No. 330389

93196-8

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

Robert W. Critchlow

Appellant

v.

Dex Media West Inc.

Appellees

Petition for Review to Supreme Court

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

Caselaw

Statutes

Court Rules

I. IDENTITY OF PETITIONER

Petitioner Robert W. Critchlow asks this court to review the Division III Court of Appeals Opinion dated February 18, 2016 designated in Part B.

II. PART B

Petitioner requests that this court review the published and unpublished parts of this Opinion in Appendix A, pages 1-12

III. ISSUES PRESENTED FOR REVIEW

A. **Whether Division III correctly construed Dex Media's Offer of Judgment to show clearly and unambiguously that Mr. Critchlow waived his rights to any attorney fees on appeal.**
B. **Whether attorney fees can be awarded to Mr. Critchlow on appeal independent of the CR 68 Offer of Judgment pursuant to the Division I Opinion of Leitz v. Hanson Law Offices.**
C. **Whether Dex Media, as a matter of law, breached their own Offer of Judgment contract by allowing the superior court to dismiss with prejudice Mr. Critchlow's case and by arguing to in their Response Brief that the dismissal be affirmed.**
D. **Whether due to this material breach of Dex Media's Civil Rule 68 contract Mr. Critchlow was excused from having to comply with any attorney fee provisions in this Offer of Judgment.**
E. **Whether public policy supports an award of attorney fees in cases involving small amounts of damages to encourage settlements and to penalize parties who resist small claims.**
F. **Whether this Court should address the due process violations from the recusal and reassignment orders so that Mr. Critchlow is not continually prejudiced by these issues of substantial public interest.**
G. **Whether the automatic and forthwith entry of Mr. Critchlow's Judgment, as ruled by Division III, would have mooted Judge Price's subsequent show cause and dismissal orders since these orders were issued after the judgment was supposed to be**

entered and there would have been no need to remand for Judge Price to conduct a sanctions hearing.

H. Whether sanctions could even be assessed by Judge Price for Mr. Critchlow's failure to appear since the record clearly shows that his attorney Al McNeil attempted to appear and that his failure to appear was not "willful" which are the required findings for imposition of such sanctions.

IV. STATEMENT OF THE CASE

Robert Critchlow made arrangements with Dex Media West Inc. for the provision of advertising services for his law office in Spokane, Washington, including a law office web site and internet services. CP 4. The web site installed by Dex Media included a "tracking number" ostensibly used by them to collect "usage information." CP 4 Mr. Critchlow was never informed by Dex Media that they were also recording his telephone calls without his knowledge or consent. CP 4. Mr. Critchlow filed causes of action against Dex Media for 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. and 4) common law tort of Invasion of Privacy. CP 4-6 Mr. Critchlow 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 Mr. Critchlow's case and ordering that his case be reassigned to another judge. CP 8 This recusal order stated that there was "good cause" for the recusal but did not state any reasons supporting this finding. CP 8 Mr. Critchlow and his attorney, Alan McNeil **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 an opportunity to be heard on these matters, nor were they given the specific reasons for the recusal of Judge Plese. CP 24-25 An order dated July 16, 2014 and signed by Judge Salvatore Cozza was signed preassigning Mr. Critchlow's case to Judge Michael Price but **no copies or notice of this order either** were mailed out to any of the parties. CP 9.

On September 25, 2014 Dex Media served upon Mr. Critchlow a Civil Rule 68 Offer to allow Judgment to be taken against them in the amount of $5,000.00. CP 19-21. On October 2, 2014 Mr. Critchlow timely complied with all the requirements of Civil Rule 68 and **accepted** Dex Media's offer within 10 days, filed their Offer of Judgment with the court along with proof that Dex Media had been served with Mr. Critchlow's acceptance.

On October 8, 2014, 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 ever mailed out to the parties. This was the first time Mr. Critchlow had received any notice of these orders from any source. He immediately emailed a letter his objections 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 file nor did she schedule any hearing** pursuant to Mr. Critchlow's request. Mr. Critchlow did not attend Judge Plese's courtroom on October 10, 2014 since he felt Judge Plese would be scheduling a hearing on the recusal as per his letter and her legal and ethical[1] duties. When Mr. Critchlow did not appear 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

[1] **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.

official court record, Mr Critchlow simply reformulated his October 8, 2014 letter into a formal 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. Judge Plese's Memorandum Letter dated October 21, 2014 responding to Mr. Critchlow's October 8, 2014 letter was 13 thirteen days late and came **after** Judge Price had already issued his show cause order. Judge Price issued an order for Mr. Critchlow to appear and state why his case should not be dismissed "for failing to appear at the scheduled status conference of October 10, 2014 at 9:00 AM."

