No. 330389

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

Robert W. Critchlow

Appellant

v.

Dex Media West Inc.

Appellees

Appellant Critchlow's Opening Brief

Robert W. Critchlow
Appellant and Co-Counsel
WSBA# 17540
208 E. Rockwell Ave
Spokane, WA. 99207
(509) 327-9544

Alan L. McNeil
Co-Counsel for Appellant
WSBA#7930
421 W. Riverside Ave
Spokane, WA. 99201
(509) 315-8390

Richard F. Lee
Co-Counsel for Appellant
WSBA# 32329
P.O. Box 7550
Spokane, WA. 99207
(509) 536-0986

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Caselaw

I. INTRODUCTION

This case is about Appellant Robert Critchlow, a Spokane attorney who had made arrangements with Appellee Dex Media West Inc. for the provision of advertising products and services. Pursuant to these arrangements, Appellees set up an internet website for Mr. Critchlow's law office. This website had a telephone number which was installed by Appellees ostensibly for tracking "usage." Appellees were not only tracking the usage of the telephone calls received by Mr. Critchlow but they were further recording these telephone calls without his knowledge or consent. Appellees Dex Media West Inc admitted that they had been making these recordings without the knowledge or consent of Mr. Critchlow.

Mr. Critchlow filed suit in Spokane County Superior Court on July 11, 2014 alleging violations of 1) Washington's Privacy Act, 2) Washington's Consumer Protection Act 3) common law tort of Invasion of Privacy 4) common law tort of Misrepresentation. A case scheduling order was issued assigning the case to Judge Annette Plese with a status conference set for October 10, 2014. On July 15, 2015 Judge Plese, on her own motion (sua sponte) signed an order recusing herself from the case and ordering that it be reassigned to another judge. Neither Appellant Critchlow nor his attorney Al McNeil were notified of this recusal motion

and order, nor was any hearing scheduled for an opportunity to be heard on the issue of recusal and the purported reasons for same. Finally, no specific reasons for recusal were stated in Judge Plese's order. On July 16, 2014 Presiding Judge Salvatore Cozza, pursuant to Judge Plese's order of recusal, signed an order reassigning Appellant's case to Judge Michael Price. No status conference date was listed in this order. Neither Mr. Critchlow nor his attorney Al McNeil received a copy of Judge Cozza's order either.

On September 25, Appellees Dex Media West Inc. pursuant to Civil Rule 68 made an Offer of Judgment to Appellant Critchlow in the amount of $5,000.00. Mr. Critchlow unequivocally accepted the Offer of Judgment by serving and filing his 1) Acceptance, 2) the Offer of Judgment and 3) Proof of Service with the court on October 2, 2014.

On October 10, 2014 Judge Michael Price issued an Order for Mr. Critchlow to appear and Show Cause why his case should not be dismissed "for failing to appear at the scheduled status conference of October 10, 2014 at 9:00 AM." This order directed Appellant Critchlow to appear at Judge Price's courtroom on November 7, 2014. On November 7, 2014, Judge Price entered an order dismissing Mr. Critchlow's case with

prejudice based on findings that Appellant had not appeared and that Appellant's case was "inactive."

This brief will explain how the law and facts of this case demonstrate that Appellant Critchlow's due process rights were violated and that he ultimately suffered extreme prejudice (dismissal) from the way the Spokane County Superior Court failed to properly and fairly administer his case.

II. ASSIGNMENTS OF ERROR-RECUSAL ORDER

A. JUDGE PLESE ERRED WHEN SHE ISSUED AN EX PARTE MOTION AND ORDER RECUSING HERSELF FROM PRESIDING OVER PLAINTIFF CRITCHLOW'S CASE.
B. STANDARD OF REVIEW FOR RECUSAL ORDERS IS ABUSE OF DISCRETION.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. IT WAS ERROR WHEN JUDGE PLESE FAILED TO GIVE ALL PARTIES NOTICE AND OPPORTUNITY TO BE HEARD CONCERNING HER MOTION AND ORDER OF RECUSAL.
2. IT WAS ERROR WHEN JUDGE PLESE FAILED TO EXPLAIN TO THE PARTIES THE SPECIFIC REASONS FOR HER PROPOSED DISQUALIFICATION.
3. IT WAS ERROR FOR JUDGE PLESE TO EXPLAIN TO THE PARTIES WHY THESE SPECIFIC REASONS WARRANTED HER DISQUALIFICATION.
4. SINCE THE MOTION AND ORDER FOR RECUSAL WAS ISSUED EX PARTE BY JUDGE PLEASE IT WAS VOID

AB INITIO AND ANY SUBSEQUENT ORDERS BASED THEREON, INCLUDING JUDGE COZZA'S ORDER FOR REASSIGNMENT WERE VOID AS WELL.

III. ASSIGNMENTS OF ERROR-DISMISSAL ORDER

A. JUDGE PRICE ERRED WHEN HE ISSUED 1) AN ORDER TO SHOW CAUSE WHY PLAINTIFF'S CASE SHOULD NOT BE DISMISSED.
B. JUDGE PRICE ERRED WHEN HE ISSUED AN ORDER DISMISSING PLAINTIFF'S CASE WITH PREJUDICE.
C. STANDARD OF REVIEW FOR THESE ORDERS IS ABUSE OF DISCRETION.
D. STANDARD OF REVIEW FOR JUDICIAL CONSTRUCTION AND INTERPRETATION OF COURT RULES IS DE NOVO.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. JUDGE PRICE ERRED WHEN HE ISSUED 1) ORDER DIRECTING PLAINTIFF TO APPEAR OR SHOW CAUSE WHY HIS CASE SHOULD NOT BE DISMISSED AND 2) AN ORDER OF DISMISSAL WITH PREJUDICE WHEN APPELLANT CRITCHLOW HAD NOT BEEN NOTIFIED BY JUDGE COZZA'S ORDER THAT JUDGE PRICE HAD BEEN ASSIGNED TO PRESIDE OVER APPELLANT'S CASE.

