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 Reply Brief

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I. PROCEDURAL SUMMARY

This case was initially about Robert Critchlow, a Spokane attorney who had made arrangements with Dex Media for the provision of advertising products and services. Dex Media set up an internet website for Mr. Critchlow's law office. This website had a telephone number which was installed by them for tracking "usage." However, Dex Media was not only tracking the usage of the telephone calls received by attorney Critchlow but they were also recording these telephone calls without his knowledge or consent.

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 and 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 written motion and without any notice to the parties or a hearing signed an order recusing herself from the case and ordering that it be reassigned to another judge. On July 16, 2014 Presiding Judge Salvatore Cozza, pursuant to Judge Plese's order of recusal, signed an order reassigning Mr. Critchlow's case to Judge Michael Price. No status conference date was

listed in this order and neither Mr. Critchlow nor his attorney Al McNeil were provided copies of Judge Cozza's order.

On September 25, 2014 Dex Media pursuant to Civil Rule 68 made an Offer of Judgment to Mr. Critchlow in the amount of $5,000.00. Mr. Critchlow unequivocally accepted the Offer of Judgment and complied with CR 68 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 8, 2014 (a mere two days before the hearing scheduled in front of Judge Plese) Dex Media's attorney Kim Kamel emailed Mr. Critchlow copies of Judge Plese's Motion and Order for Recusal and Judge Cozza's order reassigning the case to Judge Price. It is unknown when and how Kamel received copies of these orders since the record is clear that no copies were mailed[1] out to the parties. This was the first time Mr. Critchlow had received any notice of these orders from any source[2]. He immediately emailed his objections via letter to Judge Plese and asked her for a hearing to inquire into same. Mr. Critchlow's letter was completely ignored by Judge Plese. The judge failed to respond to Mr. Critchlow's letter nor did she file it nor make it part of the official court

[1] Judge Plese's Memorandum opinion dated October 21, 2014 also admits that the parties did not receive copies of these orders.
[2] These orders were not in court file either since Mr. Critchlow had carefully reviewed the court file on several occasions and had not seen any such orders.

file nor did she schedule any hearing pursuant to Mr. Critchlow's request. Mr. Critchlow did not go to Judge Plese's courtroom on October 10, 2014 since he felt the judge would be scheduling a hearing on the recusal as per his letter and her legal and ethical[3] duties. Judge Michael Price issued a Show Cause Order on October 10, 2014 directing all parties and their attorneys to appear in his courtroom on November 7, 2014. Knowing that his October 8, 2014 letter had not been placed in the court file by Judge Plese, and that it was not part of the official court record, Mr Critchlow simply reformulated his October 8, 2014 letter into his pleading entitled "Plaintiff's Notice of Objection to 1) Motion and Order for Recusal and 2) Order of Case Reassignment" and filed that with the court. Now that the contents of his letter were officially part of the court file Judge Plese was compelled to respond and did so via her Memorandum Letter/Ruling dated and filed October 21, 2014, wherein, among other things, she ruled that Mr. Critchlow was not entitled to a hearing on her motion for recusal. Unfortunately for Mr. Critchlow, Judge Plese's Memorandum Letter dated October 21, 2014 responding to Mr. Critchlow's October 8, 2014 letter was only 13 thirteen days late and came after Judge Price had already

[3] **CJC 2.6 Ensuring the Right to Be Heard.** A Judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

issued his Show Cause Order for Mr. Critchlow's failure to appear. 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 Mr. Critchlow to appear on November 7, 2014.

