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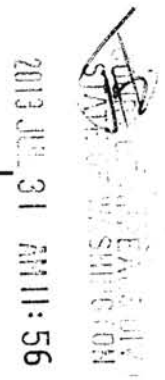
No. **699962-0 SEA**

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON



RODOLFO APOSTOL, Appellant

v.

RONALD WASTEWATER DISTRICT, Respondent

BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other Jurisdictions

Statutes

Rules and Regulations

Other Authorities

I. INTRODUCTION

This is appellant Rodolfo Apostol's ("Apostol") second appeal to this Court regarding his dismissed wrongful termination claims against Ronald Wastewater District ("the District"). The Honorable Jeffrey M. Ramsdell dismissed those claims after two separate summary judgment hearings in March and April, 2010. Those orders of dismissal were then affirmed by this Court on July 5, 2011[1], and Apostol's Petition for Review was denied by the Supreme Court on January 5, 2012.[2] It cost the District over $185,000.00 to defend Apostol's dismissed claims through denial of his petition for review to the Supreme Court.[3]

In January 2012, Apostol retained new counsel to bring a Motion to Vacate the prior judgments of the Superior Court.[4] The sole basis for Apostol's motion was his claim that he was "mentally incompetent" to represent himself in the prior lawsuit, because (1) an administrative law judge ruled after his wrongful termination claims were dismissed that he was "disabled" for purposes of receiving Social Security benefits, and (2) based on assorted declarations of individuals retroactively attesting to his "incompetence." He argued that, under CR 60(b)(11), "extraordinary circumstances" were present such that the prior judgments of Judge

[1] CP 1419-1437
[2] CP 1735
[3] CP 1599-1600
[4] CP 1479

Ramsdell should be vacated for reasons justifying relief. Judge Ramsdell denied the motion to vacate, giving rise to this second appeal.[5]

Much of Apostol's current brief re-argues why his various theories for wrongful termination should be revived. However, those arguments are irrelevant here, since dismissal of those claims has been affirmed on appeal. Of the three "assignments of error" Apostol argues justify a reversal of the trial court's denial of his motion to vacate,[6] only the third is relevant because the first two pertain to his prior appeal. The sole issue for review is whether the trial court abused its discretion when it denied Apostol's motion to vacate.

Although not easy to follow, the crux of Apostol's argument on appeal is this:

> Does the finding of an administrative law judge in 2011 that Apostol is mentally "disabled" for purposes of a claim for Social Security disability benefits (and has been since 2005), as well as post-judgment declarations from individuals attesting to his disability, justify vacating the summary judgments of dismissal against Apostol because he was "incompetent" (i.e. too mentally disabled) to represent himself during his wrongful termination lawsuit?

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[5] CP 1754-55

[6] Those are: (1) that the trial court failed to correctly apply several employment statutes; (2) that the trial court erred in denying Apostol's supporting declarations in his original summary judgment hearing; and (3) that the trial court erred in denying his Motion to Vacate and for a new trial given that "extraordinary circumstances" existed which warranted relief under CR 60(b)(11).

As shown below, the clear answer is that the trial court properly exercised its discretion by denying Apostol's motion to vacate.

II. STATEMENT OF ISSUE

1. Whether the trial court abused its discretion when it denied Apostol's Motion to Vacate based on the argument he was "incompetent" while representing himself *pro se* between 2008 (when his suit was filed) and 2010 (when his suit was dismissed).

III. STANDARD OF REVIEW

Proceedings to vacate judgments are equitable in nature, and the Court should exercise its authority liberally to preserve substantial rights and to do justice between the parties. *In re Marriage of Hardt*, 39 Wn.App. 493, 496 (Div. 3, 1985). The granting of a motion to vacate a judgment is directed to the discretion of the trial court, and will not be reversed in the absence of a manifest abuse of that discretion. *Gustafson v. Gustafson*, 54 Wn.App. 66, 70 (Div. 1, 1989).

IV. ARGUMENT

A. The trial court properly denied Apostol's Motion to Vacate and did not abuse its discretion in so doing.

1. There are no "extraordinary circumstances" present which justify vacating the underlying judgments which dismissed Apostol's claims over three years ago.