2. WHEN PLAINTIFF CRITCHLOW FILED AND SERVED HIS ACCEPTANCE OF APPELLEES' CIVIL RULE 68 OFFER OF JUDGMENT ON OCTOBER 2, 2014 ALONG WITH THE OFFER OF JUDGMENT ITSELF AND PROOF OF SERVICE, APPELLANT HAD COMPLIED WITH ALL THE REQUIREMENTS OF CIVIL RULE 68 AND THIS RULE REQUIRED THE COURT TO THEREUPON ENTER THE JUDGMENT.

3. THE LANGUAGE USED IN CIVIL RULE 68 IS MANDATORY AND IMPOSED A MANDATORY DUTY (NO DISCRETATION) UPON THE COURT, EITHER JUDGE PLESE OR JUDGE PRICE TO ENTER THE JUDGMENT FORTHWITH.

4. SINCE ENTRY OF THE JUDGMENT WAS A MINISTERIAL ACT, JUDGE PRICE HAD NO DISCRETION TO ISSUE THE SUBSEQUENT SHOW CAUSE ORDER DATED OCTOBER 10, 2014 NOR HIS ORDER OF DISMISSALWITH PREJUDICE DATED NOVEMBER 7, 2014.

5. SINCE THE COURT HAD NO DISCRETION TO ISSUE THESE ORDERS THEY WERE NULL, VOID AND WITHOUT ANY LEGAL EFFECT.

6. WITH REGARD TO THE ORDER OF DISMISSAL DUE PROCESS REQUIRED JUDGE PRICE TO PUT ON THE RECORD THE FINDINGS AS TO WHY A LESSER SANCTION OTHER THAN DISMISSAL WOULD NOT SUFFICE.

7. WITH REGARD TO THE ORDER OF DISMISSAL DUE PROCESS REQUIRED JUDGE PRICE TO PUT ON THE RECORD FINDINGS AS TO WHETHER APPELLANT'S CONDUCT WAS A WILLFUL AND DELIBERATE REFUSAL TO OBEY THE COURT'S ORDER TO APPEAR AND SHOW CAUSE WHY HIS CASE SHOULD NOT BE DISMISSED.

8. WITH REGARD TO THE ORDER OF DISMISSAL DUE PROCESS REQUIRED JUDGE PRICE TO PUT ON THE RECORD FINDINGS AS TO WHETHER APPELLANT'S CONDUCT SUBSTANTIALLY PREJUDICED APPELLEES' ABILITY TO PREPARE FOR TRIAL WHICH WAS IMPOSSIBLE AS A MATTER OF LAW SINCE THE CASE HAD BEEN SETTLED AND THERE WAS NOT GOING TO BE ANY TRIAL.

9. THE FINDINGS IN JUDGE PRICE'S ORDER THAT APPELLANT'S CASE WAS "INACTIVE" IS ERRONEOUS AND NOT SUPPORTED BY THE EVIDENCE SINCE THE COURT FILE CLEARLY SHOWED THAT APPELLANT HAD FILED HIS OFFER OF ACCEPTANCE OF APPELLEES' $5,000.00 OFFER OF JUDGMENT AND THAT THE CASE WAS THEREBY RESOLVED AND NOT GOING TO TRIAL.

IV. STATEMENT OF THE CASE

On June 11, 2014 Appellant Robert W. Critchlow d/b/a Critchlow Law Office filed a summons and complaint against Dex Media West, Inc. a foreign corporation. CP 1-6, App. A. Mr. Critchlow, an attorney, had made arrangement with Dex Media West Inc. for the provision of advertising products and services for his law office in Spokane, Washington, including print advertisements in a telephone book and also a law office web site and internet services .CP 4. The web site created and installed by Dex Media West Inc. included a "tracking number" ostensibly used by them to collect "usage information." CP 4 At no time was Mr. Critchlow ever informed by Dex Media West Inc. that they were also recording Appellant's telephone calls without his knowledge or consent. CP 4. When a client or potential client would call Critchlow Law Office they would hear a prerecorded message installed by Appellees telling these clients or potential clients that their

telephone calls were being recorded.[CP]. Appellees have admitted that they had been recording his telephone calls. CP 4-5.

Appellant filed the following causes of action against Appellees : 1) Violation of Washington's Privacy Act, RCW 9.73 et. Seq, 2) common law tort of Misrepresentation/Failure to Disclose, 3) Violation of Washington's Consumer Protection Act, RCW 19.86 et seq., 4) common law tort of Invasion of Privacy. CP 4-6, App. A. Appellant requested actual damages, statutory damages, treble damages, punitive damages, and statutory attorney fees, costs and expenses. CP 6.

