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Appellate Case No.: 70831-7-1

**IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON DIVISION ONE**

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 FEB -3 PM 2:38

Appeal from Case No.: 12-2-02451-9

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH**

The Honorable Commissioner Tracy Waggoner presided 08/09/2013

The Honorable Judge George Bowen presided 08/28/2013

STACEY KINCHEN

Appellant,

V.

AMIN KORAYTEM

Respondent

OPENING BRIEF OF APPELLANT (AMENDED)

Submitted By:
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I. INTRODUCTION

Stacey Kinchen is appealing the Order denying his Motion for Order Vacating Judgment entered on August 9, 2013 in Snohomish County Superior Court.

In rendering their ruling, the Court stated that: Notice and Service was given as received at every step of proceedings and Defendant responded and participated; there was no lack of notice; the Court has Jurisdiction; there is no Bankruptcy stay and there is no basis to set aside Judgment, Motion is Denied. **(“CP”) at # 61, P. 198.**

The Court rendered their ruling after asking Amin Koraytem’s attorney, James Hawes, a question regarding **RCW 59.18.280** and Attorney James Hawes misleading the Court with his answer by misrepresenting the truthful facts of the case. **(“RP”) at P. 13-14.**

Stacey Kinchen is also appealing the Order denying his Motion for Revision entered on August 28, 2013 in Snohomish County Superior Court. **(“CP”) at # 78, P. 10.**

In rendering their ruling, the Court stated that: Regarding **RCW 18.27.010** and **RCW 18.27.020**, Amin Koraytem can hire an unregistered, unlicensed contractor and he can also collect for damages paid to the unregistered, unlicensed contractor. He can hire and pay anybody he wants and collect for it.

I. INTRODUCTION (CONTINUED)

More so, the Court stated that Amin Koraytem was not barred from collecting damages and retaining Stacey Kinchen's deposits in regards to **RCW 59.18.280** where he failed to mail a full specific statement for the basis of retaining Stacey Kinchen's deposits to his last known address.

The Court further stated that Stacey Kinchen was misapplying the law.

Stacey Kinchen challenges both orders and the judgment on both substantive and procedural grounds. The substantive challenge is based on the Superior Court's errant reliance on the misinterpretations and misrepresentations made by Amin Koraytem's attorney, James Hawes in seeking a judgment and denial of Stacey Kinchen's Motion for Order Vacating Judgment. Amin Koraytem's attorney, James Hawes grossly misrepresented in a successful effort to deceive and mislead the Superior Court.

Stacey Kinchen procedural challenge is against both orders and judgment and is based on gross impropriety of Amin Koraytem's attorney, James Hawes how he filed and served all documents throughout this entire case.

**II. ASSIGNMENT OF ERROR AND
ISSUES PERTAINING THERETO**

(A.) ASSIGNMENT OF ERROR:

- 2.1 Commissioner Tracy Waggoner eroded when she ruled that notice and service was given as received at every step of proceedings;
- 2.2 Commissioner Tracy Waggoner eroded when she ruled that Stacey Kinchen responded and participated;
- 2.3 Commissioner Tracy Waggoner eroded when she ruled that there was no lack of notice;
- 2.4 Commissioner Tracy Waggoner eroded when she ruled that the court had jurisdiction;
- 2.5 Commissioner Tracy Waggoner eroded when she ruled regarding **RCW 59.18.280** and furthermore; abused her discretion in doing so;
- 2.6 Commissioner Tracy Waggoner eroded when she ruled that there is no basis to set aside judgment;
- 2.7 Judge George Bowen eroded when he ruled regarding **RCW 18.27.010** and **RCW 18.27.020** that Amin Koraytem can hire an unregistered, unlicensed contractor and he can also collect for damages paid to the unregistered, unlicensed contractor;

**II. ASSIGNMENT OF ERROR AND ISSUES
PERTAINING THERETO (CONTINUED)**

- 2.8 Judge George Bowen eroded when he ruled that Amin Koraytem was not barred from collecting damages and retaining Stacey Kinchen's deposits in regards to **RCW 59.18.280** where he failed to mail a full specific statement for the basis of retaining Stacey Kinchen's deposits to his last known address;
- 2.9 Commissioner Tracy Waggoner and Judge George Bowen both eroded when they failed and refused to find that Amin Koraytem's attorney, James Hawes committed fraudulent acts to obtain their judgment and to get a denial regarding Stacey Kinchen's Motion to Vacate and Motion for Revision.

(B.) ISSUES PERTAINING TO ASSIGNMENT OF ERROR:

Issue 2.1A (Pertaining to error 2.1):

At the unlawful detainer action stage, is a landlord required to serve a three day notice prior to filing an unlawful detainer?

Issue 2.1B (Pertaining to error 2.1):

Can a landlord serve his own three day notice or must it be served in the same manner as service of summons in civil actions?

II. ASSIGNMENT OF ERROR AND ISSUES
PERTAINING THERETO (CONTINUED)

Issue 2.1C (Pertaining to error 2.1):

Prior to Amin Koraytem converting his unlawful detainer into a civil action, was he required to give notice of hearing?

Issue 2.2 (Pertaining to error 2.2):

Did Stacey Kinchen respond and participate at every step of proceedings?

Issue 2.3A (Pertaining to error 2.3):

Did Amin Koraytem satisfy the three day notice service requirement prior to filing his unlawful detainer action?

Issue 2.3B (Pertaining to error 2.3):

Did Amin Koraytem satisfy the notice requirement prior to converting his unlawful detainer action into a civil action?

Issue 2.4 (Pertaining to error 2.4):

Did Snohomish County Superior Court have subject matter jurisdiction?

Issue 2.5 (Pertaining to error 2.5):

Did Commissioner Tracy Waggoner error when she ruled regarding RCW 59.18.280 and did she abuse her discretion in doing so?

II. ASSIGNMENT OF ERROR AND ISSUES
PERTAINING THERETO (CONTINUED)

Issue 2.6 (Pertaining to error 2.6):

Did Commissioner Tracy Waggoner error when she ruled that there is no basis to set aside the judgment?

Issue 2.7 (Pertaining to error 2.7):

Regarding **RCW 18.27.010** and **RCW 18.27.020**, can a landlord hire an unregistered, unlicensed contractor and collect for damages paid to the unregistered, unlicensed contractor?

Issue 2.8 (Pertaining to error 2.8):

Regarding **RCW 59.18.280**, is a landlord barred from collecting damages and retaining a tenant deposit when the landlord failed to mail a full specific statement for the basis of retaining a tenant deposit to the tenant's last known address?

Issue 2.9 (Pertaining to error 2.9):

Did Amin Koraytem's attorney, James Hawes commit fraudulent acts to obtain their judgment and get a denial regarding Stacey Kinchen's Motion to Vacate and Motion for Revision?

III. STATEMENT OF THE CASE

This case that's before the Court originally commenced from an Unlawful Detainer action filed by Amin Koraytem, Respondent on January 27, 2012.