CR 60(b)(11) is a "catch all" provision authorizing judgments to be vacated for "any other reason justifying relief." The use of the catch all provision "is confined to situations involving *extraordinary circumstances* not covered by any other section of the rule." *Summers v. Dept. of Revenue*, 104 Wn.App. 87, 14 P.3d 902 (Div. 1, 2001). Below, Apostol sought to justify vacating the judgments of dismissal from 3 years ago on the grounds that he was "incompetent due to mental illness" at the time he represented himself.

In opposing Apostol's motion to vacate in the trial court, the District argued that several issues needed to be addressed when ruling on Apostol's retroactive claim of "incompetence":

(1) Who is "competent" to testify and/or represent themselves *pro se* in a civil action?

(2) What duty does a trial court have to assess the competence or capacity of a *pro se* plaintiff?

(3) What evidence was there during the pendency of the trial court litigation that Apostol was incompetent to represent himself?

(4) What new evidence is there that Apostol was incompetent to represent himself during the pendency of the trial court litigation?

(5) What does Washington Law say about the "post-judgment" declarations of Doctors which find the retroactive "incompetency" of a litigant, and their effect on prior judgments on the merits?

Each of these questions is addressed below.

a. Under Washington law, Apostol was legally "competent" to represent himself *pro se* in his civil lawsuit against the District.

Apostol argued that he was both (1) incompetent to represent himself and (2) incompetent to testify as a witness during the trial court action. Washington law establishes he was neither.

(i) Washington Standard for Legal "Competence" to represent oneself *Pro Se*.

In Washington, mental competence of litigants is presumed. *Vo. v. Pham*, 81 Wash.App. 781, 784, 916 P.2d 464 (Div.1, 1996). In that case, the Court considered the test for a *pro se* civil litigant's competency which would require a Court to step in to appoint a guardian *ad litem*. The party, a defendant in the quiet title action, exhibited bizarre behavior at trial. Nevertheless, the court declined to conduct a competency hearing or appoint a guardian *ad litem* because it felt it did not have a sufficient record, including psychiatric evaluations. After judgment was entered against the defendant, she appealed claiming the court erred by failing to initiate a competency hearing and to have a guardian appointed. The

Court of Appeal agreed. In doing so, it considered the applicable standard for determining competency of a civil litigant by citing the Supreme Court in *Graham v. Graham*, 40 Wn.2d 66-67, 240 P.2d 564 (1952):

> *Graham* teaches that the court should appoint a guardian ad litem for a litigant when it is "reasonably convinced that a party is not competent, understandingly and intelligently, to comprehend the significance of legal proceedings and the effect and relationship of such proceedings in terms of the best interests of such party litigant."

Here, there was no evidence during the trial court proceeding that Apostol failed "understandingly and intelligently, to comprehend the significance of legal proceedings and the effect and relationship of such proceedings in terms of [his] best interests." Consider the following facts:

- Apostol clearly knew the significance of the legal proceedings such that he filed suit because "[he] feared that if [he] did not file the lawsuit then, the statute of limitations would expire." (CP 1495, Apostol Declaration at 11:22-23)
- Apostol's Complaint alleged 13 causes of action against the District;[7]
- Apostol appeared at each hearing noted with the court;
- Apostol responded to written discovery;

[7] CP 1422-23

- Apostol corresponded back and forth with the District's counsel[8], including stating that he would "follow the Local Rules of the Superior Court for King County"[9];

- Apostol responded to the District's motions for summary judgment, and represented himself at the hearings;

- Apostol timely filed a notice of appeal, authored his appellate briefs, and argued his appeal;

- Apostol petitioned the Supreme Court for review, and authored the petition;

- Apostol filed at least two other lawsuits *pro se* at the same time he sued the District for wrongful termination.[10]

The fact that an administrative law judge found in June 2011[11] that Apostol had anxieties sufficient to qualify for a "disability" with the Social Security Administration--a proceeding conducted after the dismissal of his claims and in which the District did not participate--does not change the fact that he was competent to proceed *pro se* as a civil litigant between August 2008 and April 2010. Neither do the declarations submitted from individuals who had no contact with him during that period.