Mr. Critchlow and Mr. Lee (co-counsel) were both unavailable to attend the show cause hearing scheduled for Nov. 7, 2014 and it was agreed that Alan 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 in 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 and the **only record** is Judge Price's order of dismissal and the McNeil and Kamel letters to Judge Price which were allowed to supplement the appeal record in this case by Division III pursuant to Dex Media's RAP 9.11 motion. 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.

COURT OF APPEALS DECISION-Division III issued its Opinion on February 18, 2016 and found that Mr. Critchlow was correct in his argument that, once his Offer of Acceptance was filed in compliance with Civil Rule 68, the trial court had a **"ministerial"** and **"automatic"** duty to enter the judgment **"forthwith."** Opin. 6-8 Division III ruled that the trial court had no discretion to involve itself in matters concerning the "form" of the judgment or whether Mr. Critchlow was going to provide Dex Media with a W-9 form for tax purposes. Opin. 9 Rather than on insisting

on additional terms Division III ruled that the "defense should incorporate all the terms in the Offer of Judgment." Opin. 7 They found that a CR 68 offer is not simply an offer of settlement but an offer than judgment can be entered on specified terms. Opin. 7. They held that "if the offer is accepted **the court automatically enters judgment** in favor of the offeree." Opin. 7 On the issues of due process violations by Judge Annette Plese Division III declined to address these issues because of their view that the offer of judgment ends the litigation and "our resolution of this assignment of error lacks no practical import to the outcome of the suit." Opin.5

On Mr. Critchlow's request for an award of attorney fees on appeal Division III denied his request and held that Mr. Critchlow "**waived** any recovery of reasonable attorney fees when **accepting the offer of judgment** that expressly excluded any such recovery." Opin.9 The Court held that Judge Price would preside upon remand and that "Critchlow **could claim prejudice** from our failure to address the recusal of Judge Plese. The Court then remanded for entry of judgment in favor of Robert Critchlow against Dex in the sum of $5000.00 and for entry of such sanctions, if any, that Judge Price deems appropriate for Mr. Critchlow's violation of the court order to show cause. Opin. 12 Mr. Critchlow filed his Motion for Reconsideration of Division III's Opinion on March 7,

2016 and a copy of this motion is attached hereto in Appendix B. Division III's per curium order this motion is attached hereto as Appendix C.

V. ARGUMENT OF WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b)(1)-Division III's failure to award attorney fees to Mr. Critchlow as the prevailing party on appeal directly conflicts with Washington Supreme Court opinions of *Mason v.* Mortgage *American Inc.*114 Wn.2d 842 (1990); *Physicians Ins. Exchange v. Fisons Corp.*122 Wn.2d 299 (En Banc, 1993) and *Bowers v. Transamerica Title Ins.* 100 Wn.2d 581 (1983) which authorize attorney fee awards to prevailing parties on appeal in consumer protection cases. A decision of the Washington Supreme Court is binding on all lower courts, *State v. Gore*, 101 Wn.2d 481 (1984) and this Court needs to review this.

RAP 13.4(b)(2)-Division III's opinion conflicts with the other divisional opinions of *Hodge v. Development Services* 65 Wn. App. 576 (Div. I, 1992) stating the rule that CR 68 Offers of Judgment are **contractual** in nature; *Wash. Greensview Apartment Assocs. v. Travelers Property Casualty Company of America et al,* 173 Wn. App. 663 (Div. I, 2013) for the rule stating that CR 68 Offers of Judgment must be **construed against the drafter** and *Lietz v. Hansen Law Offices, PSC* 166 Wn. App. 571 (Div. II, 2012) for the rule that attorney fees can be

awarded to the prevailing party on appeal **independent** of the language in any CR 68 Offer of Judgment.