The filing of the Complaint along with the Eviction Summons would be the only Complaint filed by Amin Koraytem throughout the entire Unlawful Detainer proceedings and the Civil proceedings combined as there were no other Complaints filed. **("CP") at # 2, P. 285-289.**

On February 3, 2012, Amin Koraytem filed an Amended Eviction Summons without an Amended Complaint. **("CP") at # 7, P. 281-282.**

On February 8, 2012, Amin Koraytem filed a Second Amended Eviction Summons without an Amended Complaint. **("CP") at # 11, P. 277-278.**

On February 21, 2012, Stacey Kinchen filed his Answer and Response. In Stacey Kinchen's Answer and Response, he argued, challenging jurisdiction, deposits, damages and service among many of his other defenses. **("CP") at # 15, P. 266-267, ("CP") at # 16, P. 242-265.**

On March 6, 2012, Amin Koraytem filed a Third Amended Eviction Summons without an Amended Complaint and it was served by his attorney, James Hawes. **("CP") at # 22, P. 307-308.**

III. STATEMENT OF THE CASE (CONTINUED)

On March 6, 2012, an agreed Judgment was entered between Amin Koraytem and Stacey Kinchen. However; Stacey Kinchen didn't waive any rights whatsoever to challenge jurisdiction, deposits, damages, service or any other defense in the agreed Judgment. **("CP") at # 21, P. 309-310.**

On May 10, 2012, Amin Koraytem filed a Motion to Convert Case to Civil Action. **("CP") at # 27, P. 290-295.**

However; prior to Amin Koraytem's filing his Motion to Convert, he failed to file a **Motion for Leave of Court** as well as a **Motion to Amend** as set forth in **CR Rule 15 (a)** which he based his Motion to Convert. There are no such Motions throughout the entire case and record.

Amin Koraytem's Motion to Convert Case to Civil Action was heard and granted on May 22, 2012. **("CP") at # 30, P. 285-286.**

Stacey Kinchen failed to respond to Amin Koraytem's Motion to Convert Case to Civil Action and failed to appear for the hearing as Amin Koraytem failed to serve Stacey Kinchen with notice of hearing. **("CP") at # 29, P. 287.**

Stacey Kinchen first learned about Amin Koraytem's Motion to Convert and his failure to serve Stacey Kinchen with Notice of Hearing on or about August 7, 2013. **("CP") at # 63, P. 185-187.**

Amin Koraytem's attorney, James Hawes mailed notice to Stacey Kinchen's old address, P.O. Box 1597, Mukilteo, WA 98275.

III. STATEMENT OF THE CASE (CONTINUED)

James Hawes received returned mail at the address as Stacey Kinchen's Post Office Box had closed on April 30, 2012.

However; James Hawes proceeded with the Motion without notifying Snohomish County Superior Court that he had received return mail at Stacey Kinchen's Post Office Box.

James Hawes failed to even notify Stacey Kinchen by phone which James Hawes has Stacey Kinchen's phone number as it has always remained the same as filed on all of Stacey Kinchen's responses and pleadings. **("CP") at # 28, 288-289, ("CP") at # 62, P. 188-197.**

On June 25, 2012, Amin Koraytem filed a Motion for Summary Judgment. **("CP") at # 33, P. 273-277.**

On July 24, 2012, Stacey Kinchen filed an Opposition and Motion to Dismiss Plaintiff's Summary of Judgment and Civil Action.

Again, Stacey Kinchen argued, challenging jurisdiction, deposits, damages and service among many of his other defenses. **("CP") at # 37, P. 257-259.**

On July 25, 2012, Amin Koraytem's Motion for Summary Judgment was heard and granted. **("CP") at # 39, P. 253-255.**

On July 25, 2013, Stacey Kinchen filed a Motion to Vacate Judgment and Order to Show Cause pursuant to **CR 60 (b) (1), (5), (6), (9) and (11).** **("CP") at # 52, P. 242-247.**

III. STATEMENT OF THE CASE (CONTINUED)

In Stacey Kinchen's Motion to Vacate Judgment and Order to Show Cause he also argued the provisions of RCW 59.18.280, RCW 18.27.010 and RCW 18.27.020. ("CP") at #52, P. 242-247, ("RP") P. 3-9.

Amin Koraytem failed to respond to Stacey Kinchen's Motion to Vacate Judgment and Order to Show Cause.

However; Amin Koraytem's attorney, James Hawes appeared at the hearing. James Hawes misled the court on multiple issues such as RCW 59.18.280, etc. perjuring himself during the hearing. ("RP") P. 9-14.

On August 16, 2013, Amin Koraytem filed his Brief in Response to Stacey Kinchen's Motion to Vacate Judgment seven days after the hearing on August 9, 2013. ("CP") at # 64, P. 175-184.

However; the copy that Amin Koraytem served upon Stacey Kinchen was not the same copy as filed in court. The case numbers were different. ("APP") at Ex. C.

On August 19, 2013, Stacey Kinchen filed a Motion for Revision from the Order denying Motion to Vacate on August 9, 2013. ("CP") at # 65, P. 171-174.

In Stacey Kinchen's Motion for Revision and the hearing on August 28, 2013, Stacey Kinchen argued challenging, Amin Koraytem failure to mail Stacey Kinchen a statement within 14 days of moving out,

III. STATEMENT OF THE CASE (CONTINUED)

defectiveness of the Three Day Notice as Amin Koraytem alleges that he served it himself and he lacked proof of mailing by regular U.S. Mail, Amin Koraytem failure to serve Stacey Kinchen with Motion to Convert and Calendar Note, Amin Koraytem failure to apply deposits, Amin Koraytem filed fraudulent declarations and charged Stacey Kinchen for damages for work performed by a person that's not a registered or licensed contractor.

Unfortunately, no transcript for the oral argument at the August 28, 2013 hearing exists. This is because the Snohomish County Court never has a court reporter perform any recording or transcript from any hearing on the regular Civil Motions Calendar unless special arrangements are made in advance. No such special arrangements were made.

IV. LEGAL AUTHORITY AND ARGUMENT

Regarding Issue 2.1A: A landlord is required to serve a Three-Day Notice pursuant to RCW 59.12.030(3) prior to filing an Unlawful Detainer action.

In its entirety, RCW 59.12.030(3) states:

When he or she continues in possession in person or by subtenant after a default in the payment of rent, and *after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided)* in behalf of the person entitled to the rent upon the person owing it, has remained uncomplished with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due.

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

In *Marie Weeks Sowers v. Alex Lewis*, 49 Wn. 2d 891, the Supreme Court held that, there must be a substantial compliance with the requisites of such a statute. Citing, *Provident Mut. Life Ins. Co. v. Thrower*, 155 Wash. 613, 285 Pac. 654 (1930). Where a special statute provides a method of process, compliance therewith is jurisdictional. Citing, *Little v. Catania*, 48 Wn. (2d), 297 P. (2d) 255 (1956).

As a jurisdictional condition precedent, where a tenant is in default in the payment of rent, the statute requires (1) that the tenant be served with a written notice to pay the rent or, in the alternative, vacate the premises within three days from the date of service (**RCW 59.12.030(3)**).

Regarding Issue 2.1B: There are no provisions set forth in **RCW 59.12.030(3)**, **RCW 59.12.040** and **CR Rule 4(g)** that authorizes or allows a landlord to serve his own Three-Day Notice.

RCW 59.12.030(3), directs a landlord to serve his Three-Day Notice in the manner set forth in **RCW 59.12.040**.

There are no provisions in **RCW 59.12.040** that directs a landlord on service of a Three-Day Notice.

However; it does direct a landlord to file his Proof of Service in the same manner as set forth in Proof of Service of Summons in a Civil action.

Proof of Service of Summons in a Civil action is governed by **CR Rule 4(g)** which has no provisions for a landlord to file Proof of Service of Summons their self.