Mr. Critchlow and Mr. Lee (co-counsel) were both unavailable to attend the hearing scheduled for Nov. 7, 2014 and it was agreed that Mr. McNeil would attend. Mr. McNeil attempted to enter Judge Price's courtroom that morning but found that no one was present and that the courtroom was locked. (McNeil letter dated November 19, 2014). Dex Media's attorney Kim Kamel also was present on that morning and indicated that she saw Mr. McNeil walking down the main hallway but did not inform him that the courtroom was now open for business. (Kamel letter dated Dec. 3, 2014) There was no verbatim record produced by the court reporter for this hearing on November 7, 2014 so there is no record as to what, if anything transpired on that date. Nonetheless Judge Price issued an order on Nov. 7, 2014 dismissing Mr. Critchlow's case with prejudice based on his findings that Mr. Critchlow had not appeared, had not communicated with the court and that his case was "inactive." Mr. Critchlow timely filed an appeal to this Court raising numerous issues, including "due process" and "abuse of discretion" violations that occurred

during the issuance of the recusal, reassignment, show cause and dismissal orders. Opening Br. 3-6.

On April 14, 2014 Dex Media filed a RAP 9.11 Motion to Supplement the Record to include Mr. Critchlow's October 8, 2014 letter emailed to Judge Plese and a copy of their proposed Judgment. Mr. Critchlow responded that Dex Media had not met the supplementation requirements of RAP 9.11 but that this Court has the authority to waive the requirements of this rule if justice so requires. Mr. Critchlow argued that if the rule's requirements were to be waived and his October 8, 2014 letter was to be made part of the record then the Al McNeil letter to Judge Price dated November 19, 2014 and the Kim Kamel response letter to Judge Price dated Dec. 3, 2014 should be also be made part of the record. The Court waived the requirements of RAP 9.11 and ordered all of these documents to supplement the record in this case.

II. RESPONSE TO CRITCHLOW OPENING BRIEF

Dex Media filed their response brief to Mr. Critchlow's Opening Brief on July 1, 2015. Among other arguments, Dex Media asserts that they are "merely a bystander in Critchlow's crusade against the decisions of two trial court judge's." They further assert that "his due process rights have not been violated" and therefore that the trial court orders should be "upheld."

Response Br. 27 Dex Media makes a number of errors and misstatements of law and fact in support of their "bystander" and "crusade" theories most of which will each be examined in turn.

III. THE UNDERLYING "MERITS" OF THIS LAWSUIT HAVE ALREADY BEEN DETERMINED VIA THE CIVIL RULE 68 OFFER AND ACCEPTANCE AND CONTRACT FOR A $5000.00 JUDGMENT TO BE ENTERED AGAINST DEX MEDIA.

Dex Media argues, consistent with their "bystander" and "crusader" themes, that "Appellant brought this appeal not based on the underlying merits of his lawsuit but based on two procedural issues which two separate judges made." Response Br. 1. If by underlying merits they are speaking of the claims as outlined in Mr. Critchlow's Complaint these issues have already been decided in his favor and cannot now be litigated on appeal, particularly when Dex Media failed to file any cross appeal contending that their Civil Rule 68 Offer of Judgment is now somehow invalid or void.

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 no Judgment was ever formally entered by the trial court, Mr. Critchlow is still the "prevailing party" and these are not "merits" that can now be litigated on appeal. Indeed, that was the construction in *Lietz v. Hansen Law Offices, PSC* 166 Wn. App. 571 (Div. II, 2012) involving the construction of CR 68 Offers of Judgement. 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:

> 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]

In this case there has never been any contention by Dex Media that there was anything wrong with their CR 68 Offer of Judgment. They cannot now, sub rosa, argue these "merits" on appeal but they would like this Court to see them as "bystanders" so that they can avoid the entry of this $5,000 Judgment along with the imposition of attorney fees for this appeal.

IV. THE COURT OF APPEALS SHOULD NOT ENABLE AND ASSIST DEX MEDIA WITH THE ILLEGAL ACT OF BREACHING THEIR CONTRACT WITH MR. CRITCHLOW FOR A $5000.00 JUDGMENT TO BE ENTERED AGAINST THEM BY AFFIRMING THESE TRIAL COURT ORDERS.