A case scheduling order was issued assigning the case to Judge Annette Plese with a status conference date of October 10, 2014.CP 7. On July 15, 2014 Judge Annette Plese issued an ex parte motion and order recusing herself from presiding over Appellant's case and ordering that the case be reassigned to another judge .CP 8. The order of recusal stated that there was "good cause" for the recusal but did not state any reasons for this finding of good cause. CP 8. Mr. Critchlow and his attorney, Alan McNeil were never received notice of nor were they provided a copy of this recusal motion and order, nor were they provided notice any hearing for this motion for recusal, nor were they accorded their due process rights and

opportunity to be heard on these matters, nor were they given the specific reasons for the recusal of Judge Plese and why these specific reasons warranted recusal of the judge. CP 24-25.

An order dated July 16, 2014 and signed by Judge Salvatore Cozza was signed preassigning Appellant's case to Judge Michael Price but no copies or notice[1] of this order were mailed out to any of the parties. CP 9.

On September 25, 2014 Appellees Dex Media West Inc. served upon Appellant a Civil Rule 68 Offer to allow Judgment to be taken against them in the amount of $5,000.00. CP 19-21. Appellees Offer of Judgment was to include "all reasonable attorney fees and costs to date." CP 19. On October 2, 2014 Mr. Critchlow timely complied with all the requirements of Civil Rule 68 and accepted Dex Media West Inc. offer within 10 days, filed their Offer of Judgment with the court along with proof (copy stamp received) that they had been served with Mr. Critchlow's acceptance of their offer.

When Mr. Critchlow eventually found out about Judge Plese' order of recusal he filed and served his Notice of Objection

[1] Judge Cozza's order indicates at the bottom that it was not mailed out to anyone.

to Order of Recusal to preserve his rights in this area and so that his subsequent conduct in proceeding with his case would not be viewed as a "waiver" of his rights. Judge Plese's Memorandum letter dated October 21, 2014 responding to Plaintiff's Notice of Objection to Order of Recusal admitted that "it appears that you did not get a copy of the order of recusal." CP 28. In her letter Appellant was also notified by Judge Plese that "the status conference date, which you received notice of when filing the case, did not change with the new judge." CP 28. Her letter notified Appellant that the "case is assigned to Judge[2] Price." CP 29. Finally, and most importantly, Judge Plese's Memorandum Letter made findings that "the court does not have to give a reason for the recusal and Counsel do not get to object to this order." CP 28.

On October 10, 2014 Judge Michael Price issued an Order for Mr. Critchlow to appear and Show Cause why his case should not be dismissed "for failing to appear at the scheduled status

[2] Judge Plese's Memorandum Letter dated October 21, 2014 was the first written notice Mr. Critchlow was given that Judge Price was now the judge assigned to his case. Her letter erroneously assumes that the original case scheduling order designating her as the assigned judge somehow miraculously also notified Mr. Critchlow that Judge Price was the new judge assigned to his case. Judge Cozza's Order of preassignement to Judge Price was never mailed to nor received by Mr. Critchlow or his attorney so this is an extraordinary leap in logic. Judge Price issued his first order (Show Cause) on October 10, 2014, approximately 10 (ten) days prior to Plaintiff receiving his written notice via Judge Plese's letter that Judge Price was now the judge assigned to his case.

conference of October 10, 2014 at 9:00 AM." This order directed Appellant Critchlow to appear at Judge Price's courtroom on November 7, 2014. On November 7, 2014 Judge Michael Price issued an Order of Dismissal with Prejudice for Appellant's case. CP 30-31. Judge Price made findings that there was good cause for dismissal with prejudice since 1) Appellant Critchlow had failed to inform the court of the status of the case so it was "inactive" and 2) that Appellant "had failed to appear." CP 30-31.

V. ARGUMENT-ORDER OF RECUSAL

STANDARD OF REVIEW FOR RECUSAL is "abuse of discretion." *State v. Perala* 132 Wn. App. 98, 130 P.3d 852 (Div. III, 2006). Discretion is not abused unless the decision is manifestly unreasonable, is based on untenable grounds or is made for untenable reasons. *Perala, id.* Indeed, a judge is presumed to perform his or her functions regularly and properly without bias or prejudice. *Perala, id.* In the case under review Judge Annette Plese was presumed to perform her functions as a judge regularly and without prejudice on Appellant Critchlow's case.

Appellant Critchlow was notified via the original case scheduling order dated July 11, 2014 that Judge Annette Plese was assigned to his case. Apparently (and unknown to Appellant) on July 15, 2014 Judge Plese signed her own (sua sponte) ex parte motion and order for recusal

removing herself from Appellant's case and ordering that the case be reassigned to another judge. No hearing was held for this ex parte motion for recusal and neither Appellant Critchlow nor his attorney Al McNeil ever received a copy of this order of recusal. These facts are undisputed. Judge Plese admits in her Memorandum Letter dated October 21, 2014 that "it appears that you did not get a copy of the order of recusal." Finally, no supporting findings or reasons were stated in this motion and order for recusal as the basis for this recusal. Indeed, in her Memorandum Letter Judge Plese unabashedly found that "the court does not have to give a reason for the recusal." CP 28.