(ii) Apostol also met the Washington Standard for Legal "Competence" to Testify.

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[8] A true and correct copy of email correspondence between the District's counsel and Apostol is found at CP 1622-1679, the Sawyer Declaration as Exhibit 2(a)-(q).
[9] CP 1632
[10] CP 1600, 1613-20
[11] CP 1499-1503

In Washington, adult witnesses are presumed competent to testify. *State v. Smith*, 97 Wn.2d 801, 802-03 (1982). To be legally competent to testify, one must be of "sound mind and discretion." RCW 5.60.020. Those of "unsound mind," and those "incapable of receiving just impressions of the facts or of relating to them truly" are incompetent to testify. RCW 5.60.050. To be of "unsound mind," means a total lack of comprehension or the inability to distinguish between right and wrong. *State v. Johnston*, 143 Wash. App. 1, 13 (2007). Just because a witness receives treatment for mental disorders is not sufficient in and of itself to demonstrate that he is of "unsound mind." *Id.* at 19.

The Washington Supreme Court has defined an "unsound mind" as follows:

> [W]e think it must include those persons only who are commonly called insane; that is to say, those suffering from some derangement of the mind rendering them incapable of distinguishing right from wrong. It cannot include within its terms the mere ignorant or uneducated, nor those who are incapable of receiving all of the impressions within the comprehension of those more commonly gifted. In other words, the statutory term refers to those who are without comprehension at all, not to those whose comprehension is merely limited.

State v. Wyse, 71 Wash.2d 434, 436, 429 P.2d 121 (1967)

Accordingly, the threshold for witness competency is very low. An individual must understand the nature of the oath to tell the truth, and he must be capable of giving a somewhat coherent account of his or her observations. *State v. Johnston, supra*, 143 Wash. App. at 18-19. That test, as applied to Apostol, does not suggest he was "incompetent" to testify in the trial court.

b. The trial court had no cause to have Apostol's competency assessed given his actions during the lawsuit.

Under Washington law, a plaintiff has a constitutionally protected right to represent himself in a court of law, and is presumed to be competent to do so. In undertaking that task, the *pro se* plaintiff is presumed to know the laws and correct procedure, and is held to the same standard as other litigants. *In Re Marriage of Olson*, 69 Wn.App. 621, 626 (Div. 1, 1993). Under RCW 4.08.060, a trial court judge may appoint a guardian whenever an incapacitated person is a party to litigation in a superior court. However, the Court need not act *sua sponte* to appoint a guardian unless it is "reasonably convinced of the mental incompetency of such party." *Graham v. Graham*, 40 Wn.2d 66-67, 240 P.2d 564 (1952). The determination of witness competency rests primarily with the trial judge who sees the witness, notices his manner and demeanor, and considers his or her capacity and intelligence. *State v. Swan*, 114 Wn.2d

613, 645 (2003). A court does not err by failing to *sua sponte* conduct a competency hearing, if the record reflects that the witness was reasonably capable of recalling and recounting the events in question. *State v. Johnston, supra*, at 14.[12]

There was no evidence during the trial court proceedings that Apostol was a person of "unsound mind," or incompetent to represent himself under the *Graham* standard. Apostol neither claimed he was mentally incompetent to proceed on his own behalf, nor did he exhibit any signs of being unable to act as his own counsel. Indeed, before he brought this action against the District, Apostol brought four other actions *pro se* in State and Federal Court. (CP 1605-1619) At no time did Mr. Apostol inform the Court or opposing counsel that he was incapable of representing himself during the lawsuit. (CP 1602 at paragraph 7)

In all correspondence with Apostol, defense counsel had no reason to suspect that Mr. Apostol was legally incompetent. (CP 1622-1679) Although he was combative, and unrealistic about his case, there is nothing in that correspondence to suggest he failed to comprehend "the significance of legal proceedings and the effect and relationship of such proceedings on him."

