County Clerk** as was also discussed in Plaintiff's Brief to Recons. Pg. 2, line 12. The duty of the Super. Court Clerk under RCW 2.32.050 *to take and certify any other written instrument*, which would demonstrate that, a "requested" judge was requested. Thus it was his error to reign as judge.

5. Case Development and Point of Reference

Historically this Court in its Division 1 renderings had advocated in State v. Hawkins No. 66936-2-I, Nov. 7, 2011 ¶ 16 that a superior court, as a court of general jurisdiction, is presumed to act within its authority **absent an affirmative showing to the contrary.**

The high Court also stated at (17) that Judge Warning in the Hawkins case had received an appropriate request to sit as a visiting judge, **because Hawkins had failed to present evidence to the contrary.**

6. Appellant Provides Evidence

Judge Warning's intrusion into Burton's case was met by objections by the plaintiff far before Warning had signed the order to take command of the case. The Appellant did not want the case moved to Cowlitz County.

This is clearly evidenced by Plaintiff's U.S. Certified Mail letter (7009-0080-0000-8596-2589) to Skamania County Courthouse/**Court Administrator Ms. Beth Hermansen** on December 3, 2009 (see page 2, "Lack of Law" last paragraph (Exhibit 1).

It also was referenced in a Certified Mailed 7007-0710-0001-1625-5570 letter of January 4, too the Honorable **Chief Justice Mr. Gerry Alexander** of the Washington State Supreme Court, Exhibit 2.

Such letter, mandatory by law of "shall," was reported to the "Presiding" Judge E. Thompson Reynolds by Hermansen under GR 29(f)(5)(c), but Reynolds, erred in not acting to secure a judge under any of the preceding rules as cited.

Including GR 29(h) who according to this rule,

"shall" be the duty of the Presiding Judge to supervise judicial officers to the extent necessary to ensure the timely and efficient processing of cases".

And under GR 29 (f) (5) (c) Reynolds erred by not taking steps to resolve the jurisdictional disputes or to gain a judicial officer in order to resolve the Burton case.

Furthermore, the defense's counsel vis-a-vis their secretary Ms. Thelma Kremer, sent the appellant a letter dated December 30, 2009 that acknowledged **appellant's refusal to sign** the enclosed order to effectuate that change (Exhibit 3).

This exhibit became listed as Exhibit 3 in the appellant's *Petition for Discretionary Review & Statement of Grounds* to this state's Supreme Court, as filed on/or about July 3, 2010.

UNLIKE IN HAWKINS, Burton has always argued that Judge Warning lacked jurisdiction. And this new evidence demonstrates factual support by the very branch of county government that should have provided and secured a judicial officer.

Appellant amends his brief by the presentation of additional facts as determined and as advanced by various County Clerks as taken by inquisition by Burton.

Beginning on Page 11, with "**UNLIKE IN HAWKINS**" through Page 13, end of second paragraph of appellants brief, Burton discusses the matters pertaining to how, who and when a request for a new judge is made.

Stymied by the lack of cohesive policy and procedural rule development to a citizen's right to a judicial process. A process in which every citizen should be assured that his/her right in petitioning the Government, is openly and fairly implemented Burton found confusion, uncertainty and bias when it became necessary to request" a new judge.

On or about April 8, 2013 Lance Burton, sent the Kittitas, Gray's Harbor, Whitman, Walla Walla and Skagit County Clerk's a simple letter seeking information regarding their appointment and recordation of a "requested" Super. Court judge".

In response to Burton's letters the following exhibits are being presented.

According to the Kittitas County Clerk, the Court Administrator makes those arrangements. Whereas the Walla Walla County Clerk states that the Judge's secretary sets the hearing before a judge Pro-tem or for an out of County Judge or Court Commissioner. And, the Whitman County Clerk has stated that "all requests for a change of judge are filed within the Whitman County Case.

Why does three out of the five counties contacted state that either the judge's law secretary, Court administrator or a court commissioner is responsible for the acquisition of an out of County judge, yet Skamania County's similar

representatives don't?

If they don't, as indicated by Mr. Kick's letter and by the recusal of Judge E. Thompson Reynolds unwillingness to be involved, how is justice being served?

And why are my Constitutional Rights being abused?

Copies of Clerk's letters from Whitman, Walla Walla and Skagit County are added here.

7. Search for the Truth

Inquisitive, Appellant Burton under the Freedom of Information Act sent on March 15th and 17th 2013 Certified mailed letter to the Lewis County Superior Court and to Ms. Sara L. Bleigh of the Lewis County Prosecutors office concerning the Division I, Court of Appeals decision on Charles Hawkins.

Appellants' letter specifically requested whether or not Judge Warning had been requested to hear and render a decision on the Hawkins case.