This is contrary to well established black letter law in this area. A motion to have a judge recuse him or herself requires notice of the motion and of the time for the hearing thereon. *Perala, id* . The notice must identify the conduct forming the basis for the proposed disqualification and the specific reason/s why the conduct warrants disqualification. *Perala Id* and *Estate of Barovic* 88 Wn. App. 823, 946 P.2d 1202 (Div. II, 1997). Whether a judge's impartiality might be reasonably questioned is tested under an objective standard that assumes that a reasonable **person knows and understands all of the facts.** *Sherman v. State* 128 Wn.2d 164, 905 P.2d 355 (1995). Accord, *Kauzlarich v. Yarbrough* 105 Wn. App. 632, 20 P.3d 946 (Div. II, 2001) Like Judge Plese the judge in the *Kauzlarich* case recused herself sua sponte on her own motion. However, unlike Judge Plese the judge in the *Kauzlarich* case did give reasons for her recusal on

the record (viz, that she was a judge in Pierce County where many judges and court personnel were witnesses in the case). *Kauzlarich, id* citing Report of Proceedings (Feb. 7, 1997) at 15-16. The Court of Appeals in *Kauzlarich* upheld the judge's order of recusal since she had put her reasons for so doing on the record, the parties had been notified of these reasons and her reasons were deemed sufficient and not an abuse of discretion.

In the case under review, Judge Plese 1) failed to state her reasons for recusal 2) failed to put her reasons for recusal on record and 3) failed to show how these reasons required her recusal and 4) failed to conduct a hearing and notify all parties of her intention to recuse herself so as to give them an opportunity to be heard. Judge Plese simply issued the order ex parte and **didn't even send a copy of this order** to Appellant Critchlow nor his attorney, nor indeed to any parties in this case. As such, Judge Plese's Motion and Order for Recusal is **null and void** since it was made **ex parte and without notice** to Appellant Critchlow so that he would have an opportunity to respond and to hear the explanation of the specific factual reasons for recusal. *G.W. Ganoung et al v. Chinto Mining Company* 26 Wn.2d 566, 174 P.2d 759 (1946). Since the order of recusal was null and void any **subsequent orders** (reassignment order, show cause order, dismissal order) based thereon and proceeding therefrom were **also null and void**. This manner of proceeding on Appellant Critchlow's case was a violation of due process of the highest order, particularly since it involves the potential bias of a judge.

DUE PROCESS-Our role is not to define due process according to "our personal and private notions of fairness" *State v. Hotrum* 120 Wn. App. 681, 87 P.3d 766 (Div. III, 2004) citing *State v. Cantrell* 111 Wn. 2d 389, 389, 758 P.2d 1 (1988) quoting *United States v. Lovasco* 431 U.S. 783, 790, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977). Courts must decide whether the criticized act violates those "fundamental conceptions of justice which lie at the base of our civil institutions and which define the communities' sense of fair play and decency." *Hotrum, supra* citing *Cantrell, supra* quoting *United States v. Lovasco* 431 U.S. 783, 790 (1977). "An essential ingredient of due process is notice" *State v. Hotrum* 120 Wn. App. 681, 87 P.3d 766 (Div. III, 2004)[ex parte sentencing order] quoting *In Pers. Restraint of Cashaw*, 68 Wn. App. 112 at 124, 839 P.2d 332 (Div. I, 1992)

Judge Plese does not get to decide her own personal view of "due process" is that the parties and their attorneys on her cases don't have the right to be present at any of her motions and orders of recusal for their comments and opportunity to be heard and to be notified of the reasons for the recusal and why these reasons justify recusal. Judge Plese, in proceeding the way she did clearly violated Appellant Critchlow's due process rights to the fair administration of justice.

VI. ARGUMENT-ORDER OF DISMISSAL

STANDARD OF REVIEW FOR DISMISSAL-A trial court's dismissal of a case for noncompliance with court orders is reviewed for "abuse of

discretion." *Apostolis v. Seattle*, 101 Wn. App. 300, 3 P.3d 198 (Div. I, 2000). Discretion is abused if the decision to dismiss is manifestly unreasonable or based on untenable grounds. *Apostolis, id.*

By written pleading dated September 25, 2014 Appellees Dex Media West Inc. made a Civil Rule 68 Offer of Judgment in the amount of $5000.00 to Appellant Critchlow. Mr. Critchlow had ten days under CR 68 to accept this offer and he timely and unequivocally accepted Appellees' Offer of Judgment. He filed a pleading entitled Plaintiff's Acceptance of Offer of Judgment on October 2, 2010 which included Appellees' Offer of Judgment as an attachment. This pleading also contained copy stamped receipts from Appellee's law firm showing proof that they had been served with Plaintiff's acceptance of their offer.

Civil Rule 68 provides in pertinent part:

> At any time more than 10 days before the trial begins a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted either party may then file the offer and notice of acceptance together with proof of service there **and thereupon the court shall enter judgment**.(emphasis added in bold).

STANDARD OF REVIEW FOR COURT RULES-The interpretation of a court rule is a question of law that is reviewed "de novo." *Hedlund v.*

Vitale 110 Wn. App. 183, 39 P.3d 358 (Div. II, 2002). However, an unambiguous court rule is applied as written and does not require judicial construction; it is presumed that the drafters meant exactly what the rule says. *Plouffe v. Rock* 135 Wn. App. 628, 147 P.3d 596 (Div. I, 2006). When the language is clear courts cannot construe a statute contrary to its plain language. *City of Kirkland v. Ellis* 82 Wn. App. 819, 826, 920 P.2d 206 (1996).The word "shall" in a court rule imposes a **mandatory duty**. *Rudolph v. Empirical Research Sys.* 107 Wn. App. 861, 28 P.3d 313 (Div. II, 2001). See also *Ballasiotes v. Gardner* 97 Wn.2d 191, 642 P.2d 397 (1982).