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[12] Washington law accords with FRCP 17. Where a party's conduct in court and out of court does not raise so serious a question of his mental competence at the time of trial to require a collateral judicial inquiry as his actions, the Court has no duty to conduct a Rule 17 hearing. *Hudnall v. Sellner*, 800 F.2d 377 (4th Circuit 1986), cert. den. 479 U.S. 1069 (1987).

c. The "new evidence" submitted by Apostol (that he was incompetent to represent himself during the pendency of the trial court litigation the trial court) was weighed by the Trial Court and the Motion to Vacate was properly denied.

The trial court action lasted from August 28, 2008 (Complaint filed) to April 23, 2010 (dismissal of remaining claims on Summary Judgment). To support his motion to vacate under CR 60(b)(11), Apostol submitted the declarations of five individuals to support his claim that he was 'incompetent" to represent himself and/or testify in that action. All of these declarations were admitted by the trial court, and considered by Judge Ramsdell when ruling on Apostol's motion to vacate.[13] As shown below, there are significant problems with the declarations. Only one of the declarants (his personal physician, Dr. Mayeda) actually saw or spoke to Apostol during the pendency of his lawsuit, and Dr. Mayeda's medical records show no evidence of Apostol's claimed "incompetency."

(i) Susan Mindenberghs. An attorney, she represented Apostol from May 2005-September 2005. On the basis of a phone call she had with him in September 2005, she somehow concluded Apostol was incompetent to represent himself in *August 2008*! Other than that, she had

[13] The District unsuccessfully moved to strike each of these Declarations. All Declarations submitted by Apostol in support of his Motion to Vacate were admitted by Judge Ramsdell prior to his denial of Apostol's motion to vacate. (CP 1766-67)

no contact with Apostol during the time his claims were litigated below. (CP 1508-1509)

(ii) Stephen Paulis. Last worked with Mr. Apostol in 2003, when he retired. He testified that Apostol's work performance was "superb." Yet his declaration says nothing about his interaction with Mr. Apostol between August 2008 and April 2010, when Apostol claims he was incompetent to represent himself. (CP 1511-1513)

(iii) Dr. David Dixon. He evaluated Mr. Apostol in 2006, and later in February 2007 for purposes of his claim for workplace injuries before the Department of Labor and Industries (which he lost). (CP 1517) Thereafter, he never saw Mr. Apostol again until June of 2012 when he was asked to evaluate him by Apostol's new lawyer (5 years later!). (CP 1517-18) On the basis of that "post-judgment, post-appeal, and post-petition evaluation," he somehow concluded that Mr. Apsotol was incompetent to represent himself from August 2008 to April 2010. Although he opined that "Mr. Apostol's mental illnesses likely rendered him unable to represent himself in a Court or any adversarial proceeding [since] 2005...," he failed to establish that he had any contact whatsoever with Apostol from February 20, 2007 to June 2012. (CP 1519)

(iv) Dr. Hanan Berman. His declaration stated that he treated Mr. Apostol for anger management in 1997 and 1999, and then again

briefly in the 2006. (CP 1545) After that time, he never saw Apostol. However, in response to a letter from Apostol on November 28, 2008 for a "statement" in support of his L&I claim, Dr. Berman sent a letter to the Department of Labor & Industries which states only that Apostol is "likely acutely anxious and depressed in response to his ongoing situation and may well continue to have an adjustment disorder that is in direct response to the events of recent years." (CP 1681-1685) There is nothing in that letter – which was contemporaneous with Apostol's trial court action here – about Apostol being "incompetent," of "unsound mind," or lacking capacity to represent himself in those proceedings.

(v) Dr. Kenneth Mayeda. Is Apostol's primary care physician, and has been "for more than 25 years." He is not a mental health professional, although he is the only health professional who *actually saw* Apostol during the time his lawsuit was pending in this court. In his ddeclaration, he *never* testifies that Apostol was incompetent to represent himself or testify during the period of this lawsuit. (CP 1553-54) For the balance of his ddeclaration, Dr. Mayeda speaks about his treatment of Mr. Apostol prior to February 2006. (Id.)