Offers of Judgment proceedings under Civil Rule 68 are essentially contractual in nature. See *Hodge v. Development Services* 65 Wn. App. 576 (Div. I, 1992) citing *Erdman v. Cochise County Arizona*, 926 F.2d 877 (9th Cir. 1991); *Radecki v. Amoco Oil Co.*, 858 F.2d 397 (8th Cir. 1988) and *Bentley v. Bolger*, 110 FRD 108 (C.D. Ill, 1986). When a plaintiff accepts the offer of judgment according to the rule, the defendant pays the attorney fees and costs to the date of the offer. *McConnell v. Mother Works Inc.*, 1331 Wn. App. 525 (Div. III, 2006). Because CR 68 imposes upon offerees risks not imposed by private settlement offers any ambiguity in the offer of judgment is construed against the offeror. *Wash. Greensview Apartment Assocs. v. Travelers Property Casualty Company of America et al,* 173 Wn. App. 663 (Div. I, 2013).Thus the **clear public**

policy of Washington Courts is to **uphold these Civil Rule 68 "contracts."** Dex Media is arguing that this Court should assist them with their "breach of contract" with Mr. Critchlow by affirming these trial court orders, including the order of dismissal with prejudice. Such affirmance would preclude the entry of this $5000.00 Judgment. Dex Media now seeks to make Court of Appeals Div. III a further participant in its own continuing illegal acts by breaching their own CR 68 contract. RPC (Rule of Professional Responsibility) 8.4 (f) states that it is misconduct for a lawyer to "knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of conduct or other law." The Court of Appeals should not allow Dex Media to use it to breach their agreement to allow a $5000.00 Judgment to be entered against them.

V.THE RECORD IS CLEAR THAT NEITHER MR. CRITCHLOW NOR HIS COUNSEL HAD ANY KNOWLEDGE OF THE EXISTENCE OF THESE ORDERS OF RECUSAL AND REASSIGNMENT UNTIL HE WAS EMAILED COPIES OF THESE ORDER BY KIM KAMEL ON OCTOBER 8, 2014.

With regard to the order of reassignment by Judge Cozza Dex Media agues that "the record is not clear whether that reassignment order was mailed by the clerk's office to the parties." Response Br. 6 In fact the record is absolutely clear that neither Mr. Critchlow his counsel Alan McNeil ever received any knowledge of the existence of these orders until

Kamel emailed copies of them to Mr. Critchlow on October 8, 2014, just two days before the hearing set in front of Judge Plese. The orders themselves clearly indicate that these were not mailed out to the parties and Judge Plese further confirms in her Memorandum Opinion/Letter that such are the facts. When Mr. Critchlow received these orders from Kamel just two days prior to the hearing he immediately emailed Judge Plese a letter that same day objecting to this recusal procedure, stating his good faith belief that the orders were "void" and requesting a formal hearing on same. Mr. Critchlow believed that the October 10, 2014 status hearing would be cancelled and that a hearing on "recusal" would be scheduled in front of Judge Plese but apparently the status hearing was not cancelled. Kim Kamel was cc'd a copy of Mr. Critchlow's letter with his stated intent not to attend the hearing in front of Judge Plese for October 10, 2014 until these issues could be addressed. There is no record[4] that such a hearing even took place either in Judge Plese's or Judge Price's courtroom on that date.

What is not clear from the record however is exactly when and how did Dex Media attorney Kim Kamel get notice of these orders of recusal and reassignment? The record clearly shows that these orders were not mailed out to the parties and Judge Plese agrees with these facts. What is also not

[4] Mr. Critchlow requested verbatim reports of proceedings for the recusal order, show cause order and order of dismissal and was informed that no hearings were reported. The only "record" of such a hearing was Judge Price's show cause order.

clear from the record is how far in advance did Ms. Kamel have knowledge of these orders and how long she did she wait until producing copies of these to Mr. Critchlow? Did Kamel wait until the last minute to reveal her knowledge of these orders for strategic or harassment purposes or to gain some type of other advantage? These questions will probably go unanswered but the questions themselves and the issues they raise support Mr. Critchlow's claims that his "due process" rights were being violated.