In the case under review Appellant Critchlow complied with his duties under CR 68 by 1) filing and serving his Acceptance of Dex Media West Inc. Offer of Judgment 2) filing a copy of their Offer of Judgment and 3) filing proof that they (via copy stamped pleadings) had been served copies of this Acceptance within the 10 day period. These pleadings were all filed on October 2, 2014. Judge Cozza's Order reassigning the case to Judge Price was never mailed out to any of the parties notifying them that Judge Price was now assigned to Appellant's case. In any event, and assuming arguendo that Judge Price was lawfully and properly assigned to Appellant's case, according to the requirements of CR 68 Judge Price was under a duty to enter "thereupon" enter judgment in the case. Instead of

entering the judgment as required by CR 68 Judge Price issued two separate orders: 1) order to show cause why Appellant's case should not be dismissed for failure to appear at the October 10, 2014 status conference and 2) an order of dismissal with prejudice. Judge Price could not exercise any discretion as to these two orders since he was under a "mandatory duty" to enter Appellant Critchlow's judgment. *Rudolph v. Empirical Research Sys, supra.* Since he had no discretion to issue these orders they are, along with the initial order of recusal, null, void and without any legal effect.

MINISTERIAL ACTS- Judge Price's failure to simply enter the Judgment for $5,000.00 as required by CR 68 was a purely "ministerial act." See *State of Washington v. Eldridge Shelby* 69 Wn.2d 295, 418 P.2d 246 (1966)[formal entry of Findings of Facts and Conclusions of Law signed and entered by judge is "ministerial"]; *Cinebar Coal and Coke Co. v. George Robison et al* 1 Wn.2d 620, 97 P.2d 128 (1939)[clerk's failure to file and enter judgment on docket was "ministerial"]; *Equity Group v. Hidden* 86 Wn. App. 148, 943 P.2d 1267 (Div. II 1997)[judicial act of entering judgment confirming arbitration award is "ministerial"]

The performance of an official's duty is considered a "ministerial act" where the law prescribes and defines the official's duty with such

precision and certainty as to leave nothing to the exercise of discretion or judgment. *Bothell v. Gutschmidt* 78 Wn. App. 654, 898 P.2d 864 (Div. I, 1995). A "ministerial" act is one that "involves obedience to instructions or laws instead of discretion, judgment or skill" *City of Wenatchee v. Owens* 145 Wn. App. 196, 185 P.3d 1218 (Div. III, 2008) quoting BLACKS LAW DICTIONARY (8th ed. 1999) at 1017. If the "ministerial act" is mandatory, it is also termed a "ministerial duty." *City of Wenatchee, id* citing BLACK's supra at 26. Based on the judicial construction and interpretation of CR 68 Judge Price was under a ministerial duty to enter Appellant Critchlow's judgment for $5000.00. There was no discretion to do anything else at that point in time. Further, Judge Price had no discretion as a **matter of law** to enter either the Show Cause Order or the Order of Dismissal With Prejudice.

FAILURE TO MAKE REQUIRED FINDINGS FOR DISMISSAL- Washington courts do not resort to dismissal lightly. *Woodhead v. Discount Waterbeds Inc.* 78 Wn. App. 125, 896 P.2d 66 (Div. I, 1995) citing *Anderson v. Mohundro* 24 Wn. App. 569, 575, 604 P.2d 181 (1979)[because dismissal is the most severe sanction its use must be tempered by careful exercise of judicial discretion to assure that it's imposition is merited] Abuse of Discretion is the standard of review for such dismissals and the court abuses its discretion when it's decision is 1)

manifestly unreasonable or 2) based on untenable grounds. *Woodhead, supra.* Disregard of a court order without reasonable excuse or justification is deemed willful. *Woodhead, supra.* However, the trial court must consider on the record whether a lesser sanction would suffice in addition to making clear on the record the factors of willfulness. *Woodhead, supra* citing *White v. Kent Medical Or. Inc.* 61 Wn. App. 163, 810 P.2d 4 (1991). In *White, id* the trial court had not considered any of these questions on the record and the case was therefore reversed and remanded to the trial court. *Woodhead, supra* citing *White v. Kent Medical Or. Inc.* 61 Wn. App.at 176

A trial court's choice of what sanction to impose is generally within the court's discretion. *White, supra* citing *Rhinehart v. KIRO Inc.* 44 Wn. App. 707, 723 P.2d 22 (1986). Before resorting to default or dismissal, the most severe sanctions available under the rule, the court must consider, on the record, whether a lesser sanction would suffice. *White, supra* citing *Snedigar v. Hodderson*, 114 Wn.2d 153, 786 P.2d 781 (1990).

DUE PROCESS-The issue of due process is involved if the sanction imposed against a defendant as a summary punishment for contempt in refusal to obey the court's order. *Assoc. Mortgage Investors v. Kent*

Constr. Co. Inc 15 Wn. App. 223, 548 P.2d 558 (1976) citing *Mitchell v. Watson* 58 Wn. 2d 206, 361 P.2d 744 (1961). Our role is not to define due process according to "our personal and private notions of fairness" *Hotrum, supra* citing *State v. Cantrell* 111 Wn. 2d 389, 389 (1988) quoting *United States v. Lovasco* 431 U.S. 783, 790 (1977). Courts must decide whether the criticized act violates those "fundamental conceptions of justice which lie at the base of our civil institutions and which define the communities' sense of fair play and decency." *Hotrum, supra* citing *Cantrell, supra* quoting *United States v. Lovasco* 431 U.S. 783, 790 (1977).