Through third party discovery, the District obtained the medical records of Dr. Mayeda from March 2008 through July 2009 (when

defendant obtained copies of Dr. Mayeda's medical records).[14] During the period of Mr. Apostol's lawsuit, there is absolutely nothing in Dr. Mayeda's medical records indicating either (1) he questions Mr. Apostol's "competency," or (2) that he made any referrals for further assessment by any mental health professionals. The only referrals made during this time period were to Dr. Stan Lee for worsening diarrhea, and to Dr. David Chang for sleep apnea. (CP 1701-13)

Other than these Declarations, the only support for the contention that Apostol was "incompetent" to represent himself during his lawsuit is the "Decision" of the Social Security Administration's administrative law judge, dated June 22, 2011. That decision found:

> "[Apostol] has the following severe impairments: depressive disorder not otherwise specified; personality disorder with passive aggressive, negativistic, obsessive compulsive, and avoidant traits, and PTSD." (CP 1473)

Whatever determinations were made by the administrative law judge, he did <u>not</u> determine that Apostol was "incompetent" to represent himself in that (or this) action.[15] Indeed, Apostol fails to cite a single case for the proposition that a finding of mental "disability" by the Social Security Administration, by itself, automatically operates to make a

[14] True and correct copies of the relevant medical records from Dr. Mayeda's files, including the Release signed by Apostol, are found at CP 1688-1713.

[15] If he had, that would be truly strange given that Apostol represented himself *pro se* in the action for Social Security disability benefits.

plaintiff "incompetent" to represent himself *pro se* in a civil action. Unfortunately, Apostol's argument is even more tenuous. He argues that that a finding of mental "disability" by the Social Security Administration, obtained after dismissal of a collateral civil action on the merits by a trial court, and affirmed on appeal, is the type of "extraordinary circumstance" which compels vacating the trial court's judgment under CR 60(b)(11).

2. Apostol's Reliance on *In re Meade* is misplaced.

Citing *In re Meade*, 103 Wn.2d 374 (1985), Apostol seeks to undo years of unsuccessful litigation by submitting declarations from vvarious individuals that he was "mentally incompetent" at the time he was prosecuting his civil claims against the District. In *Meade*, the Washington Supreme Court extended the standard used to determine whether a criminal defendant is competent to stand trial to determine whether an attorney is competent to appear in bar disciplinary proceedings. That standard requires that the person is (1) capable of properly understanding the nature of the proceedings against him, and (2) capable of rationally assisting his legal counsel in the defense of his cause. *Id.* at 380.

The Supreme Court explained that attorney disciplinary proceedings must meet the same due process requirements as a criminal proceeding. "If an attorney does not have the requisite mental competency to

intelligently waive the services of counsel or to adequately represent himself or herself, the attorney's due process right to a fair hearing is violated if the attorney is allowed to appear *pro se*." *Citing In re Ruffalo,* 390 U.S. 544, 550 (1968); *State v. Kolocotronis*, 73 Wn.2d 92, 99 (1968).

Importantly, Meade's behavior was noted by the *initial* Hearing Officer to be "sufficiently inappropriate" to question his competency. Coupled with the later determination of Meade's psychiatrist that Meade was not capable of representing himself during the time of the disciplinary hearings, the Supreme Court determined that Meade did not have a fair hearing when he appeared *pro se* in the earlier disciplinary hearings, and ordered that the findings of the hearing officers in the earlier proceedings be vacated. *In re Meade*, 103 Wn.2d at 381-382.

Apostol seeks to broaden the holding in *Meade* to include civil cases where a mental health professional determines (after judgment) that a *pro se* plaintiff was "incompetent" to represent himself during the time his action was pending. If such an "expert" opinion is rendered, Apostol argues, then the judgments against the *pro se* plaintiff must be vacated because he had the ineffective assistance of counsel (himself). However, *Meade* is distinguishable in several important ways.

(a) Unlike a criminal defendant or a lawyer subject to a disciplinary proceedings, Apostol's status as a *pro se* plaintiff in a civil lawsuit does not guarantee him the right to effective assistance of counsel.

Apostol's reliance on *Meade* and his claim of "entitlement to Due Process" are misplaced. Under Washington law, Apostol has a constitutional right to bring a civil lawsuit and to represent himself *pro se*. There is a recognized difference between parties to civil actions and defendants in criminal or disciplinary proceedings. First, is the right to the effective assistance of counsel in a criminal proceeding guaranteed under both the United States and Washington State constitutions.[16] If a party does represent himself in a criminal proceeding, then he must be legally competent to do so. Otherwise, the representation is "ineffective", and violates Constitutional due process concerns.