8. Response Denied and Unfulfilled

Appellant also sought answers to other questions, but specifically whether there was any evidence to affirm a request for a new judge had been made. And if it had, please send Burton a copy of such requests or of any record to such requests that would have been required by the Lewis County Clerk to record under RCW 36.23.030.

On March 22, 2013 a letter signed by Mr. Glenn J. Carter, the Civil Deputy Prosecuting Attorney for the Lewis County Prosecutors Office responded (Appendx 1).

His response indicated that [they] had *no responsive documents that met Burton's requests*, thus, there were no records of requests made either in writing, email, or voice notes to verify that Judge Warning had received a request to render a decision on the Hawkins matter.

Mr. Carter's March 22, 2013 letter also assured Burton, that the letter seeking *information would be forwarded to the Lewis County Superior Court for response*.

As anticipated as of May 15, 2013, there has been **no** communication from the Lewis County Superior Court.

9. Patternization

As exhibited herein a pattern is shown that obtaining a judicial officer to render a decision does not conform to judicial and lawful protocol.

Judge Warning's jump to hear and decide the Burton matter was not only unlawfully accomplished but has resulted in the denial and delay of Burton's civil action of four years.

10. Denial of Constitutional Rights

Lance Burton who has sought to have his Petition heard by an authoritative judge; to have his day in court has instead, experienced the violation of his guaranteed rights under both the state and federal Constitution to wit: Rights of Art. I, Section 3, due process; for unnecessary delay 10; and has required Burton to spend vast amounts of time, energy and money to protect, preserve the laws of this state.

Instead of honoring Plaintiff's motion, and the law, Warning refused to step down and dismissed the motion, which is part of this appeal.

The Appellant understands that Judge Warning had no other choice but to deny plaintiff's motion, for not to do so, would have been an admission that he lacked judicial standing.

11. Case Authority

A court's authority to exercise its subject matter jurisdiction over a case may be **restricted by failure to comply** with lawful exercise of that jurisdiction. Citing Moore v. Com, **527 S.E. 2d 406, 259 Va 431 (2000)**

"Jurisdiction means the power of a court to hear and determine a cause, which power is conferred by a Constitution, or statute or both." Penn v. Com, 528 S.E. 2d. 179, 32 Va. App, 422 (2000).
Also, the courts in Clark v. State, 717 N.E. 2d 18, transferred

denied 741 N.E. 2d 1247(2000) stated that **“judgment made when the court lacks subject matter jurisdiction is void.”**

D. Relief Sought: Civil Rule-8

The evidence demonstrates that Warning lacked jurisdiction. Therefore, the Appellant under CR-8(a) is entitled and demands the relief he seeks.

Judge Warning voluntarily pledged his oath to support the Constitution's of the United and Washington State. The evidence presented reveals that **no request** were made, written or otherwise, granting his appointment, **which confirms the fact that he lacked jurisdiction and authority.**

Furthermore, confronted with a pending federal proceeding also barred him from taking any action other than what the appellant sought. Including a motion for sanctions made by the defense, which is sought to be stricken.

The appellant demands that laws be applied as are intended by the legislature. Void the sanctions, vacate the decision, return this case to Skamania County and award the Appellant his legal/expense costs, reasonable compensation for his time for research, preparation and other general expense, including sanctions for offending justice and the rules of law.

It should be noted that according to Barron's 'Law Dictionary, fifth edition, page 306, say's is the doing of a wrongful or unlawful act; "a wrongful act which the actor has no legal right to do ...as any wrongful conduct which affects, interrupts or interferes with the performance of an official duty;..as an act for which there is no authority or warrant of law; ...as an act which a person ought not to do at all ..." 97 S.E. 2d 33, 42.

This is a violation of the oath of office; or the willful neglect, or the failure by an elective public

officer to **perform faithfully a duty** imposed by law.

Piersol v. Stipak, III, 140 Wn.2d 306.

1. **Failure to Defend or Refute by Defendant's/Judge**

Judge Warning's challenge to power was never defended by him or the defense's counsel.

Instead, Warning arrogantly defies Burton's pleas and filings. He violates RCW 2.28.030, numerous Constitutional law both state and federal and RCW 9a.80.010(1)(a)(b).

This legislative law, decrees that a public servant is guilty of official misconduct if, with intent to obtain a benefit **or to deprive another person of a lawful right or privilege:** (a) *He Intentionally commits an unauthorized act under color of law, or* (b) *He intentionally refrains from performing a duty imposed upon him by law.*

2. Justice and Fundamental Principles

The defense/counsel has erred by disregarding the concept that justice is based upon the rule of law and that those **fundamental ethical principles** must always remain present.

There is even the consideration under the Rules of Prof. Conduct (RPC) 3.3(a)(3) that the defendant's and their counselors knew or should have known that Judge Warning lacked proper authority and jurisdiction in this matter.