Due process considerations require that before a trial court dismisses an action there must have been a willful or deliberate refusal to obey the order which substantially prejudices the opponent's ability to prepare for trial. *White, supra* citing *Associated Mortgage Investors v. G.P. Kent Constr. Co.* 15 Wn. App. 223, 548 P.2d 558 (1976). Further, the trial court must make it clear on the record whether the factors of willfulness and prejudice and prejudice are present before it enters a dismissal. *White, supra* citing *Snedigar v. Hodderson, supra.* See also *Peluso v. Barton Auto Dealerships Inc.* 138 Wn. App. 65, 155 P.3d 978 (Div. III, 2007)[trial court order dismissing case for violating scheduling order reversed on appeal since no findings that lesser sanction would suffice,

violation of court's order was willful and this created substantial prejudice for defendant].

The court reporters for Judge Plese and Judge Price have both responded that there were **no verbatim recorded proceedings or hearings** for any of the orders that were entered in Appellant's case so the Court of Appeals is constrained to only consider the findings contained in these orders and other matters in the court record in making their decision. *State of Washington v. Ronald Davis et al* 73 Wn.2d 271 (1968)[An appeal must be decided on the record made in the trial court] If Judge Price had simply reviewed Appellant's court file he would have ascertained that Appellant's case had been resolved, that Appellees' Offer of Judgment had been accepted and that Appellant had complied with all the requirements of CR 68 by filing and serving his acceptance of their offer, by filing copy of Appellees' Offer of Judgment along with proof (copy stamp received) that they had been served Appellant's acceptance of their offer. Judge Prices's order of dismissal was manifestly unreasonable and based on untenable grounds because:

1) His finding that the case was "inactive" was manifestly unreasonable and based on untenable grounds since the court file showed that the Offer of Judgment had been accepted and that Appellant had complied with all the requirements of CR 68 leaving only the "ministerial act" of entering the judgment with the court.

2) Judge Price made no findings in his order as to whether a lesser sanction would suffice.
3) Judge Price made no findings in his order whether Appellant's failure to appear was willfully done or without reasonable excuse.
4) Judge Price made no findings in his order whether Appellant's failure to appear prejudiced the Appellees' ability to prepare for trial.
5) Judge Prices'order was manifestly unreasonable and based upon untenable grounds because there was not going to be any trial since the case had already been settled so it would be impossible, as a **matter of law**, for Appellee Dex Media West Inc. to suffer any prejudice thereby.

VII. RAP 18.1 REQUEST FOR ATTORNEY FEES

As previously stated Appellees' Dex Media West Inc. made a Rule 68 Offer of Judgment to Appellant Robert Critchlow. Their pleading specifically stated that their Offer of Judgment (pg 1, lines 23-25) was for the sum of $5000.00 (five thousand dollars) "including all reasonable attorney fees and costs to date." These attorneys fees included those being sought by plaintiff under Washington's Consumer Protection, RCW 19.86 et. Seq. and Washington's Privacy Act, RCW 9.73 et. Seq. Appellant Critchlow had ten days under CR 68 to accept this offer and he timely and unequivocally accepted Appellees' Offer of Judgment and served filed a pleading entitled Plaintiff's Acceptance of Offer of Judgment on October 2, 2010 which included Appellees' Offer of Judgment as an attachment.

Because Federal Rule of Procedure 68 is "virtually identical" to Washington's Civil Rule 68 we may look to federal interpretations of that rule in interpreting CR 68. See *Lietz v. Hansen Law Offices, PSC* 166 Wn. App. 571, 580, 271 P.3d 899 (Div. II, 2012) A Rule 68 Offer of Judgment is a proposal of settlement that, **by definition, stipulates that the plaintiff** shall be treated as the **prevailing party**. *Delta Air Lines Inc. v. August* 450 U.S. 346, 363, 101 S. Ct. 1146, 67 L.Ed.2d 287 (1981). See also *Util. Automation 2000 Inc v. Choctawhatchee Elect. Coop Inc.* 298 F.3d 1238, 1248 (11th Cir. 2002); *Spegon v. Catholic of Chi.* 175 F.3d 544, 550 (7th Cir. 1999); *Webb v. James* 147 F.3d 617, 623 (7th Cir. 1998); *Lyte v. Sara Lee Corp.*950 FR.2d 101, 102 (2d Cir. 1991) and *Baird v. Boise, Schiller & Flexner LLP*219 F. Supp. 2d 510, 522 n.9 (S.D.N.Y. 2002)[emphasis added in bold]

Although Appellees' Offer of Judgment was never formally entered by the trial court, Appellant Critchlow was still the "prevailing party" at the trial court level as per the construction and interpretation of CR 68. Indeed, that was the construction in *Lietz, supra* when Lietz appealed the trial court's decision refusing to enter appellee Hansen Law Offices Offer of Judgment which Lietz claimed he had unconditionally accepted. Leitz had been a paralegal for this law firm under Rule 6 and both his employment and Rule 6 sponsorship were terminated by this law firm in

violation of state employment law. The Offer of Judgment was silent on the issue of attorney fees and the trial court ruled that there was no "meeting of the minds" and that the Offer of Judgment was thereby invalid. The Court of Appeals reversed and further noted at:

> Lietz also requests attorney fees on appeal **independent** of his claim for attorney fees under under *Seaborn* and the parties CR 68 judgment. RAP 18.1 allows us to award reasonable attorney fees where, as here, a statute provides for such fees and the party requests the fees in his opening brief. RAP 18.1 (a-b); *Dice v. City of Montesano,* 131 W. App. 675 (2006). RCW 49.48.030 grants attorney fees to an employee who is successful in a wages claim against his employer.[emphasis added in bold]