In its entirety, **RCW 59.12.040** states:

Any notice provided for in this chapter shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he or she be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his or her place of residence; or (3) *if the person to be notified be a tenant, or an unlawful holder of premises, and his or her place of residence is not known, or if a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also*

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated. Service upon a subtenant may be made in the same manner: PROVIDED, That in cases where the tenant or unlawful occupant, shall be conducting a hotel, inn, lodging house, boarding house, or shall be renting rooms while still retaining control of the premises as a whole, that the guests, lodgers, boarders, or persons renting such rooms shall not be considered as subtenants within the meaning of this chapter, but all such persons may be served by affixing a copy of the notice to be served in two conspicuous places upon the premises unlawfully held; and such persons shall not be necessary parties defendant in an action to recover possession of said premises. Service of any notice provided for in this chapter may be had upon a corporation by delivering a copy thereof to any officer, agent, or person having charge of the business of such corporation, at the premises unlawfully held, and in case no such officer, agent, or person can be found upon such premises, then service may be had by affixing a copy of such notice in a conspicuous place upon said premises and by sending a copy through the mail addressed to such corporation at the place where said premises are situated. **Proof of any service under this section may be made by the affidavit of the person making the same in like manner and with like effect as the proof of service of summons in civil actions.** When a copy of notice is sent through the mail, as provided in this section, service shall be deemed complete when such copy is deposited in the United States mail in the county in which the property is situated properly addressed with postage prepaid: PROVIDED, HOWEVER, That when service is made by mail one additional day shall be allowed before the commencement of an action based upon such notice. RCW 59.18.375 may also apply to notice given under this chapter.

In its entirety, **CR Rule 4(g)** states:

- (g) Return of Service. Proof of service shall be as follows:
- (1) If served by the sheriff or his deputy, the return of the sheriff or his deputy endorsed upon or attached to the summons;
 - (2) If served by any other person, his affidavit of service endorsed upon or attached to the summons; or

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

- (3) If served by publication, the affidavit of the publisher, foreman, principal clerk, or business manager of the newspaper showing the same, together with a printed copy of the summons as published;
or
- (4) If served as provided in subsection (d)(4), the affidavit of the serving party stating that copies of the summons and other process were sent by mail in accordance with the rule and directions by the court, and stating to whom, and when, the envelopes were mailed.
- (5) The written acceptance or admission of the defendant, his agent or attorney;
- (6) In case of personal service out of the state, the affidavit of the person making the service, sworn to before a notary public, with a seal attached, or before a clerk of a court of record.

Regarding Issue 2.1C: Amin Koraytem was required to serve Stacey Kinchen with Notice of Hearing on his Motion to Convert Unlawful Detainer to Civil action pursuant to CR Rule 15(a) in which he based his Motion and CR Rule 5(a).

In part, CR Rule 15(a) states:

If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties.

In its entirety, CR Rule 5(a) states:

(a) Service-When Required. Except as otherwise provided in these rules, *every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.* No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in rule 4.

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

Regarding Issue 2.2: Stacey Kinchen (*did not*) respond and participate at every step of proceedings.

Stacey Kinchen did not file a response to Amin Koraytem's Motion to Convert Unlawful Detainer to Civil action as Amin Koraytem failed to serve Stacey Kinchen with Notice of Hearing.

Amin Koraytem's Calendar Note states that he mailed Motion; Declaration, Calendar Note and (Proposed Order) to Stacey Kinchen last known address of (P.O. Box 1597, Mukilteo, WA 98275). (See Calendar Note, ("CP") at # 28, P. 288-289).

Stacey Kinchen's P.O. Box closed on April 30, 2012. Amin Koraytem got return mail at Stacey Kinchen's P.O. Box and failed to inform Snohomish County Superior Court. (See statement from Post Office, ("CP") at # 62, P. 188-197).

Stacey Kinchen failed to appear at the hearing as the hearing was unknown to him. The minute entry shows that Stacey Kinchen (*did not*) appear. (See Minute Entry, ("CP") at # 29, P. 287).

More so, Stacey Kinchen argues that Amin Koraytem fraudulently stated on his Calendar Note that he mailed Stacey Kinchen a (Proposed Order) on his Motion to Convert Unlawful Detainer Case to Civil Action as (there are no Proposed Orders filed by Amin Koraytem throughout the entire case at the Unlawful Detainer stage or the Civil Action stage.

Stacey Kinchen further argues that Amin Koraytem had other means of notifying him of the hearing on his Motion to Convert Unlawful Detainer Case to Civil Action once he received return mail at Stacey Kinchen P.O. Box.

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

Stacey Kinchen argues that his current phone number is the same as on all his pleadings filed at the Unlawful Detainer stage. Amin Koraytem and his attorney, James Hawes has the number. However; both of them failed to call to notify Stacey Kinchen of such an important hearing.

Stacey Kinchen argues that Amin Koraytem has Stacey Kinchen's personal email address and work email address as both Stacey Kinchen and Amin Koraytem work for the same employer, The Boeing Company. However; Amin Koraytem still failed to notify Stacey Kinchen of such an important hearing.

Regarding Issue 2.3A: Amin Koraytem's Three-Day Notice is defective, improper service, contradicting, fraudulent and fail to comply with the requirements of RCW 59.12.030(3).

Amin Koraytem filed two Declarations. The first Declaration is titled, Declaration of Service of Notice To Pay Rent Or Quit Premises by Certified Mail, stating that on **(January 12, 2012 at 2:45 PM)**, he mailed the Three-Day Notice himself by way of certified mail with return receipt. **("CP") at # 19, P. 312-319.**

The second Declaration is titled, Declaration Of Service Of Notice To Pay Rent Or Quit Premises, stating that on **(January 12, 2012 at 2:45 PM)**, he placed the Three-Day Notice on Stacey Kinchen's door himself. **("CP") at # 19, P. 312-319.**

Stacey Kinchen first argues that the two Declarations are contradicting and fraudulent because there's just no way Amin Koraytem could've performed and completed both services on the same date and at the same time.

Stacey Kinchen alleges that since there's really no proof of Amin Koraytem ever posting the Three-Day Notice on Stacey Kinchen's door, Amin Koraytem filed the second Declaration because he failed to comply with the requirement set forth in **RCW 59.12.030(3)**.

In part, **RCW 59.12.030(3)** states:

If a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held.

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

Otherwise, how could Amin Koraytem be so confused that he would say that he placed a Three-Day Notice on Stacey Kinchen's door at the same time he was at the Post Office mailing Stacey Kinchen a Three-Day Notice and the Post Office is miles away from Stacey Kinchen's address?

Second, Stacey Kinchen argues that Amin Koraytem lacked proof of mailing which is a requirement set forth in RCW 59.12.030(3).

In part, RCW 59.12.030(3) states:

And also sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated.

Amin Koraytem shows proof of mailing by way of certify mail which is also contradicting because of all the different dates on the envelope and it was returned.

However; Stacey Kinchen argues that if the law had intended for a landlord to serve his Three-Day Notice by way of certified mail only and not regular U.S. Mail, then it would have specified as other laws do. Some laws require service to be performed by way of both certified mail and regular U.S. mail.

Third, Stacey Kinchen contends that Amin Koraytem's Three-Day Notice is defective and improper because he served it himself.

Stacey Kinchen reiterates his argument from above that RCW 59.12.030(3), RCW 59.12.040 and CR Rule 4(g) (*has no*) provisions that authorize or allow a landlord to serve their own Three-Day Notice.

Regarding Issue 2.3B: Amin Koraytem failed to satisfy the service of notice requirement regarding his Motion pursuant to CR Rule 5(b)(1).