RAP 13.4(b)(4)-Division III also failed to address Mr. Critchlow's request that they determine as a **matter of law** that Dex Media materially **breached** their CR 68 **contract** with Mr. Critchlow by allowing his case to be dismissed by the superior court and arguing to the Court of Appeals that this dismissal be affirmed; and whether this breach excused Mr. Critchlow from complying with the attorney fee provisions of their CR 68 Offer of Judgment, **issues of substantial public interest.**

RAP 13.4(b)(4)-Division III also failed to address whether any sanctions hearing in front of Judge Price is now necessary since if their Opinion that the superior court had a **"ministerial"** and **"automatic"** duty to enter Mr. Critchlow's judgment **"forthwith"** Opin. 6-8 had been followed by the superior court there never would have been any show cause or dismissal orders **issues of substantial public interest.**

VI. ARGUMENTS

A. Division III incorrectly construed Dex Media's Offer of Judgment to show clearly and unambiguously that Mr. Critchlow waived his rights to any attorney fees on appeal.

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) 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.*, 131 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). See also *Nusom v. Comh Woodburn Inc G Cit* 122 F.3d 830 (9th Cir. 1997) citing *Erdman v. Cochise County* 926 F.2d 877, 880-81. But "Rule 68 offers differ from contracts with respect to attorney fees", *id* at 880; as to them, **any waiver or limitation must be clear and unambiguous**. *Nusom, supra* citing *Guerrero v. Cummings* 70 F.2d 1111, 1113 (9th Cir. 1995) and *Erdman v. Cochise County* 926 F.2d 877 (9th Cir. 1991). In this case Dex Media served its Offer of Judgment and Mr. Critchlow unequivocally accepted their offer. CP 18-21. Dex Media's Offer of Judgment in pertinent part reads as follows:

> Pursuant to CR 68 as well as any other applicable cost shifting provisions of Washington State statutes, Defendant Dex Media West Inc. hereby offers to settle and to permit a judgment against it for any and all claims arising out of the above-referenced case for the sum of Five thousand and No/100 Dollars ($5,000.00) including all reasonable attorney fees and costs incurred to date.

The language of this offer is that Mr. Critchlow's costs and attorney fees "incurred to date" (of the offer) were to be included in the judgment. If Mr. Critchlow's case went to trial and he did not recover an award of at least $5000.00 then he would be unable to recover his "post offer" attorney fees. However Mr. Critchlow's case never went to trial since he accepted Dex Media's Offer of Judgment and thus any discussion about waiving any post offer attorney fees does not apply. Further, nothing in the Offer of Judgment mentioned any **waiver of rights to attorney fees** in the event of an **appeal to a higher court**. Indeed, neither party was even contemplating any appeal at the time of the acceptance.

Where a statute allows an award of attorney fees at trial, an appellate court has the authority to award fees on appeal. *Standing Rock Homeowners Assn v. Misich* 106 Wn. App. 231, 247 (2001) 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; *Wilkinson v. Smith* 31 Wn. App. 1, 15 (1982); *Nguyen v. Glendale Constr. Co.* 56 Wn. App. 196 (1089); *Robinson v. McReynolds* 52 Wn. App. 635 (Div. II, 1988); *Mason v.* Mortgage *American Inc.*114 Wn.2d 842 (1990); *Physicians Ins. Exchange v. Fisons Corp.*122 Wn.2d 299 (En Banc, 1993) and *Bowers v.*

Transamerica Title Ins. 100 Wn.2d 581 (1983). This Supreme Court should accept review of Mr. Critchlow's case because this *Critchlow v. Dex Media* Opinion **directly conflicts** with these cases.

B. Attorney fees should be awarded to Mr. Critchlow on appeal independent of the CR 68 Offer of Judgment pursuant to the Division II Opinion of Leitz v. Hanson Law Offices.

Mr. Critchlow has continually cited and quoted the Division II Opinion of *Lietz v. Hansen Law Offices, PSC* 166 Wn. App. 571 (Div. II, 2012) involving the construction of CR 68 Offers of Judgement and the award of attorney fees on appeal. Mr. Lietz appealed a trial court's decision refusing to enter Hansen Law Offices Offer of Judgment which Lietz, like Critchlow, had unconditionally accepted. Leitz had been a paralegal and was discharged 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 this offer was thereby invalid. Division II of the Court of Appeals reversed and further noted with regard to the request for attorney fees on appeal:

> 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]

Division II, in *Leitz, Id*, clearly ruled that they were awarding attorneys to Mr. Leitz on appeal **independent** of "the parties CR 68 judgment. Thus assuming, arguendo, that that Div. III is correct that Mr. Critchlow waived his right to attorney fees via the language in the CR 68 Offer of Judgment, the court still has the authority to award fees to Mr. Critchlow as the prevailing party on appeal "independent" of the CR 68 Offer of Judgment The Supreme Court needs to accept review of this case due to **the direct conflict** between Division III's *Critchlow v. Dex Media* opinion and Division II's opinion of *Lietz v. Hansen Law Offices.*

C. Dex Media, as a matter of law, breached their own Offer of Judgment contract by allowing the superior court to dismiss with prejudice Mr. Critchlow's case and by arguing to the Court of Appeals in their Response Brief that the dismissal be affirmed, issues which are of substantial public interest.