VI. MR CRITCHLOW DID SEEK REVIEW AND A HEARING OF JUDGE PLESE'S ORDER FOR RECUSAL BUT NO RESPONSE WAS FORTHCOMING UNTIL HE FILED THE SUBSTANCE OF HIS OCTOBER 8, 2014 LETTER AS A FORMAL PLEADING WITH THE COURT AFTER JUDGE PRICE'S SHOW CAUSE ORDER HAD ALREADY BEEN ISSUED.

Dex Media argues that "at no time did Critchlow or his two attorneys file a Motion for Reconsideration to seek an interlocutory appeal of Judge Plese's order." Response Br. 6 Mr. Critchlow did in fact seek review of her ruling by requesting a hearing on same in his October 8, 2014 letter. No response whatsoever (not even a phone call) was received from Judge Plese or her chambers and no hearing was provided to Mr. Critchlow. Judge Plese was finally forced to respond with a Memorandum Opinion/Letter when Mr. Critchlow formally filed his Notice of Objection. In her Memorandum Opinion Judge Plese ruled that Mr. Critchlow was not entitled to a hearing

on the recusal motion and order, which is not only a violation of law but also a violation of the Code of Judicial Conduct which provides as follows:

> **CJC 2.6 Ensuring the Right to Be Heard.** A Judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

These actions (letter, filed Notice of Objection) do not demonstrate any willful failure on Mr. Critchlow's part to disobey lawful court orders. In fact they demonstrate that he was lawfully, ethically and in good faith concerned about the propriety of these orders and wanted a hearing to address these issues, a hearing which he was never provided in violation of his "due process" rights. Indeed, he communicated in his October 8, 2014 letter to Judge Plese his well founded belief that his due process rights had been violated and that her orders of recusal and reassignment were "void." As this Court has previously noted, judgments entered in a proceeding failing to comply with the procedural due process requirements are void. *Marriage of Ebbighausen*, 42 Wn. App. 99 (Div. III, 1985) citing *In Re Sumey*, 94 Wn. 2d 757, 762, 621 P.2d 108 (1980); *Baxter v. Jones*, 34 Wn. App. 1, 3, 658 P.2d 1274 (1983); *Halsted v. Sallee*, 31 Wn. App. 193, 195, 639 P.2d 877 (1982); *In Re Clark* 26 Wn. App. 832, 837, 611 P.2d 1343 (1980) and *Esmieu v. Schrag*, 15 Wn. App. 260, 265, 548 P.2d 581 (1976). Indeed, this Court has most recently reaffirmed these principles in its case

of *Tatam v. Rodgers*, 170 Wn. App. 76, 99 (Div. III, 2012). If Mr. Critchlow believed that Judge Plese's orders of recusal and reassignment were void and without legal effect then how can he be accused of willfully violating these orders, particularly when he had specifically requested a hearing on same which would require him to appear in court[5]?

VII. CODE OF JUDICIAL CONDUCT SECTION 2.11 IS NOT THE CONTROLING AUTHORITY FOR DECIDING WHETHER JUDGE PLESE PROPERLY FOLLOWED THE CORRECT PROCEDURE FOR RECUSING HERSELF FROM THIS CASE.