We know from above in prior arguments that Amin Koraytem was required to serve Stacey Kinchen with notice of his Motion to Convert Unlawful Detainer to Civil Action pursuant to CR Rule 5(a).

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

However; the service requirement is governed by CR Rule 5(b)(1) which Amin Koraytem failed to comply with.

In its entirety, CR Rule 5(b)(1) states:

On Attorney or Party. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, **if no address is known, filing with the clerk of the court an affidavit of attempt to serve**. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service on an attorney is subject to the restrictions in subsections (b)(4) and (5) of this rule and in rule 71, Withdrawal by Attorneys.

The record (***do not***) reflect any such affidavit that Amin Koraytem filed stating that he received return mailed at Stacey Kinchen's P.O. box.

See (***In re Marriage of Mu Chai, 122 Wn. App. 247***). The trial court erred in ruling that Mu Chai substantially complied with the notice requirements for the motion to convert the decree. The decree was thus subject to vacation.

The Court of Appeals Reversed and Remanded the case back to the trial court.

See (***HASTINGS v. GROOTERS, 144 Wn. App. 121***). The courts dismissed that case because of non-compliance with CR Rule 5(b)(1).

Regarding Issue 2.4: Snohomish County Superior Court lacked subject matter jurisdiction to grant Motion to Convert Case to a Civil Action, grant Summary Judgment, impose attorney fees and awards.

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

It's undisputed that Snohomish County Superior Court's jurisdiction was questionable or lacking in the very beginning at the Unlawful Detainer stage as Amin Koraytem himself admitted. **(“CP”) at # 21, P. 309-310.**

It's undisputed that on March 6, 2012, Amin Koraytem contends his Unlawful Detainer claim was resolved and Snohomish County Superior Court's limited statutory purpose ended once the agreed Judgment was signed between both parties. **(“CP”) at # 27, P. 290-295, (“CP”) at # 33, P. 273-277.**

It's also undisputed that Amin Koraytem contends and admits to serving Stacey Kinchen with a Third Amended Summons and Complaint. **(“CP”) at # 27, P. 290-295, (“CP”) at # 33, P. 273-277, (“CP”) at # 22, P. 307-308.**

However; the record **(do not)** reflect a second or third Complaint or Amended Complaints. In fact the record only reflect a Eviction Summons and Complaint, **(“CP”) at # 2, P. 366-370**, Amended Eviction Summons only, **(“CP”) at # 7, P. 362-363**, Second Amended Eviction Summons only, **(“CP”) at # 11, P. 358-359** and Third Amended Eviction Summons only, **(“CP”) at # 22, P. 307-308.**

Stacey Kinchen contends and challenges Amin Koraytem's Third Eviction Summons on two grounds:

- (1.) Stacey Kinchen contends that Amin Koraytem's Third Eviction Summons is insufficient and void as he failed to comply with **CR Rule 15 (a)** and **CR Rule 15 (c)** as he failed to file a Motion for Leave of Court and Motion to Amend before amending his Third Amended Eviction Summons.
- (2.) Stacey Kinchen contends that Amin Koraytem's Third Amended Eviction Summon is insufficient and void because he served Stacey Kinchen with another Unlawful Detainer Eviction Summons pursuant to **RCW 59.18.365** and not a new or amended Summons and Complaint as set forth in **CR Rule 4.**

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

Stacey Kinchen will first address the issue where Amin Koraytem failed to comply with CR Rule 15(a) and CR Rule 15(c).

Summons is defined as Order of court naming a party that a case involving it is filed and an appearance must be made. (Black Law Dictionary).

Complaint is defined as the first or initiatory pleading on the part of the plaintiff in a civil action. (Black Law Dictionary).

In its entirety, CR Rule 15(a) States:

Amendments. *A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or*, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, *the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party*; and leave shall be freely given when justice so requires. *If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion.* If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

In this current case that's before the court, Amin Koraytem had already amended his Summons twice, first on February 3, 2012, ("CP") at # 7, P. 362-363 and February 8, 2012, ("CP") at # 11, P. 358-359 , prior to Stacey Kinchen filing his Answer and Response on February 21, 2012, ("CP") at 15, P. 347-348 and ("CP") at # 16, P. 323-346.

Stacey Kinchen contends that Amin Koraytem had already exhausted his amendment once as a matter of course prior to Stacey Kinchen filing his Answer and Response.

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

Stacey Kinchen contends that Amin Koraytem let the *20 days after* Stacey Kinchen filed his Answer and Response elapse as well. Amin Koraytem's only other option to amend his pleadings was to move for Leave of Court which he failed to do as well.

See (*SPRAGUE v. SUMITOMO FORESTRY 104 Wn.2d 751*), Citing, (*SANWICK v. PUGET SOUND TITLE INS. CO., 70 Wn.2d 438, 423 P.2d 624, 38 A.L.R.3d 315 (1967)*), where Sprague amended twice, then sought a third amendment, which was denied.

See also (*HERRON v. TRIBUNE PUBLISHING CO. 108 Wn. 2d 162*) and (*DEL GUZZI CONSTR. v. GLOBAL NORTHWEST 105 Wn.2d 878*), where both cases involves Amendments and Leave of Court.

In its entirety, CR Rule 15(c) States:

Relation Back of Amendments. *Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.* An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

In this current case that's before the court, Stacey Kinchen contends that Amin Koraytem failed to file any pleadings that *Relates Back* as Amin Koraytem only filed an Amended Eviction Summons only.

Stacey Kinchen contends that an Amended Eviction Summons (*is not*) a Complaint as it fails to put the Defendant on notice of the new or amended claims asserted against him.

Stacey Kinchen contends that for Amin Koraytem to have commenced an action against him and the Snohomish County Superior Court to have jurisdiction, Amin Koraytem first must file a valid Summons and Complaint.

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

An amendment which changes only the legal theory of the action, or adds another claim arising out of the same transaction or occurrence, will relate back. (*HARRY L. GRANT et al., Appellants, v. G. PATRICK MORRIS et al., Respondents, 7 Wn. App. 134*).

In its entirety, CR Rule 3(a) States:

Methods. Except as provided in rule 4.1, ***a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint.*** Upon written demand by any other party, the plaintiff instituting the action shall pay the filing fee and file the summons and complaint within 14 days after service of the demand or the service shall be void. An action shall not be deemed commenced for the purpose of tolling any statute of limitations except as provided in RCW 4.16.170.

In its entirety, RCW 4.28.020 States:

Jurisdiction acquired, when. From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings

Stacey Kinchen will now address the issue where Amin Koraytem served Stacey Kinchen with another Unlawful Detainer Eviction Summons pursuant to RCW 59.18.365 and not a new or amended Summons and Complaint as set forth in CR Rule 4.

Stacey Kinchen contends that Amin Koraytem's ***special summons employed*** was wholly insufficient to give Snohomish County Superior Court jurisdiction of the parties in a general proceeding.

See (*Little v. Catania, 48 Wn.2d 890 (Wash. 1956) 297 P. 2d 255*), Citing, (*Jeffries v. Spencer, 86 Wash. 133, 149 P. 651*) and (*State ex rel. Seaborn Shipyards Co. v. Superior Court, supra.*) where the special summons was used, the court obtained jurisdiction of the parties for a limited statutory purpose only-namely, to determine the issue of possession in an unlawful detainer action. Having obtained that

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

limited jurisdiction, the court could not transform the special statutory proceedings into an ordinary lawsuit, and determine the issues and grant relief therein as though the action was a general proceeding.