D. This material breach of the Civil Rule 68 contract excused Mr. Critchlow from having to comply with any attorney fee provisions in Dex Media's Offer of Judgment, issues of substantial public interest.

"A CR 68 offer operates as a **contract** in that the terms of the offer control the extent to which attorney fees and costs may be awarded." *Johnson v. Dept. of Transportation*, 177 Wn. App. 684 (Div. I, 2013) citing *Guerrero v. Cummings*, 70 F.3d 1111, 1114 (9th Cir. 1995). The policy favoring fair settlements under CR 68 is promoted by certainty and the **elimination of unintended results**. *Wallace v. Kuehner* 111 Wn. App. 808 (Div. II, 2002) citing *Hodge v. Dev. Services of* America, 65 Wn.

App. 576, 584 (1992). *Hodge Id* was one of the cases cited by Dex Media in their Offer of Judgment as to how they intended it to be interpreted, viz that there should be no "unintended results" such as a ruling that Mr. Critchlow could not request attorney fees on appeal.

Absent disputed facts a court determines the construction or legal effect of a contract as a **matter of law**. *Pierce Co. v. State*, 144 Wn. App. 783 (Div. II, 2008). A **breach** of contractual terms so material as to constitute a failure of consideration **discharges** the nonbreaching party from his obligations under the contract. *Don L. Cooney Inc v. Star Iron and Steel Co.*, 12 Wn. App. 120 (Div. I, 1974). A party to a contract is **relieved of his duty to perform** when the other party, by word or act, indicates he will not perform. *Sherman v. Lunsford*, 44 Wn. App. 858 (Div. I, 1986). Here Mr. Critchlow unconditionally accepted Dex Media's Offer of Judgment and filed the offer and his acceptance and proof of service pleadings with the superior court on Oct. 2, 2014. Dex Media then breached their own agreement by 1) failing to enter it with the superior court 2) failing to notify Critchlow's attorney Al McNeil (who was out in the hall according to the record in this case) that Judge Price was ready to conduct the status conference 3) failing to notify Judge Price's bailiff that Mr. McNeil was outside in the hall 4) failing to notify Judge Price's clerk that the case was settled and that only a judgment needed to be entered and

5) arguing to Division III in its Response Brief that Judge Price's order of dismissal should be "affirmed." In his Reply Brief (pg 9) and also in his Motion for Reconsideration Mr. Critchlow argued that these actions by Dex Media constituted a "breach of contract." The Supreme Court needs to accept review of this case to determine whether as a **matter of law** Dex Media breached their CR 68 Offer Of Judgment.

E. Public policy supports an award of attorney fees to prevailing parties in cases involving small damage amounts to encourage settlements and to penalize parties who resist small claims which are issues of substantial public interest.

The amount in controversy in this case is a $5000.00. In their Offer of Judgment Dex Media notifies Mr. Critchlow that it is being made pursuant to CR 68 "as well as any applicable cost shifting provisions of Washington State statutes." CP 18 One of these "cost shifting" statutes is RCW 4.84.250 (attorney fees in actions for $10,000.00 or less). The purpose of RCW 4.84.250 is to encourage our-of-court settlements and to **penalize parties who unjustifiably bring or resist small claims.** *Last Chance Stable v. Stephens*, 68 Wn. App. 710 (Div. III) citing *Valley v. Hand*, 38 Wn. App. 170 (1984) and *Harold Meyer Drug v. Hurd*, 23 Wn. App. 683 (1979). "[T]he obvious legislative intent is to enable a party to pursue a meritorious claim **without seeing his award diminished in whole or in part by legal fees.**" *Last Chance Stable, supra* quoting *Northside Auto*