If Appellant Critchlow prevails in this appeal he is entitled to an award of attorney fees pursuant to RAP 18.1 Further it is well established that the Consumer Protection Act provides "adequate ground" for awards of attorney fees on appeal. See *Evergreen Collectors v. Larry Holt* 60 Wn. App. 151, 803 P.2d 10 (Div. II, 1991) quoting/citing *Wilkinson v. Smith* 31 Wn. App. 1, 15, 639 P.2d 768 (1982). Accord, *Nguyen v. Glendale Constr. Co.* 56 Wn. App. 196, 782 P.2d 110 (1089); *Robinson v. McReynolds* 52 Wn. App. 635, 762 P. 2d 1116 (Div. II, 1988) and *Mason v.* Mortgage *American Inc.* 114 Wn.2d 842, 792 P.2d 842 (1990). See finally *Physicians Ins. Exchange v. Fisons Corp.* 122 Wn.2d 299, 858 P.2d 581 (En Banc, 1993) citing *Bowers v. Transamerica Title Ins.* 100 Wn.2d 581, 602, 675 P.2d 193 (1983).

VIII. CONCLUSION

When Judge Annette Plese was initially assigned as the judge to Mr. Critchlow's case it was presumed that she would perform her functions as a judge regularly and without prejudice towards Mr. Critchlow and/or his case. Her Motion and Order for Recusal and directing that the case be reassigned was "void ab initio" since it was done ex parte without notice to the parties in this case. Neither Appellant nor his attorney received a copy of Judge Plese's Motion and Order for Recusal nor did they receive a copy of Judge Cozza's order reassigning the case to Judge Price. Any of the orders subsequent to the ex parte order of recusal, were also void since they were tainted by and flowed directly from the void recusal order.

The Motion and Order for Recusal was also an "abuse of discretion" since Judge Plese failed to follow clearly established black letter law requiring 1) notice to the parties 2) her reasons stated as part of the record 3) reasons which justified her recusal and 4) opportunity for the parties to comment on her proposed recusal and her reasons.

Judge Michael Price's Order of Dismissal with Prejudice was an "abuse of discretion" since it was manifestly unreasonable and based on untenable grounds. Judge Price failed to make and findings that 1) a lesser sanction than dismissal would suffice, 2) that failure to obey his orders by

Appellant was willful 3) that the failure to obey his order resulted in substantial prejudice to Appellees' ability to prepare for trial. Further, Judge Price's order of dismissal was untenable as a "matter of law" since the parties had already settled the case and there was not going to be any trial therefore it would be impossible as a matter of law for Appellee to suffer any prejudice. Finally, Judge Price's finding in his order that the case was "inactive" is clearly erroneous since the court file showed that the case was resolved and Appellant had accepted Appellees' Offer of Judgment. Finally, once Appellant complied with the requirements of Civil Rule 68 the court was under "mandatory" and "ministerial" duties to enter the $5000.00 judgment. The court had no discretion as a "matter of law" to do anything else.

Appellant Critchlow asks this court to reverse these orders, remand his case to the trial court and direct entry of his $5,000.00 judgment and to also award Mr. Critchlow attorney fees for this appeal.

DATED THIS 30th day of Mar 2015.

ROBERT W. CRITCHLOW
Appellant and Co-Counsel
WSBA# 17540

ALAN L MCNEIL
Co-Counsel for Appellant
WSBA# 7930

RICHARD F. LEE
Co-Counsel for Appellant
WSBA# 32329

APPENDIX A

PLAINTIFF CRITCHLOW'S COMPLAINT FOR DAMAGES

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

ROBERT W. CRITCHLOW, individually and d/b/a CRITCHLOW LAW OFFICE Plaintiff, v. DEX MEDIA WEST, INC., a foreign corporation, Defendants.	No. 14202624-7 PLAINTIFF'S COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

COMES NOW Plaintiff ROBERT W. CRITCHLOW to allege and complain as follows:

I. JURISDICTION\VENUE\PARTIES\AGENCY

1.1 At all times relevant hereto plaintiff, ROBERT W. CRITCHLOW was a licensed Washington attorney residing in Spokane County, Washington and doing business as CRITCHLOW LAW OFFICE.

1.2 At all times relevant hereto defendant DEX MEDIA WEST INC. was a foreign corporation duly organized under the laws of the State of Delaware, with branch offices located in the State of Washington and Spokane County, Washington and doing business in

Alan L. McNeil-Attorney at Law
421 W. Riverside Ave., Ste. 660
Spokane, WA 99201
Tel: 509. 315-8390

the State of Washington and Spokane County, Washington providing advertising products and services to Washington residents.

1.3 At all times relevant hereto all acts performed by defendants DEX MEDIA WEST INC. and their agents and employees were made during the regular course of business and under the direction and control of defendants and on behalf of and for the benefit of defendants DEX MEDIA WEST INC.

1.4 Venue is proper pursuant to RCW 4.12.025(1)(a) [county where transaction of business occurred]; RCW 4.12.025(1)(b) [county where defendant has an office for the transaction of business]; RCW 4.12.025(2)(b); and [county where tort occurred].

II. BASIC FACTS

2.1 That on or about March 8, 2012 plaintiff ROBERT CRITCHLOW made arrangements with defendants DEX MEDIA WEST INC. for the provision of advertising products and services for his Law Office in Spokane, WA. including print advertisements in a telephone book and provision of a Law Office web site and internet services.