Dex Media cites Code of Judicial Conduct (CJC) 2.11 for the argument that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Response Br. 14 Dex Media then goes on to cite the comments to CJC 2.11 for the proposition that recusal is required **"regardless of whether a motion to disqualify is filed."** (Original Bold and Underline). However, Dex Media fails to appreciate that in fact Judge Plese did sign and file her own written motion for recusal so this argument simply does not apply to the facts of Mr. Critchlow's case. Further, Dex Media fails to explain, even if a formal hearing was not required, how the parties would be able to determine whether the judge's impartiality might be in question if there is no hearing on the relevant disqualifying issues. CJC 2.11 is secondary

[5] Such a hearing could even have occurred telephonically given that the status conference was still two (2) days away.

authority at best and does not trump the clear line of reported cases, including *State v. Perala*, 132 Wn.App. 98 (Div. III, 2006) and *Kauzlarich v. Yarbrough* 105 Wn. App. 632, 20 P.3d 946 (Div. II, 2001) which require a hearing on these "recusal" issues and for there to be some kind of "record" of same. It should be noted that the judge in *Kauzlarich v. Yarbrough, Id* did not file a formal written motion but nonetheless still held a hearing in open court on the issue of her recusal.

It is axiomatic that a record must be made at the trial court level for any legal issue that may be subject to appeal in order for the appellate courts to determine if any errors were committed. Here we do not have a record of the reasons for Judge Plese's recusal so whether the recusal was proper cannot be determined at this stage with this record. But that is not necessary for this Court to decide this appeal. The record we do have is unmistakably clear that neither Mr. Critchlow, nor his attorney McNeil were ever afforded notice and an opportunity to address these recusal issues, whatever they might be. This was a clear violation of Mr. Critchlow's due process rights and these judgment/orders were and are void. Mr. Critchlow acted in good faith in treating them as such and requesting a hearing on these issues which was never granted by Judge Plese despite her legal and ethical obligations.

If secondary authorities such as the CJC 2.11 are to be considered as determinative in this appeal this Court should perforce look at its own reference to a 1990 Advisory Ethics opinion bearing on that same CJC rule as cited in *Tatum v. Rodgers*, 170 Wn. App.76 283 P.3d 583 (Div. III. 2012) where this Court observed at 95:

> A Judge is **required to disclose to the parties on the record** any known past association with a law firm or attorney which would lead a reasonable person to infer that the judge is partial or that there is a potential for a conflict of interest...(emphasis added in bold)

Thus, however you slice it, whether a formal motion is filed or not, a hearing is still required to satisfy the legal, ethical and "due process" requirements surrounding the proper recusal of judges.

VIII. MR CRITCHLW WAS NOT PROVIDED AN OPPORTUNITY BE HEARD ON THE RECUSAL ISSUE AT JUDGE PRICE'S SHOW CAUSE HEARING SINCE ONLY JUDGE PLESE COULD GIVE HER REASONS FOR HER RECUSAL AND ONLY SHE COULD RECONSIDER HER OWN ORDERS.

Dex Media argues that Mr. Critchlow had an opportunity to be heard on Judge Plese's recusal and reassignment orders via Judge Price's Show Cause Hearing of Nov. 7, 2014. Response Br. 24 Nothing in the record supports this statement. Judge Price's October 10, 2014 Show Cause order says nothing about the recusal issues nor does it reference Mr. Critchlow's October 8, 2014 letter that he emailed to Judge Plese. This argument is Dex

Media grasping for straws. Judge Price would not know the reasons for Judge Plese's recusal nor her failure to hold a hearing for same nor could he lawfully "reconsider" an order made by another judge.

IX. NOT ONLY WAS DEX MEDIA NOT PREJUDICED BY MR. CRITCHLOW'S ACTIONS IN THIS CASE, IT WAS IN FACT MR. CRITCHLOW WHO WAS PREJUDICED BY THE ACTIONS OF DEX MEDIA AND THEIR ATTORNEY KIM KAMEL.