In *(Young Women's Christian Ass'n v. Lapresto, Mo.App., 169 S.W.2d 78, 80)*, the Missouri court reversed the cause and remanded with instructions to dismiss.

Regarding Issue 2.5: Commissioner Tracy Waggoner eroded and abused her discretion in rendering her ruling, after asking Amin Koraytem's attorney, James Hawes if any credits had been applied to the current Judgment regarding RCW 59.18.280. ("RP") at P. 13-14.

In its entirety, RCW 59.18.280 states:

Within fourteen days after the termination of the rental agreement and vacation of the premises or, if the tenant abandons the premises as defined in RCW 59.18.310, within fourteen days after the landlord learns of the abandonment, the landlord shall give a full and specific statement of the basis for retaining any of the deposit together with the payment of any refund due the tenant under the terms and conditions of the rental agreement. No portion of any deposit shall be withheld on account of wear resulting from ordinary use of the premises. The landlord complies with this section if the required statement or payment, or both, are deposited in the United States mail properly addressed with first-class postage prepaid within the fourteen days.

The notice shall be delivered to the tenant personally or by mail to his or her last known address. ***If the landlord fails to give such statement together with any refund due the tenant within the time limits specified above he or she shall be liable to the tenant for the full amount of the deposit. The landlord is also barred in any action brought by the tenant to recover the deposit from asserting any claim or raising any defense for retaining any of the deposit unless the landlord shows that circumstances beyond the landlord's control prevented the landlord from providing the statement within the fourteen days or that the tenant***

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

abandoned the premises as defined in RCW 59.18.310. *The court may in its discretion award up to two times the amount of the deposit for the intentional refusal of the landlord to give the statement or refund due. In any action brought by the tenant to recover the deposit, the prevailing party shall additionally be entitled to the cost of suit or arbitration including a reasonable attorney's fee.*

Nothing in this chapter shall preclude the landlord from proceeding against, and the landlord shall have the right to proceed against a tenant to recover sums exceeding the amount of the tenant's damage or security deposit for damage to the property for which the tenant is responsible together with reasonable attorney's fees.

Stacey Kinchen contends that nowhere in the statute above do it authorizes, allow or require that the Commissioner or Judge ask questions regarding credits and payments. It's either the landlord mailed the statement or not. **("RP") at P. 13-14.**

A decision on a motion to vacate is reviewed for an abuse of discretion. The decision will be overturned only if it was manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. **(Canam Hambro Systems, Inc. v. Horbach, 33 Wn. App. 452, 453-54, 655 P.2d 1182 (1982)).**

Regarding Issue 2.6: Stacey Kinchen's case has Merits that supports a Prima Facie Case.

Prima Facie Case is defined as at first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure ; presumably. **(Black Law Dictionary).**

Stacey Kinchen contends that in his case that's before the court, the record itself contains a substantial amount of strong evidence that supports all of his claims alleged and a *Prima Facie Case*.

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

Stacey Kinchen further contends that he have established that Amin Koraytem failed to serve him with a *Three-Day Notice* prior to filing his Unlawful Detainer Action, he have established that Amin Koraytem failed serve him with *Notice of Hearing* prior to Amin Koraytem Converting the case to a Civil Action, he have established that his *P.O. Box was closed*, he have established that *he did not appear at the hearing*, he have established that Amin Koraytem *failed to mail him a statement within fourteen days of move out*, he have established that Amin Koraytem *hired an unregistered contractor*, he have established that Amin Koraytem *committed fraudulent acts and misrepresentations* and he have established that *Snohomish County Superior Court lacked jurisdiction*.

Stacey Kinchen contends that Commissioner Tracy Waggoner could have easily ruled in his behalf on any one of the issues listed above.

See (*Callahan v. Walla Walla Hous. Auth.* 126 Wn. App. 812), for discussion on *Prima Facie Case*.

Regarding Issue 2.7: Amin Koraytem meets the definition of a contractor under RCW 18.27.010(1). Under RCW 18.27.020, contractors are barred from hiring unregistered and unlicensed contractors. Unregistered and unlicensed contractors are barred from bidding on contracts and it's a crime to do so.

In its entirety, RCW 18.27.010(1) states:

"Contractor" includes (any person), firm, corporation, or other entity who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate or to do any part thereof including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works in connection therewith, the installation or repair of roofing or siding, performing tree removal services, or cabinet or similar installation; or, (who, to do similar work upon his or her own property), employs members of more than one trade upon a single job or project or under a single building permit except as otherwise provided in this

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

chapter. "Contractor" also includes a consultant acting as a general contractor. "Contractor" also includes any person, firm, corporation, or other entity covered by this subsection, whether or not registered as required under this chapter or who are otherwise required to be registered or licensed by law, who offer to sell their property without occupying or using the structures, projects, developments, or improvements for more than one year from the date the structure, project, development, or improvement was substantially completed or abandoned.

In its entirety, **RCW 18.27.010(14)** states:

"Unregistered contractor" (means a person), firm, corporation, or other entity doing work as a contractor without being registered in compliance with this chapter. "Unregistered contractor" includes contractors whose registration is expired, revoked, or suspended. "Unregistered contractor" does not include a contractor who has maintained a valid bond and the insurance or assigned account required by RCW 18.27.050, and whose registration has lapsed for thirty or fewer days.

In **(Coronado v. Orona, 137 Wn. App. 308, Feb. 2007, Court of Appeals:** Holding that the landscaper performed tasks that required a contractor's registration for the entire indivisible contract.

In **(POPE & TALBOT v. PRODUCTIZATION, INC. 74 Wn. App. 197),** Court of Appeals: Holding that the contractor registration act applied, that the plaintiff had standing to assert it, and that it barred enforcement of the arbitration clause.

In its entirety, **RCW 18.27.020(1)** states:

Every contractor shall register with the department.

In its entirety, **RCW 18.27.020(2)** states:

It is a gross misdemeanor for any contractor to:

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

(a) Advertise, offer to do work, submit a bid, or perform any work as a contractor without being registered as required by this chapter;

(b) Advertise, offer to do work, submit a bid, or perform any work as a contractor when the contractor's registration is suspended or revoked;

(c) Use a false or expired registration number in purchasing or offering to purchase an advertisement for which a contractor registration number is required;

(d) Transfer a valid registration to an unregistered contractor or allow an unregistered contractor to work under a registration issued to another contractor; or

(e) Subcontract to or use an unregistered contractor.

In its entirety, **RCW 18.27.020(4)** states:

All gross misdemeanor actions under this chapter shall be prosecuted in the county where the infraction occurs.

In its entirety, **RCW 18.27.020(5)** states:

A person is guilty of a separate gross misdemeanor for each day worked if, after the person receives a citation from the department, the person works while unregistered, or while his or her registration is suspended or revoked, or works under a registration issued to another contractor. A person is guilty of a separate gross misdemeanor for each worksite on which he or she violates subsection (2) of this section. Nothing in this subsection applies to a registered contractor.

In ***(STATE v. BEDKER 35 Wn. App. 490)***, the contractor was convicted for performing work as a contractor without a state registration certificate.

In ***(HERBERT E. VEDDER et al., Appellants, v. HARRY F. SPELLMAN et al., Respondents 78 Wn.2d 834)***, the contractors were not licensed to perform contracting work.

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

Regarding Issue 2.8: Amin Koraytem was barred from retaining Stacey Kinchen's deposits pursuant to RCW 59.18.280 where he failed to mail Stacey Kinchen a full specific statement for the basis of retaining Stacey Kinchen's deposits.

