

NO. 44120-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

LANCE BURTON,

Appellant,

v.

HONORABLE SUPERIOR COURT JUDGE (Ret.) ROBERT L. HARRIS  
and MARY JO HARRIS, et. al.,

Respondents.

BRIEF OF RESPONDENTS

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## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE	
Procedural Posture .....	1
III. STATEMENT OF THE FACTS .....	2
IV. ARGUMENT	
1. Burton failed to perfect the record for review.....	2
2. Burton has failed to satisfy the procedural requirements for relief under CR 60(b).....	4
3. Miscellaneous Issues.....	5
4. Frivolous Action .....	6
V. CONCLUSION.....	6

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>Cases:</b>	
<u>Erdman v. Chapel Hill Presbyterian Church</u> , 156 Wn. App. 827 234 P.3d 229 (2010).....	3
<u>Harbison v. Garden Valley Outfitters, Inc.</u> , 69 Wn. App. 590 849 P.2d 669 (1993).....	3
<u>Miller Casualty Insurance v. Briggs</u> , 100 Wn.2d 9, 665 P.2d 887 (1983).....	6
<u>Roberson v. Perez.</u> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	6
<u>Vance v. Offices of Thurston County comm’rs</u> , 117 Wn. App. 660 71 P.3d 680 (2003).....	4
 <b>Rules:</b>	
CR 60(b).....	1-5
Wash. RAP 9.2.....	3

## I. INTRODUCTION

This case presents this Court with the difficult issue of providing finality to the claims of Lance Burton<sup>1</sup>, Appellant, against any who reject his claims. Burton first sued his attorney and, when the Honorable Robert L. Harris dismissed Burton's lawsuit for failure to timely file it within the statute of limitations, Burton commenced an action against Judge Robert Harris. Burton's claims have proceeded through the trial court and appellate court, until review was rejected by the Supreme Court. Four months following issuance of the mandate, Burton filed its motion for relief under CR 60(b). As will be demonstrated below, Burton has provided this Court with no new evidence that could not have been discovered in the exercise of reasonable diligence that would warrant review under CR 60(b). Burton's claims should be rejected and this Court should impose sanctions for Burton's abuse of the appellate process.

## II. STATEMENT OF THE CASE

### Procedural Posture

The posture of Burton's last suit against the Honorable Robert Harris was first decided in the appellate court under No. 41521-6-II in its

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<sup>1</sup> Mr. Burton is hereinafter referred to as "Burton" for simplicity purposes. No disrespect is intended.

Unpublished Decision at 164 Wn. App. 1002. Review was denied by the Supreme Court at 173 Wn.2d 1023 (2012).

Approximately four months later, after issuance of the Mandate, Burton filed its motion to vacate judgment under CR 60(b).

### III. STATEMENT OF THE FACTS

A statement of the facts is contained in the Unpublished Opinion issued by this Court on September 20, 2011, in Cause No. 41521-6-II. The balance of the facts will be discussed as needed in the body of the brief.

### IV. ARGUMENT

1. Burton failed to perfect the record for review.

As Appellant, Burton has the burden of perfecting the record on appeal, so that this Court has before it the information and evidence relevant to the issues that are presented for consideration. In fact, Burton has attached to its brief and amendments to its brief documents that may or may not have been presented for consideration by the trial court judge. Specifically, attached to the amended portion of Burton's brief are letters from Kittitas, Whitman and Walla Walla counties. These documents bear no stamp from Cowlitz County and Respondents are unable to verify whether these documents were presented to the trial court. It is Burton's obligation to cite to the Clerk's Papers the record that supports its factual

arguments. The copying and attachment of documents without a reference to the Clerk's Papers makes it impossible to Respondents to assure that these records are properly before this Court. In Harbison v. Garden Valley Outfitters, Inc., 69 Wn. App. 590, 849 P.2d 669 (1993), the court admonished a party for inappropriately including in the appendix to their opening brief [*documents*] not of the record, without indicating to the court in the brief that those matters were not part of the record and that a motion was pending to allow their consideration. *Id.* at 594-595.

Appellate courts have refused to consider issues where the appellant fails to perfect the record on appeal. In Wash. RAP 9.2, *see also*, Erdman v. Chapel Hill Presbyterian Church, 156 Wn. App. 827, 234 P.3d 299 (2010) (where court held appellate bears the burden of perfecting the record so that the reviewing court has before it all the evidence relevant to the issue and matters and matters not in the record will not be considered) at 838-839.

Even in those circumstances where Burton does cite to the record the citation is frequently to multiple documents. In paragraph 4, Page 7 of Burton's brief, he cites "CP 43,44, 45, and 58." Such citations leave the

court and reader to guess what is the support.<sup>2</sup> This should refuse to review issues where Burton has failed to provide support or specific citation to the record. Erdman, *supra*.

2. Burton has failed to satisfy the procedural requirements of relief under CR 60(b).

Burton has made several unsupported allegations against defense counsel and the trial court. Burton has not, however, addressed the central issue in this case, the requirements for review under CR 60(b). Burton's failure to demonstrate its entitlement ends review and its appeal must be dismissed.

CR 60(b) authorizes a court to vacate a judgment on the basis of "[**n**ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under CR 60(b).]" A court will not grant vacation under this rule unless the **newly discovered evidence** is material. [*emphasis added.*] Vance v. Offices of Thurston County Comm'rs, 117 Wn. App. 660, 671, 71 P.3d 680 (2003). Moreover, a court must reject a motion unless the moving party can demonstrate the inability to timely discover the evidence through the exercise of due diligence. Id.

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<sup>2</sup> See Appellant's Brief, p 7, paragraph 4.

In this case, Burton has failed to show the relevance a response to a public record disclosure request has to the selection of judges. Plaintiff must demonstrate the legal significance of its evidence. The exhibit attached to Plaintiff's CR 60(b) motion only shows that Skamania did not have a document responsive to Mr. Burton's request. It does provide the necessary link to support a motion for relief from judgment.

It is important to note again that Appellant has previously argued its claim that the transfer of the case to Cowlitz County was error. That claim was rejected by the Court of Appeals in Cause 41521-6-II following transfer by the Supreme Court.

### 3. Miscellaneous Issues.

Burton has raised and reargued issues previously considered by the Court of Appeals regarding the propriety of Judge Warning hearing the instant action. To the extent these issues have been addressed by the Court previously, the law of the case doctrine applies. This Court has previously considered and rejected claims that Judge Warning acted improperly in granting Clark County's motion for summary judgment.

The present action involves the same trial court cause number, the same parties and the same arguments raised and resolved previously. Under the law of the case doctrine, this Court has held that a principle of



law will be followed in subsequent stages of the same litigation. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).


4. Frivolous Action.

This appeal does not present an arguable basis for relief from judgment. Appellant has merely reargued its prior case. This Court should award attorney's fees as a sanction for Appellant's actions. An action or motion is frivolous if there are no "debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there is no reasonable possibility of success. Miller Casualty Insurance v. Briggs, 100 Wn.2d 9, 15, 665 P.2d 887 (1983).

V. CONCLUSION

Clark County respectfully requests this Court to reject Burton's claims and affirm the determination of the trial court denial of Burton's motion for relief under CR 60(b) and award Respondents their costs and attorney's fees.

Respectfully submitted this 14<sup>th</sup> day of June, 2013.

  
\_\_\_\_\_  
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