Dex Media argues that "Critchlow's actions have prejudiced Dex by requiring its counsel to attend two unnecessary hearing (sic) and to respond to this appeal." Response Br. 22 Mr. Critchlow asserts that it is Dex Media and their attorney Kim Kamel who is to blame for what happened in this case. In her letter to Judge Price dated December 3, 2014 Kamel admits that she saw Mr. McNeil wandering around in the main hallway[6] at the appointed time and place of the hearing yet she made no effort to call his attention to the fact that Judge Price's courtroom was now open. Indeed Ms. Kamel states the opposite in her letter, viz that instead of calling out to Mr. McNeil she simply **"watched him to determine whether I needed to return to your courtroom. He did not enter your courtroom at that time."**

Rather than suffering prejudice themselves Mr. Critchlow contends that Dex Media and Kamel have themselves engaged in conduct prejudicial to

[6] This main hallway is different from the small hallway immediately outside Judge Price's courtroom referenced in Kamel's letter.

the administration of justice and violated established "practice norms" per RPC 8.4(d) by 1) failing to alert Mr. McNeil that the courtroom was now open and/or 2) failing to alert court clerk Ashley that Mr. McNeil was out in the main hallway and/or 3) failing to unilaterally advise Judge Price of the current status of the case. Kamel should have informed Judge Price of the status of the case regardless of whether Mr. McNeil was present in the courtroom. This has been done in numerous "status conferences" over the years by attorneys in the State of Washington. As long as notice has been given of the status conference it is not an improper ex parte proceeding and common "practice norms" are for the remaining attorney to unilaterally advise the court of the case's status. Kamel's failure to alert Mr. McNeil that the courtroom was now open and/or her failure to alert court clerk Ashely that she had seen Mr. McNeil wandering about in the main hallway and/or her failure to unilaterally advise Judge Price of the status of the case was conduct prejudicial to the administration of justice in violation of RPC 8.4(d).

Conduct prejudicial to the administration of justice within the meaning of RPC 8.4(d) is conduct in an official or advocatory role that violates accepted norms of practice or conduct physically interfering with the enforcement of the law. *Disciplinary Proceeding Against Longacre*, 155 Wn.2d 723 (2005) An attorney's mental state in committing such an act of

misconduct under this rule may consist of intent, knowledge or negligence. *Disciplinary Proceeding Against Dynan*, 152 Wn.2d 601 (2004) Misconduct can be based on either a lawyer's actions or omissions *Haley v. Highland*, 142 Wn.2d 135 (2000) [failure of attorney to inform court and client of client's ineligibility for RCW 26.16.200 exemption.]These rules are designed to protect the integrity of the legal system and the ability of courts to function as courts. *Discipline of Carmick*, 146 Wn.2d 582 (En Banc. 2002) Moreover, RPC 8.4 is not limited to misconduct that occurs in open court so it is irrelevant that Kamel may not have entered Judge Price's courtroom. *Discipline of Boelter*, 139 Wn. 2d 81 (En Banc. 1999). Kim Kamel and Dex Media only have themselves to blame for a dismissal that could have been avoided if Kamel had simply acted in a professional manner, discharged her duties accordingly and alerted Mr. McNeil, alerted court clerk Ashely of Mr. McNeil's presence in the main hallway or unilaterally informed Judge Price of the status of the case.

X. STATE V. ROCHA IS A CASE ABOUT THE RIGHT TO OPEN COURTROOMS AND IN ANY EVENT SUPPORTS MR. CRITCHLOW'S CLAIMS THAT THERE SHOULD HAVE BEEN A HEARING ON THE RECUSAL ISSUES.

Dex Media cites the Division III case of *State v.* Rocha, 181 Wn. App. 833 (Div. III, 2014) for the proposition that Judge Plese was not required to provide notice and a hearing when she filed her own motion and order for

recusal. Respondent Br. 16 *State v. Rocha, Id* does not stand for that proposition. Indeed, *Rocha* was a case about a purported violation of a defendant's rights to "open proceedings" under Wash. Constitution, Article I, § 22 and was not a case about the rules on recusal.