Stacey Kinchen reiterates his prior argument presented above *regarding issue 2.5* on this issue.

In part, RCW 59.18.280 states:

If the landlord fails to give such statement together with any refund due the tenant within the time limits specified above he or she shall be liable to the tenant for the full amount of the deposit.

The court may in its discretion award up to two times the amount of the deposit for the intentional refusal of the landlord to give the statement or refund due.

See (*SARDAM v. MORORD 51 Wn. App. 908*), where the tenant sought in small claims court the return of her security deposit under RCW 59.18.280.

Regarding Issue 2.9: Attorney James Hawes committed fraudulent acts and grossly misled the Snohomish County Superior court with his misrepresentations, interpretations and statements.

Fraud is defined as some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. (*Black Law Dictionary*).

See (*Maher v. Hibernia Ins. Co., 67 N. Y. 292*).

In parts, RPC 8.4 states:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

IV. LEGAL AUTHORITY AND ARGUMENT (CONTINUED)

(b) commit a *criminal act* that reflects adversely on the lawyer's *honesty, trustworthiness* or *fitness as a lawyer* in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(k) violate his or her oath as an attorney;

(m) violate the Code of Judicial Conduct; or

(n) engage in conduct demonstrating unfitness to practice law.

See ***(IN RE DISCIPLINARY PROCEEDING AGAINST PRESZLER 169 Wn. App. 1)***, where the attorney was suspended for three years for acts such as **filing false documents.**

Stacey Kinchen contends that Attorney James Hawes committed similar fraudulent acts such as:

- (1.) Filed false Declaration; ***(“CP”) at # 10, P. 360-361;***
- (2.) Filed false Three-Day Notices and Declarations; ***(“CP”) at # 19, P. 312-319;***
- (3.) Filed false document stating he mailed Notice and Proposed Orders; ***(“CP”) at 28, P. 288-289;***
- (4.) Made false statements and misrepresented true facts in open court; ***(“RP”) at P. 13-14, See Checks at (APP.) at Ex. A and Ex. B.;***
- (5.) Served unfiled documents other than what he filed; ***APP A.;***
- (6.) Filed late documents and still use them in a hearing; ***(“CP”) at # 64, P. 175-184***

In ***(DONALD TUSCHOFF et al., Respondents, V. CHESTER A. WESTOVER et al., Appellants 65 Wn.2d 69)***, the appellants case was dismissed for certain fraudulent misrepresentations.

V. CONCLUSION

For the reasons presented above, the Snohomish County Superior Court's August 9, 2013, Order Denying Stacey Kinchen's Motion for Order Vacating Judgment should be reversed.

Accordingly, the Snohomish County Superior Court's August 28, 2013, Order Denying Stacey Kinchen's Motion for Revision and awarding attorney fees in the amount of \$3,641.20 should be reversed.

Finally, this court should dismiss Amin Koraytem case for his fraudulent acts.

Dated this 3rd day of February, 2014.


Stacey Kinchen, Appellant

VI. APPENDIX

Attached hereto are copies of the following:

EXHIBIT A: CHECK NUMBER 2221, WRITTEN ON JULY 15, 2010

EXHIBIT B: CHECK NUMBER 2222, WRITTEN ON AUGUST 2, 2010

EXHIBIT C: AMIN KORAYTEM'S AUGUST 9, 2013 BRIEF FILED ON AUGUST
16, 2013 MAILED TO STACEY KINCHEN (**DIFFERENT FROM
FILED VERSION**)

EXHIBIT A

CHECK NUMBER 2221

WRITTEN ON JULY 15, 2010


Routing	Sequence #	Paid Date	Amount	Account	Serial	Capture Source
12500854	8510489343	07162010	\$1000.00	3293197178	2221	00007139


WELLS FARGO BANK, N.A.
 KENT MAIN OFFICE
 204 WEST MEEKER STREET
 KENT, WA 98032

STACEY A KINCHEN
 13221 22ND AVE S
 SEATAC, WA 98168-2931

2221
 19-854/1250 3066
 3293197178

July 15, 2010
Date

Pay to the Order of *Amir Koraytem* \$ *1000.00*
One Thousand ^{*00*}/_{*100*} Dollars  Security Features Details on Back

 Wells Fargo Bank, N.A.
 Washington
 wells Fargo.com

for *Deposit* *Stacey Kinchen*

⑆ 125008547⑆ 3293197178 0222⑆

Wells Fargo Bank, N.A. Loan Chase Bank 937 120082515

NO POSTAGE
 NECESSARY
 IF MAILED
 IN THE
 UNITED STATES

POSTAGE WILL BE PAID BY ADDRESSEE

NO POSTAGE
 NECESSARY
 IF MAILED
 IN THE
 UNITED STATES

EXHIBIT B

CHECK NUMBER 2222

WRITTEN ON AUGUST 2, 2010

Routing	Sequence #	Paid Date	Amount	Account	Serial	Capture Source
12500854	8614226614	08032010	\$1580.00	3293197178	2222	00007139


WELLS FARGO BANK, N.A.
 KENT MAIN OFFICE
 204 WEST MEEKER STREET
 KENT, WA 98032

STACEY A KINCHEN
 13221 22ND AVE S
 SEATAC, WA 98168-2931

2222
 19-854/1250 3066
 3293197178

August 2, 2010 Date

Pay to the Order of *Annin Koraytem* \$ *1580.00*

Fifteen Hundred Eighty 00/100 Dollars  Security Features Details on Back

 Wells Fargo Bank, N.A.
 Washington
 wells Fargo.com

\$500 Partial last month Rent
 For *\$4080 prorated Rent 8/10* *Stacey Kinchen* SP

⑆ 125008547⑆ 3293197178⑈ 02222

[Faint, mostly illegible text and markings, possibly a signature or stamp]

EXHIBIT C

AMIN KORAYTEM'S AUGUST 9, 2013 BRIEF

FILED ON AUGUST 16, 2013 MAILED TO STACEY KINCHEN

(DIFFERENT FROM FILED VERSION)

Christensen & Hawes, INC., P.S.

Attorney at Law
3102 Rockefeller Avenue
Everett, Washington 98201-4029

425.258-4464

425.388.0247 fax

August 7, 2013

Stacey A. Kinchen
PO Box 1351
Kent WA 98035-1351

Sent via First Class Mail

RE: Koraytem vs. Kinchen

Dear Mr. Kinchen:

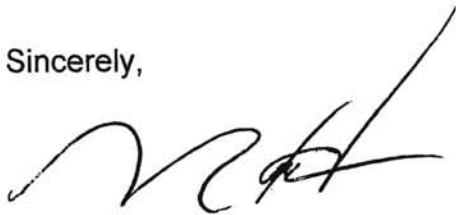
Please find attached list of documents enclosed.

1. PLAINTIFF'S RESPONSIVE BRIEF RE: MOTION TO VACATE JUDGMENT

Please take the following action:

For your records.

Sincerely,



James R. Hawes

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SUPERIOR COURT OF WASHINGTON
COUNTY OF SNOHOMISH

AMIN KORAYTEM,

Plaintiff,

vs.

OKSANA KARABUT AND VLADIMIR
KARABUT and JOHN DOE OCCUPANT,

Defendant.

No.: 102049817

Plaintiff's Responsive
Brief Re: MOTION TO VACATE
JUDGMENT

Hearing Date: August 9, 2013

COMES NOW Plaintiff herein, by and through his attorneys of record, and responds to the Motion to Vacate and declaration filed by the Defendant.