In *Meade*, the Washington Supreme Court held that attorney disciplinary hearings must also meet the requirements of due process. *In re Meade*, 103 Wn.2d at 381, c*iting In re Ruffalo,* 390 U.S. 544, 550 (1968). Those requirements include that the lawyer who is the subject of disciplinary action must have "competent" counsel at disciplinary hearings for the hearing to be "fair." If the lawyer represents himself *pro se* at his own disciplinary proceeding, he must be legally competent. The Washington Supreme Court insisted in *Meade* that no findings against a disciplined lawyer would stand (and would be vacated) if that lawyer who

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[16] United States Constitution, Sixth Amendment, and Washington State Constitution, Article I, Section 22.

represented himself *pro se* was not legally competent at the time of the disciplinary proceeding against him.

Here, Apostol's lawsuit against his former employer does not require the same protection. As a civil litigant, he does not have a constitutional right to counsel. There is no threatened state action against him which constitutes punishment or threatens his liberty. His is simply a wrongful termination lawsuit for which he decided to represent himself *pro se*. He cites no authority for the proposition that the right to counsel extends to *pro se* civil litigants like him. Accordingly, if he acts as his own lawyer, and unless there is some evidence of incapacity or incompetence ascertainable by the trial court, he is presumed to be competent to represent himself fully and will be held by the court to the same standard as a licensed attorney. *In Re Marriage of Olson*, 69 Wn.App. 621, 626 (Div. 1, 1993).

(b) Unlike in *Meade,* Apostol gave no indication of "incompetence" or "mental disability" during his lawsuit to justify vacating the judgments dismissing his claims.

Even if Apostol had a right to counsel as a civil litigant, his reliance on *Meade* is still misplaced. Apostol exercised his right to act *pro se* because he could not find an attorney to take his wrongful termination

case.[17] In the course of self-representation, he: (1) filed his Complaint, (2) filed pleadings, (3) responded to discovery, (4) responded to motions that were brought against him, (5) appeared in Court, (6) affirmatively stated he would follow the rules of Superior Court, and (7) communicated with opposing counsel. Before his claims were dismissed in March and April 2010, he never mentioned that he was "mentally incompetent" or too "mentally disabled" to represent himself in during his lawsuit. He had no outbursts or demonstrations which indicated to opposing counsel or the Court that he lacked the competence to represent himself.

This is a key distinction which the Washington Supreme Court has recognized to distinguish the outcome in *Meade* from other cases. In the matter of *In Re Koehler*, 110 Wn.2d 24 (1988), the State Bar Association initiated disciplinary proceedings against Koehler following complaints by several clients. In defending these claims, Koehler appeared *pro se* at the initial fact finding stage, and the hearing officer found that the Bar Association counsel had met the burden of proof on every count charged. She was represented by counsel at the sanction phase, and the Board adopted the hearing examiners findings. Koehler appealed.

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[17] CP 1495, lines 21-22.

Pending that appeal, however, another disciplinary proceeding against Koehler commenced. Citing *Meade*, Koehler's attorney argued that because a psychiatrist had recently deemed her to be suffering from "chronic hypomania," that her appeal from the prior disciplinary action should be stayed pending a competency hearing. Her attorney also argued that the findings of the disciplinary hearing held over one year before should be vacated because she acted *pro se* in that hearing.

The Supreme Court declined to stay the pending appeal of the prior proceeding, and rejected the argument that Koehler was "mentally incompetent" to defend herself at the earlier proceeding. The Court considered two affidavits in its decision: the affidavit of the hearing officer in the prior action, and the affidavit of Koehler's psychiatrist. The hearing officer stated that, *from his firsthand observation*, Koehler appeared to be competent at all times. Addressing the psychiatrist's affidavit, the Court stated:

> Against the hearing officer's firsthand observation, we have only an affidavit of Dr. Steiert giving his opinion that Koehler would have been incapable of competently representing herself 1 year before she consulted him for treatment. This amounts to speculation about Kohler's former mental condition and does not convince us of her incompetency when contradicted by the

> firsthand observations of the hearing officer.