2.2 That this web site created by defendants included a tracking telephone number which was installed and operated by defendants and allegedly used by defendants to collect "usage information."

2.3 That at no time was plaintiff ever informed by defendants that there was a feature with this tracking system whereby defendants regularly recorded plaintiff's telephone calls without plaintiff's knowledge, consent or authorization.

2.4 That when a client or potential client would call Critchlow Law Office these they would hear a message from defendants telling them that their telephone calls were being recorded.

Alan L. McNeil-Attorney at Law
421 W. Riverside Ave., Ste. 660
Spokane, WA 99201
Tel: 509. 315-8390

2.5 That defendants have admitted that they have recorded these telephone calls made.

2.6 That defendants claim that these recordings made by them were done "inadvertently."

III. CLAIMS\CAUSES OF ACTION

3.1 FIRST CAUSE OF ACTION--Upon information and belief and as a direct and proximate result of their actions and\or omissions in the provision of advertising products and services and specifically recording plaintiff's telephone calls without his consent or knowledge defendants have violated plaintiff's STATUTORY PRIVACY RIGHTS. See RCW 9.73 et. seq.

3.2 SECOND CAUSE OF ACTION--Upon information and belief and as a direct and proximate result of their actions and\or omissions in the provision of advertising products and services and specifically recording plaintiff's telephone calls without his consent or knowledge defendants have committed the common law tort of MISREPRESENTATION/FAILURE TO DISCLOSE, to wit:

3.2A. That defendants had a quasi-fiduciary relationship of trust and confidence with plaintiff and defendants possessed superior specialized knowledge and experience which was relied upon by plaintiff.

3.2B That defendants failed to use reasonable care to disclose to plaintiff this telephone call recording feature included with plaintiff's internet products and services and defendants knew that this information would justifiably induce plaintiff to act or refrain from acting in this business transaction.

3.2C That plaintiff relied on defendants superior knowledge and experience and this trust relationship and was proximately damage thereby when defendants recorded plaintiffs telephone calls without plaintiff's knowledge

Alan L. McNeil-Attorney at Law
421 W. Riverside Ave., Ste. 660
Spokane, WA 99201
Tel: 509. 315-8390

or consent. See *Richland Sch. Dist. v. Mabton Sch. Dist.* 111 Wn. App. 377 (Div. III, 2002) and RESTATMENT (SECOND) TORTS § 551.

3.3 THIRD CAUSE OF ACTION--Upon information and belief and as a direct and proximate result of their actions and\or omissions in the provision of advertising products and services and specifically recording plaintiff's telephone calls without his consent or knowledge defendants have violated WASHINGTON'S CONSUMER PROTECTION ACT. See RCW 19.86 et. seq., to wit:

3.3A. That defendants failure to disclose that they were recording plaintiff's telephone calls without his authorization or consent was an unfair or deceptive act or practice,

3.3B. That occurred in trade or commerce,

3.3C. That had and has an impact on the public interest, and

3.3D. That proximately injured plaintiff's business or property. See *Bloor v. Fritz* 143 Wn.App. 718 (Div. II, 2008)

3.5 FOURTH CAUSE OF ACTION--Upon information and belief and as a direct and proximate result of their actions and\or omissions in the provision of advertising products and services and specifically recording plaintiff's telephone calls without his consent or knowledge defendants have committed the common law tort of INVASION OF PRIVACY/INTRUSION INTO PRIVATE AFFAIRS, to wit:

3.5A Defendants intentionally intruded into plaintiff's private affairs by recording Plaintiff's confidential telephone calls.

3.5B. That these intrusions would be highly offensive to a reasonable person. See RESTATEMENT (SECOND) TORTS, § 652.

Alan L. McNeil-Attorney at Law
421 W. Riverside Ave., Ste. 660
Spokane, WA 99201
Tel: 509. 315-8390

IV. DAMAGES

4.1 As a direct and proximate result of the actions and\or omissions complained of herein, plaintiff has suffered ACTUAL DAMAGES in an amount to be proven at trial.

4.2 As a direct and proximate result of the actions and\or omissions complained of herein, plaintiff has suffered STATUTORY DAMAGES in an amount to be proven at trial.

4.3 As a direct and proximate result of the actions and\or omissions complained of herein, plaintiff has suffered TREBLE DAMAGES in an amount to be proven at trial.

4.4. As a direct and proximate result of the actions and\or omissions complained of herein, plaintiff has suffered PUNITIVE DAMAGES in an amount to be proven at trial

V. RELIEF SOUGHT

5.1 Plaintiff is entitled to the AFORMENTIONED DAMAGES in amounts to be proven at trial.

5.2 Plaintiff is entitled to STATUTORY ATTORNEY FEES.

5.3 Plaintiff is entitled to STATUTORY COSTS AND EXPENSES.

5.4 Plaintiff is entitled to an INJUNCTION prohibiting defendants from making further nonconsensual recordings of telephone calls of any residents in the State of Washington.

5.5 Plaintiff is entitled to ANY OTHER LEGAL OR EQUITABLE RELIEF that the court deems just and fair based on the facts and circumstances of this case.

SUBMITTED THIS 11th day of July, 2014.

ALAN L. MCNEIL
WSBA # 7930
Attorney for Plaintiff Critchlow

Alan L. McNeil-Attorney at Law
421 W. Riverside Ave., Ste. 660
Spokane, WA 99201
Tel: 509. 315-8390