This matter arises out of an unlawful detainer action commenced by the owner/landlord. Final Judgment was entered by the Honorable George Bowden over one (1) year ago, **not by Default, but rather by Motion For Summary Judgment**, on July 25, 2012. As such, this motion properly should be heard by Judge Bowden. The decision to grant a motion based on CR 60(a) is generally within the discretion of the trial court. Foster v. Knutson, 10 Wash. App. 175, 516 P.2d 786 (1973).

1. CR 60. Relief from Judgment or Order: **CR 60 (b)(1)** provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

Plaintiff's Responsive
Brief Re: MOTION TO VACATE JUDGMENT

1 (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in
obtaining a judgment or order;

2 (1) Motions brought under CR 60 (b)(1)(2) and (3) must be filed within one year after
3 entry of said judgment or order. The instant motion meets only that criterion of the rule, in that it
4 appears to be filed exactly one year to the day.

5 a. However, the fact that Defendant knew about the one year deadline, and/or
6 purposefully delayed filing for one year, is a strong factor that should enter into the
7 courts determination when balancing equities and the discretionary powers of the
8 court. If the reasons given as the basis for the motion were known early on, the fact
9 that the motion was filed within one year does not mean the delay was reasonable,
10 and is a basis for denying the motion.

11 b. As is detailed below, when determining whether or not to set aside judgments the
12 court is directed by case law to review both **“the reason for the party's failure to
13 appear timely.”** and **“the party's diligence in seeking relief following notice of
14 the default.”** See Plaintiff's Response to Defendant Motion to Stay Enforcement of
15 Judgment (Page 4, paragraph 5. “History of Bad Faith Tactics.”) containing a detailed
16 recitation of attempts by Defendant over the past twelve months to use Bankruptcy
17 court improperly to avoid payment of this debt, to the extent that the Bankruptcy Court
18 has now issued orders relative to Defendant's Chapter 13 Bankruptcy precluding
19 operation of an Automatic Stay, denying the separate request for an Injunction, and
20 also specifically denying the requested Order to Release Withheld Wages under a
21 garnishment issued by this court on Plaintiff's Judgment. That document is
22

1 incorporated into Plaintiff's response by this reference thereto. Further, Defendant
2 should be barred from presenting this Motion based upon principles of Laches.

3 (2) The types of alleged errors claimed by Defendant are not those that are subject to
4 CR 60(a). As stated by Division One of the Appellate Court:

5 "It is well established that CR 60(a) is designed for the correction of mere mechanical
6 mistakes only and cannot be used to effect substantive changes. Foster, 10 Wash. App.
7 at 177. Moreover, the language of the rule provides only for the correction of mistakes
8 and errors within a judgment or order, not for the vacation of a judgment or order.

9 Western Community Bank v. Grice, 55 Wash. App. 290, 293 777 P.2d 39 (1989).

10 The Division One Appellate Court has elucidated the difference between error that can
11 be corrected under CR 60(a) and judicial error (here error imputed to the arbitrator) as follows:

12 [I]f the trial judge signs a decree, through misplaced confidence in the attorney who
13 presents it, or otherwise, which does not represent the court's intentions in the premises,
14 an error contained therein may be corrected under Rule 60. The testimony of the trial
15 judge signing the judgment or decree will be received in this connection. (Citations
16 omitted.) 4 L. Orland, Wash. Prac., Rules Practice § 5712, at 540 (3d ed. 1983). Thus,
17 "[t]he test for distinguishing between 'judicial' and 'clerical' error is whether, based on the
18 record, the judgment embodies the trial court's intention." Marchel v. Bunger, 13 Wash.
19 App. 81, 84, 533 P.2d 406, review denied, 85 Wash. 2d 1012 (1975).

20 In re Marriage of King, 66 Wash. App. 134, 138, 831 P.2d 1094 (1992).

21 Defendant does not make any claim that some portion of the judgment deviates from what the
22 court intended. Accordingly, the present judgment is presumed to accurately reflect the
23 intention of the court, and CR 60(a) is not appropriate to be used to set aside the instant
24 judgment.

25 (3) Further, the appropriate remedy for claimed errors at law is an appeal: "The courts
have consistently rejected efforts to use a Motion To Vacate as a vehicle for asserting errors at
law." Civil Procedure, Karl b. Tegland, Volume 14 of Washington Practice at p. 607.

1 (4) The Defendant has alleged in his Motion, and the Declaration attached thereto,
2 the existence of alleged defenses. However, those defenses were presumably taken into
3 consideration by the Honorable Judge Bowden when making his determination on the Motion
4 For Summary Judgment, and found to be baseless.

5 Defendant filed an answer, and a document designated as a Response, in answer to the
6 complaint. Defendant's response to the Motion for summary judgment is merely a recitation of
7 the assertions submitted by him previously in his Response/Answer to the complaint.

8 **Defendant admits that he voluntarily withheld payment of rent, but failed to state a**
9 **legal excuse for doing so. RCW 59.18.080 states that Payment of rent is a condition to**
10 **exercising any of the tenant remedies provided in Chapter 59.18.** Accordingly, any
11 defenses based upon remedies afforded under the Landlord Tenant Act are precluded by
12 operation of law.

13 However, several of the purported defenses mentioned in the present motion are brought
14 for the first time, either in his response to the Summary Judgment Motion, or in the present
15 Motion to Vacate. This was not a motion for default. His answer was filed, and considered, and
16 no basis is given to allow defendant to attempt to amend his answer now.

17 (5) It should be noted that the Defendant dodged service for a prolonged period,
18 requiring Plaintiff's counsel to get permission from the court for alternative service by mail. At
19 hearing on the Show Cause proceeding, Defendant appeared **with legal counsel** (Housing
20 Justice Program) and a **Stipulated Order** was entered giving Defendant additional time to
21 move out, and upon failure to do so, a Writ would be issued forthwith. Of course, he failed to
22 move out and a Writ was required to be served.

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1 (6) The Court considered Defendant's claim that the Plaintiff failed to serve him with a
2 3-Day Notice to Pay Or Vacate and found it not credible or relevant. This notice is only relevant
3 to the unlawful detainer action regarding the issue of possession, and was effectively waived by
4 entry of the Stipulated Order agreeing for the issuance of a Writ if Defendant did not vacate the
5 property timely. The Judgment was based upon a civil action for breach of contract, not an
6 unlawful detainer action.

7 In any event, Plaintiff filed his Declaration of Posting of the "3-Day Notice to Pay Or
8 Vacate" on the front door of the property, and additionally gave his Declaration of Mailing of the
9 said notice to the Defendant. Attached to the Declaration was a copy of a US Postal Service
10 Certified Mail receipt showing multiple attempts to deliver, and that the Defendant failed to pick
11 up the same despite not less than three (3) attempts at delivery. The Court found the
12 Defendants allegation to not be credible. **The Purpose of this discussion is this: full due
13 process was afforded Defendant each step of the way, and he had access to legal
14 counsel.**

15 (7) **Excusable Neglect / Irregularity.** Defendant claims ignorance of the law, and
16 bad traffic on I-5, as the reasons for his failure to appear and argue the case, and file his
17 response timely to the Motion For Summary Judgment.

- 18 a. There was no irregularity in obtaining judgment. To the contrary, out of an
19 abundance of caution, Plaintiff gave written notice of the filing for hearing of His
20 Motion for Summary Judgment to Defendant not only at the address of record
21 with the court when he filed his Notice of Appearance, but also to an address in
22 Kent, WA., that Counsel became aware of inadvertently. Defendant **admits**

1 that he received that notice. The court had before it for consideration his
2 Answer and his detailed Response, which basically duplicated his untimely
3 filed Response to the Plaintiff's MSJ.