Koehler, *supra*, 110 Wn.2d at 30.

Under *Koehler*, even if there were a right to the effective assistance of counsel for civil litigants acting *pro se*, there must still be some manifestation of "incompetency" in the trial court proceeding before the reviewing court will vacate the orders or decisions of the trial court. Having a "post-judgment" declaration from a mental health professional which attests retroactively to the incompetence of the *pro se* plaintiff is not enough.

In the trial court, Judge Ramsdell observed Apostol firsthand during his several appearances before the Court, and read his submissions. These included two hearings on motions to compel (January 9, 2009, April 10, 2009), as well as two lengthy hearings on summary judgment motions (March 12, 2010 and April 23, 2010). Nothing said or done by Apostol during those appearances suggested he was legally incompetent to represent himself because of "mental disability." At no time did Judge Ramsdell question Apostol's competency. Moreover, Apostol never informed the Court or counsel that he was mentally disabled, or unable to represent himself *pro se*.[18]

[18] CP 1602, at paragraph 7.

Against this, Apostol offered the Declaration of David Dixon that, based on his meetings with Apostol in 2006, 2007, and 2012 that he suffers from PTSD and "Generalized Anxiety Disorder." (CP 1518-19) Further, based on these meetings with Apostol, he believes these "mental illnesses" rendered Apostol unable to represent himself at any time since 2005. (*Id.* at 1519) However, Dr. Dixon did not treat, observe, or assess Apostol during the very period when Apostol's case was pending before the trial court: August 2008-May 2010. Dr. Dixon admits that he last observed Apostol on February 20, 2007, some 18 months *before* Apostol filed his lawsuit against Ronald Wastewater District. (CP 1518) The next time he evaluated Apostol was in June 2012—over two years *after* Apostol's claims were dismissed on summary judgment! *Id.*

Judge Ramsdell properly weighed the evidence submitted by the parties and denied Apostol's motion to vacate under CR 60(b)(11). As stated in his order:

> Despite any mental infirmity that Mr. Apostol may have suffered from when pursuing his claim originally before this court, the records in the court file, Mr. Apostol's correspondence with opposing counsel, and Mr. Apostol's conduct in open court before the undersigned judge leads this court to conclude that Mr. Apostol was sufficiently capable of representing himself

> so as to make the relief requested under CR 60(b)(11) unwarranted,[19]

Under *Koehler*, Dr. Dixon's declaration simply wouldn't be enough to vacate the prior orders of dismissal even if (1) Apostol had a right to counsel as a civil litigant, and (2) the obvious foundational problems of Dr. Dixon's retroactive diagnosis and opinions were resolved. Absent some manifestation of mental disability or incompetence during the three years when Apostol's case was pending, it would be extremely harsh and prejudicial to vacate the orders of dismissal after such a lengthy and expensive lawsuit for the District.

V. CONCLUSION

For the foregoing reasons, Apostol's motion to vacate under CR 60(b)(11) was properly denied. The trial court did not abuse its discretion when it denied Apostol's motion. There are no "extraordinary circumstances" to warrant vacating the judgments entered against Apostol more than three years ago. Although fortunate to obtain a disability determination from the Social Security Administration for his depression and anxieties in June 2011, that does not mean he was "incompetent" under Washington law when he represented himself *pro se* between

[19] CP 1765

August 2008 and April 2010. There was no evidence of such incompetence during the trial court action. Dr. Dixon's opinion that Apostol was not "competent" during his time before the trial court is contrary to the observations of the court and opposing counsel, as well as other evidence of Apostol handling his own case. Reversing the trial court's February 7, 2013 order would be manifestly unjust and prejudicial to Defendant.

RESPECTFULLY SUBMITTED this 30th day of July, 2013.

LAW OFFICE OF DANIEL P. MALLOVE, PLLC

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Scott R. Sawyer, WSBA #20582
Attorney for Respondent Ronald Wastewater District

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 copy of Brief of Respondent 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 30th day of July, 2013.

Meredith M. Klein, legal assistant
Law Office of Daniel P. Mallove, PLLC