But instead of disclosing these issues to both appellate and this state's highest tribunal, kept silent.

By their remaining silent, they have failed to perform the duty imposed by the RPC 3.5(a) which is **not to influence a judge** ... *or other official?* or (d) *engage in conduct intended to disrupt a tribunal, which applies to any proceeding (5).*

Furthermore, a lawyer shall not make a statement that the lawyer knows to be false, concerning the qualifications, integrity, or record of a judge.
Citing RPC 8.2(a).

The defense's voluntary stimulus to obtain the release of the Skamania County case to Judge Warning and Cowlitz County was an administrative act, executed without authority or provisions of the Washington State Constitution and/or the State Legislature.

Appellant contends that lawyer's participating in such actions of misconduct under RPC 8.4(a) (b) (c) (d) become prejudicial to the administration of justice.

That under (e) (f) knowingly assist a judge or judicial officer in such conduct, is a violation of applicable rules of judicial conduct and/or other law (k).

Clearly, had the defense/counsel responded, or appeared in court to defend Judge Warning's presumed power at the plaintiff's CR 60 Vacation hearing of September 21st 2012, they would have further violated the Rules of Professional Conduct.

Judge Warning made aware of the facts that the defendant's both failed to respond and appear (VRP pg. 1, lines 6-7) as required, became an admission to plaintiff's CR 60 motion, thus Judge Warning was required under the Judicial Cannon 2(a) **to respect and comply with the law**, but failed to do so.

CR 12(b) also stipulates **that every defense, in law and fact in any pleading.. shall be asserted**. The respondent's given that opportunity however never did so.

E. CONCLUSION

The Appellant requests that this matter be removed from Cowlitz County and Judge Stephen Warning then be transferred back to Skamania County and to the former Superior Court Judge, Thomas Lodge. Or, former Appellant Judge, Joe Morgan or Retired Clark County Superior Court Judge Ed Poyfair or other mutually acceptable judicial officer.

The role of the higher court is to review the record and the facts thereto in order to determine whether error's have been made. And, to assure that the spirit and best interest of the law is preserved and carried out and not just for Judges.

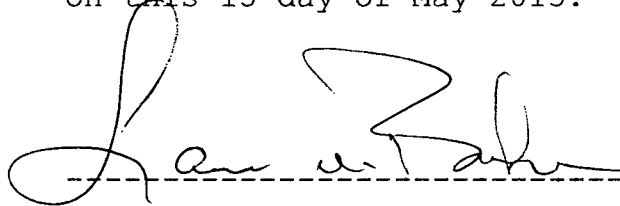
The facts and the lawful evidence in this case, demonstrate that Judge Warning never was requested or appointed by a majority of state Justices, the Governor, or Judge E. Thompson Reynolds.

The **defense failed to respond or appear to timely notices**; thus they **abandoned** this case and their defensive arguments to defeat plaintiff's CR 60 motion to vacate. Their right to seek and be awarded sanctions was without lawful basis and erroneous.

Appellant Lance Burton, has been unlawfully denied his Constitutional Rights of Due Process, at considerable expense in time, energy, money, and the deprivation of business enterprises.

The Appellant seeks nothing more than equal treatment, justice and reimbursement for these delay's.

I Lance Burton, prayerfully submit this brief together with exhibits and affidavit's under threat of perjury for the state of Washington, on this 15 day of May 2013.

A handwritten signature in black ink, appearing to read "Lance W. Burton", is written over a horizontal dashed line.

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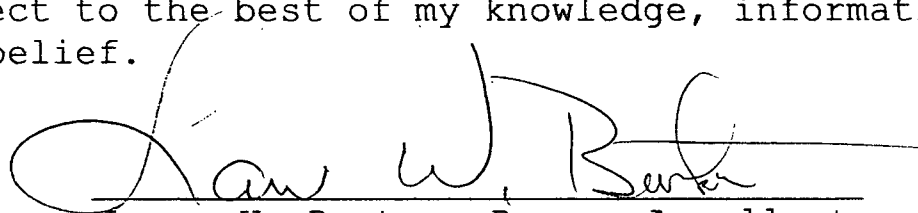
CERTIFICATE OF DELIVERY AND MAILING

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, am over eighteen years of age.
2. On Friday June 14, 2013 in person, I hand delivered pages (i), (iii), (v) of Corrected pages to Appellant's Brief and served notice that pages deemed as 11(a), 11(b), and 11(c) and letters from Whitman, Walla Walla and Skagit County Clerks are to be removed from the previously delivered copy of Appellant's Amended Brief as delivered to them on May 28, 2013.
3. Also on this day I did hereby send a date-stamped copy of the defendant's acknowledgement together with two copies of the above-described pages by U.S. Certified Mail as 7012-3050-0000-8810-0968 to the Court of Appeal.

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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