Defendant Rocha was a murder suspect and the assigned Judge was Evan Sperline. During the pendency of the case the defendant's lawyer received word that his firm had undertaken a case representing Judge Sperline's daughter, *Id* at 835.the defense lawyer advised the prosecutor of his intention to close the courtroom for a hearing to discuss these matters. The prosecutor objected to this procedure. The judge ruled that the "matter should be heard on the record" and asked whether anyone objected to having a closed hearing. *Id, 835*. Hearing no objection the matter was heard at the end of the docket in a "closed hearing." When the matter was later called the prosecutor objected and asked the judge to reconsider his previous "closed hearing" ruling arguing that that the court needed to balance the "closed hearing" requirements of *State v. Bone-Club*, 128 Wn.2d 254 (1995) before deciding on this procedure. *Id, 836* The court denied the prosecutor's request and the matters were discussed in a "closed hearing." Judge Sperline ruled that he did not believe defense counsel's representation of his daughter in an unrelated case would affect his ability to be fair and impartial and did not recuse himself from the case. *Rocha Id* at 836. Judge

Sperline concluded the hearing with an order that a transcript of the proceedings would be "sealed" until future order of the court. Six days later Judge Sperline, by confidential letter, reversed his ruling. The prosecutor then filed a motion for discretionary review with this Court.

Division III felt the "open hearing" requirements of *State v. Bone-Club*, 128 Wn.2d 254 (1995) were at issue and most particularly wanted briefing on the "experience and logic" test set forth in *State v. Sublette*, 176 Wn.2d 58 (2012). In *Rocha* at 837, Division III held that "this case presents the issue of whether the hearing was required to be conducted in public."

Note that Division III is talking here about a **"closed hearing"** with notice and opportunity to be heard given to the parties, not as in the case under review a situation where Judge Plese did not conduct any hearing at all let alone a "closed hearing." Dex Media cites dicta in *Rocha* for the proposition that "trial judges frequently recuse, sua sponte, in all types of civil and criminal ligation" and that *Rocha* makes it clear that it could not conclude that all recusal's take place in the Courtroom. Response Br. 16 Again, Dex Media misses the point here. The issue in Mr. Critchlow's case is not whether the hearing took place in a "closed courtroom" but the fact that no hearing at all took place when Judge Plese filed and issued her motion and order for recusal. Further, it is also clear that *Rocha* was

discussing sua sponte recusals that applied to uncontested recusal motions and clarified this by observing at 839:

> Nonetheless, we believe that when recusals are *litigated* in Washington they typically are litigated in open court. Accordingly this prong favors hearing recusal *motions* in the court. (Original Italics)

In this context *Rocha* goes on further to describe the public policy behind this rationale by observing at 840:

> A public hearing concerning the judge's ability to impartially decide a case also would tend "to remind the officers of the court of the importance of their functions." *State v. Brightman*, 155 Wn. 2d 506, 514.

So rather than supporting Dex Media arguments the *Rocha* case actually affirms Mr. Critchlow's contentions that he should have been provided notice and a hearing for Judge Plese's motion and order for recusal, particularly since he had been vigorously contesting and litigating this recusal order via his October 8, 2014 letter to the judge and his later formally filed Notice of Objection.

XI. DESPITE MR. CRITCHLOW'S ABSENCE AT THE SHOW CAUSE HEARING JUDGE PRICE DID HAVE THE OPPORTUNTIY AND DID IN FACT MAKE FACTUAL FINDINGS FOR HIS ORDER DISMISSING WITH PREJUDICE.

With regard to Mr. Critchlow's contention that Judge Price failed to make appropriate findings to support his order of dismissal Dex Media

argues that Judge Price "did not have the opportunity to provide on the record his decision to dismiss Critchlow's claims as Critchow never appeared." Response 24 This argument by Dex Media belies the factual record of this case. Although there was no verbatim report of proceedings Judge Price did in fact make written findings of fact and conclusions of law for his order of dismissal even without the presence of Mr. Critchlow or his attorneys. This cursory order and record of dismissal clearly show it was manifestly unreasonable and based on the following untenable grounds:

1) Judge Price's finding that Mr. Critchlow's case was "inactive" was manifestly unreasonable and based on untenable grounds since the official court file showed that the Dex Media Offer of Judgment had been accepted and that Mr. Critchlow 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 since by definition there was no going to be any 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.