4 b. Washington follows the general rule that an attorney's negligence or
5 incompetence will not constitute sufficient grounds to vacate a judgment and is
6 not excusable neglect. Lane v Brown & Haley, 81 Wa App 102 (1996).
7 Washington State holds a pro se litigant to the same standard as an attorney.
8 Batten v. Abrams, 28 Wn. App. 737, 739 n.1, 626 P.2d 984, review denied, 95
9 Wn.2d 1033 (1981).

10 c. In any event, as the Defendant's Response to the MSJ was nearly identical to
11 his Answer and his detailed Response already in the court file, such that his
12 neglect in timely filing resulted in a harmless error as his position on the legal
13 issues was determined fully by review of the records and files, and no sworn
14 testimony of facts supporting his claim was given in his Response to support
15 his many claims.

16 2. Factors to Consider - Case Law: In determining whether to vacate a **default** judgment, the
17 court will consider four factors, two primary, and two secondary.

18 **The primary factors are:**

- 19 (1) the existence of substantial evidence to support, at least prima facie, a defense to the
20 claim asserted, and
21 (2) the reason for the party's failure to appear timely.

1 **The secondary factors are:**

2 (3) the party's diligence in seeking relief following notice of the default, and

3 (4) the effect of vacating judgment on the opposing party.

4 Calhoun v Merritt, 46 Wn.App. 616 (1986); Shepard Ambulance Inc. v. Helsell, Fetterman,

5 Martin, Todd & Hokanson, 95 Wash.App. 231, 974 P.2d 1275 (Wash.App.Div.1 1999).

6 **3. Argument:**

7 **(1) PRIMA FACIE CASE DEFENSE.** In the instant case, the defendants present no
8 evidence to support at least a prima facie defense to Plaintiff's claims.

9 As asserted by the Defendant, he voluntarily withheld payment of rent because Landlord
10 didn't return his repeated calls for his requests of additional time to pay rent. **RCW 59.18.080**
11 **states that Payment of rent is a condition to exercising any of the tenant remedies**
12 **provided in Chapter 59.18.**

13 Further, he **waived** any objection to the issuance of the Writ by entering into an
14 Stipulated Order.

15 The section cited by Defendant as a basis to refute that the Landlord cannot collect
16 money for repair work performed by a handyman who was not licensed as a contractor is
17 erroneous. The cited law does not say that, and only refers to the section of the law that
18 prohibits an independent action by an unlicensed contractor to collect against a home owner
19 under certain circumstances. An owner of a residence can always act as his own contractor
20 without being licensed as a contractor, and can hire anyone he wants to cut his grass, paint or
21 repair the premises, etc. Further, this is a matter of law which is not subject to determination in
22

1 a Motion to Vacate, and for which a timely appeal would have been needed to file in order to
2 challenge.

3 Defendant admits rent was owing, and under the lease, he was therefore fully entitled to
4 judgment for rent arrears, late fees, interest, costs and legal fees. This is what was correctly
5 given to Plaintiff in his Summary Judgment.

6 (2.) **PARTY'S FAILURE TO APPEAR TIMELY and THE PARTY'S DILIGENCE IN**
7 **SEEKING RELIEF FOLLOWING NOTICE OF THE DEFAULT.** The Defendants total lack of
8 diligence in bringing this matter to the courts attention in a timely manner is inexcusable. He
9 knew the summary Judgment motion was pending, even filed his response to it, yet failed to do
10 anything about it for twelve months. This failure to caused Plaintiff to incur substantial costs and
11 fees, including bankruptcy attorney fees, as is detailed below.

12 **BAD FAITH.** As is spelled out above, Defendant tried to get the judgment discharged by
13 re-opening his prior bankruptcy the day before the MSJ hearing, and thereafter used the
14 automatic stay of the bankruptcy code repeatedly to frustrate legal process of this court
15 (Garnishment Writs) until the Bankruptcy Court finally ordered he would no longer have the
16 ability to get the protection under the Automatic Stay, and later specifically denied his request
17 for an injunction against Plaintiff's garnishment writs, due to his misuse of the same. As stated
18 in the attachment, **Defendant's present Bankruptcy Petition is Defendant's third (3rd) case**
19 **pending within the last year, and is Defendant's fifth (5th) case pending since February,**
20 **2011.** On each Plan submitted to the court, he listed as the reason why payment to plaintiff

21 was not provided in his plan was that he intended to seek to vacate the judgment in state court.

22 Defendant has been represented by legal counsel for a substantial period of the above listed
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1 history in the bankruptcy court, and surely would or should have sought guidance about the due
2 diligence requirement for filing the Motion to Vacate the Judgment. There is no excuse for the
3 unreasonable delay in filing this motion. Tegland would agree:

4 The one-year provision is regarded as fixing the outer-most limit in time for the making of
5 the motion. If the grounds of the motion are sooner discovered, vacation may be denied
6 if there is an unreasonable delay in making the motion, even though a year has not yet
7 elapsed. Luckett v Boeing Co., 98 Wash. App. 307, 989 P.2d 1144 (Div 1 1999).
8 Civil Procedure, Karl b. Tegland, Volume 14 of Washington Practice at p. 619.

9 While unavoidable casualty, misfortune, or "any other reason." may not have a specific one-year
10 limitation, the time limit is still a **reasonable** time.

11 **(3.) EFFECT UPON PLAINTIFF.** Plaintiff will incur substantial prejudice if this relief is
12 granted. Plaintiff has already incurred costs for 4 garnishments, attorney fees in this court and
13 in Bankruptcy court. The bankruptcy court is the best place to handle this, and has already
14 shown its frustration with the conduct of the Defendant, and given him several "second
15 chances", to the point that justice required firm action by the court, and the same was given.

16 **4. Relief Requested.** The Defendant's motion should be denied and fees assessed
17 against him in an amount not less than his past and present garnishment costs \$1,141,20, and
18 attorney fees.

19 The undersigned Attorney verifies that he estimates that the sum of 8.5 hours of time will
20 be spent through the hearing on this matter. Due to Defendant's untimely service of his Motion
21 to Stay Enforcement of Judgment, counsel appeared in court twice, to learn the motion not
22 scheduled, and a subsequent hearing not confirmed, after preparing a response and being
23 served with a calendar Note. My usual and accustomed hourly rate is \$295.00 hour. That rate
24 is at or below the prevailing market rate for attorneys with comparable experience in this area.

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1 Accordingly, Plaintiff requests fees to respond to this matter that arose out of the neglect of
2 Defendant in the amount of \$2,500.00, and Writ costs of \$1,141.30, totaling \$3,641.20.

3 If the court determines to allow the Defendant to be heard on the merits of their case, it is
4 requested that they be ordered to pay Plaintiff's attorney's fees as a pre-condition to being able
5 to file an answer. Judgment should enter against the Defendants for Plaintiff's attorney's fees
6 and costs, payable within two weeks of this hearing and failing to pay the same timely should be
7 cause for the motion herein to be dismissed without further notice, with judgment for the fees
8 awarded herein remaining, bearing interest at the statutory rate.

9 Respectfully submitted,

10 DATED: August 7, 2013.

11 
12 _____
13 JAMES R. HAWES WSBA #11684, of
Christensen & Hawes INC., P.S.
Attorneys for Plaintiff

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