Serv. Inc. v. Consumers United Ins. Co., 25 Wn. App. 486, 492 (1980). The prevailing party is not necessarily required to have specifically pleaded RCW 4.84.250 nor to have asked for attorney fees before trial in order to be entitled to recover under the statute. All that is required is some type of notice that reveals the risk of going to trial and that encourages a nonjudicial settlement of the dispute. *Pubic Util Dist. No. 1 v. Crea*, 88 Wn. App. 390 (Div. II, 1997) citing *Beckman v. Spokane Transit Authority*, 107 Wn.2d 790 (1987). The notice requirement does not require the party to plead RCW 4.84.250 nor to ask for attorney fees. *Lay v. Hass,* 112 Wn. App. 818 (Div. II, 2002) citing *Pubic Util Dist. No. 1 v. Crea*, 88 Wn. App. 390 (Div. II, 1997) Actual notice is sufficient. *Pubic Util Dist. No. 1, Id.*

In this case actual notice was properly given to Dex Media via Mr. Critchlow's formal pleading entitled Acceptance of Defendant's CR 68 Offer of Judgment that the amount in controversy was $5,000.00. And, Dex Media themselves set forth notice that their offer was being made pursuant to "any applicable cost shifting provisions of Washington State statutes" proving that Dex Media was on notice of the requirements of RCW 4.84.250. The record here clearly shows that Dex Media attorney Kim Kamel (see her letter dated Dec. 3, 2014) states that she attended the Nov. 7, 2014 Show Cause hearing in front of Judge Price and that she saw

Critchlow's attorney Mr. McNeil out in the hall. Even so, she made no effort to get Mr. McNeil's attention so that this hearing could be commenced nor did she inform Judge Price's staff that Mr. McNeil was out in the hall so that he could be brought into the courtroom, nor did Ms. Kamel inform Judge Price or his staff that the case had been settled and was merely awaiting entry of a $5000.00 judgment. Instead, Ms. Kamel blithely left the courthouse knowing that an order of dismissal would be entered since this was stated as a consequence of failing to appear in Judge Price's written Order to Show Cause. As such, Dex Media has **unjustifiably resisted** the entry of this $5000.00 judgment in violation of the public policy concerning cases involving amounts less than 10,000.00. The Supreme Court needs to accept review of this case to review these issues which are of substantial public interest.

F. This court should address the due process violations from the recusal and reassignment orders so that Mr. Critchlow is not continually prejudiced by these issues of substantial public interest.

G. The automatic and forthwith entry of Mr. Critchlow's Judgment, as ruled by Division III, would have mooted Judge Price's subsequent show cause and dismissal orders since these were issued after the judgment should have been entered according to Division II's ruling and hence there would be no need to remand for a sanctions hearing.

H. Sanctions cannot even be assessed by Judge Price for Mr. Critchlow's failure to appear since the record clearly shows that Mr. McNeil attempted to appear and that his failure to appear was not "willful" which are the required findings for imposition of sanctions.

Procedural due process demands that a deprivation of life, liberty or property be preceded by notice and an opportunity for a hearing appropriate to the nature of the case. *Halstead v. Sallee* 31 Wn. App. 193 (Div. III, 1982) citing *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 313 (1950) "An order based on a hearing in which there was not adequate notice or opportunity to be heard is **void**. *Halstead v. Sallee* 31 Wn. App. 193 (Div. III, 1982) citing *Esmieu v. Schrag*, 88 Wn.2d 490, 497 (1976) See also *Marriage of Ebbighausen*, 42 Wn. App. 99 (Div. III, 1985); *In Re Sumey*, 94 Wn. 2d 757, 762 (1980); *Baxter v. Jones*, 34 Wn. App. 1, 3 (1983); *In Re Clark* 26 Wn. App. 832 (1980) and *Tatam v. Rodgers*, 170 Wn. App. 76, 99 (Div. III, 2012).

A motion to have a judge recuse him or herself requires notice of the motion and of the time for the hearing thereon. *State v. Perala* 132 Wn. App. 98 (Div. III, 2006). 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 (1995). Accord, *Kauzlarich v. Yarbrough* 105 Wn. App. 632 (Div. II, 2001) Like Judge Plese the trial 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 and did give notice to the parties** 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. Judge Plese failed to do this in the case under review. Indeed, Judge Plese **didn't even send a copy of this order** to Mr. Critchlow or his attorney Al McNeil and they had to find out about through opposing counsel two days prior to the status conference. Judge Plese's Order for Recusal/Reassignment is **void** since it was made ex parte and without notice and opportunity to be heard. *G.W. Ganoung et al v. Chinto Mining Company* 26 Wn.2d 566 (1946).