Dex Media's argument here is completely without merit.

XII. CIVIL RULE 41(b) DOES NOT APPLY TO JUDGE PRICE'S ORDER OF DISMISSAL WITH PREJUDICE.

Dex Media argues that Judge Price had authority to dismiss Mr. Critchlow's case under Civil Rule 41(b). Response Br. 20 However, this rule would only apply if Mr. Critchlow had failed to note his case for trial within one (1) year after the issues had been joined CR 41(b)(1). Mr. Critchlow did not and was not going to note the case for trial since, after he filed his Notice of Acceptance of Dex Media's CR 68 Offer of Judgment there was not going to be any trial. Further a "motion" to dismiss must be filed by a "party" (not a judge) who gives "10 days notice." Such was not done in Mr. Critchlow's case. Further a CR 41(b) dismissal cannot be sustained unless the trial court affirmatively states on the record that the defendant was "prejudiced" by the violation. *Rivers v. Conf. of Mason Contractors*, 145 Wn. 2d 674 (En. Banc, 2002) citing *Woodhead v. Dis. Waterbeds Inc.*, 78 Wn. App. 125, 129 (1995). The record is undisputed that Judge Price made no such findings of "prejudice" in his order. Moreover, Dex Media was not prejudiced by Mr. Critchlow's failure to attend this Show Cause hearing since there was not going to be any trial. The rest of CR 41(b) involves "clerk's motion's for dismissal" given "after 30 days notice" which also does not apply to this case.

XIII. MR. CRITCHLOW DID COMMUNICATE WITH THE COURT CONCERNING THE STATUS OF HIS CASE BY FILING HIS ACCEPTANCE OF DEX MEDIA'S RULE 68 OFFER OF JUDGMENT.

Dex Media contends that Judge Price could not enter a Judgment for Mr. Critchlow "particularly when neither Mr. Critchlow nor his attorneys had appeared or otherwise communicated with his court in any way until after entry of the dismissal order." Response Br. 26 Once again Dex Media is making up a factual record that simply does not exist. The record clearly discloses that Mr. Critchlow complied with all the requirements of Civil Rule 68 by timely serving and filing with the trial court his acceptance of Dex Media's offer to allow a $5000.00 judgment to be entered against them. Mr. Critchlow's Notice of Acceptance pleading was a communication to the court. Even without any input from attorneys McNeil and Kamel Judge Price only needed to pick and read the official court file (and these communications) to see that Mr. Critchlow's case had been resolved and the only thing left to do was to formally enter his $5000.00 Judgment. Either Judge Price did not discharge his legal and ethical duties to review[7] the court file, or if he did, simply ignored the factual record and communications that this file revealed. Despite the absence of Mr. Critchlow or his attorneys Judge Price had other available options which were much less severe than his order of "dismissal with prejudice." If the judge had reviewed the court file he would have concluded that it was necessary to issue an order setting

[7] **CJC Rule 2.5 Competence, Diligence and Cooperation**
(A) A judge shall perform judicial and administrative duties competently and diligently.

a **"presentment hearing** date for the entry of Mr. Critchlow's judgment. This would have been a much more reasonable alternative than the severe order of dismissal with prejudice and consistent with rules that are designed to protect the integrity of the legal system and the ability of courts to function as courts. *Discipline of Carmick*, 146 Wn.2d 582 (En Banc. 2002)

XIV. CONCLUSION

This Court should not assist Dex Media in the breach of their agreement to allow a $5000.00 Judgment to be entered against them by affirming these trial court orders. These orders should be reversed and the case remanded for entry of the agreed $5000.00 Judgment and attorney fees should be awarded to Mr. Critchlow for this appeal.

DATED THIS 23 day of July, 2015.

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