Division III held that Judge Michael Price would preside upon remand and that "Critchlow could claim prejudice from our failure to address the recusal of Judge Plese." Opin. 11 Indeed, Mr. Critchlow **continues to be prejudiced** by these due process violations and the void recusal/reassignment order. If **not for that void order** this case would never have ended up in front of Judge Michael Price. Further if the CR 68 judgment had been entered **"automatically"** and **"forthwith"**[2] (as Division III has already ruled in its Opinion) when Mr. Critchlow accepted it on October 2, 2014 **the case would have ended at that time** and there would not have been any order setting a Show Hearing (issued on Oct. 10, 2014) for November 7, 2014 and these matters would all be moot. Finally the record of this case shows that Mr. Critchlow's attorney Al McNeil attempted to go to this hearing and that Dex Media's attorney saw him out in

[2] See also *Mallory v. Eyhrich*, 992 F.2d 1273 (6th Cir. 1991)[offer of judgment rules leave no discretion in district court to do anything but enter judgment by directing that clerk shall enter judgment after proof of offer and acceptance have been filed] Mot. Recon. 8

the hall and said nothing to Mr. McNeil nor Judge Price's staff that McNeil was present any alleged failure to appear was not "willful." *Woodhead v. Discount Waterbeds Inc.* 78 Wn. App. 125 (Div. I, 1995).

VII. CONCLUSION AND RELIEF REQUESTED

This Supreme Court should accept review of this case because Division III's *Critchlow v. Dex Media* Opinion directly conflicts with Washington Supreme Court opinions authorizing awards of attorney fees on appeal in Consumer Protection cases. This Court should accept review because this Opinion conflicts other divisional opinions that CR 68 Offer of Judgments are contractual in nature and are to be construed against the drafters. This Court should accept review because the Opinion conflicts with the Div. II case of *Leitz v. Hanson Law Offices*, 166 Wn. App. 571 (2012). This Court should accept review of this case to determine whether Dex Media breached their CR 68 contract as a matter of law, issues of substantial public interest. This Court should accept review of the due process violations flowing from the void recusal and reassignment orders, issues of substantial public interest. Finally this Court should review and **modify** the *Critchlow v. Dex Media* Opinion to 1) allow an award of attorney fees on appeal to Mr. Critchlow and to 2) not require any sanctions hearing to be held upon remand to superior court.

DATED THIS 23 day of May, 2016

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

CRITCHLOW V. DEX MEDIA OPINION

FILED

FEBRUARY 18, 2016

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

ROBERT W. CRITCHLOW, individually and d/b/a CRITCHLOW LAW OFFICE,	)	No. 33038-9-III
Appellant,	)	
v.	)	
DEX MEDIA WEST, INC., a foreign corporation,	)	OPINION PUBLISHED IN PART
Respondent.	)	

FEARING, J. — Following the acceptance and filing of an offer of judgment from Dex Media West, Inc. (Dex), plaintiff Robert Critchlow failed to appear for two scheduled hearings, and a newly assigned trial court judge dismissed Critchlow's case with prejudice. Critchlow appeals the dismissal and an earlier judge's recusal. We reverse the trial court's dismissal of the complaint and direct judgment to be entered in favor of Critchlow for the sum stated in the offer of judgment. In the unpublished portion

of the opinion, we remand to the trial court for imposition of lesser sanctions against Critchlow for his failure to appear at the hearings.

FACTS

The underlying facts bear little importance on appeal. Robert Critchlow, a Spokane attorney, contracted with Dex to create a website, publish advertising in a telephone book, deliver Internet service, and provide phone service that included usage tracking. Without Critchlow's knowledge, Dex recorded all his phone calls. One who called Critchlow heard a message from Dex informing him or her of the call being recorded.

PROCEDURE

On July 11, 2014, Robert Critchlow sued Dex, in Spokane County Superior Court, for common law and statutory privacy violations, misrepresentation of services, and violation of the Washington Consumer Protection Act, chapter 19.86 RCW. On July 11, the superior court presiding judge entered an order that scheduled a case status conference for October 10 and assigned Critchlow's case to Judge Annette Plese. The order commanded the parties: "to attend a Case Status Conference before your assigned judge on the date also noted above." Clerk's Papers (CP) at 7.

On July 15, 2014, Judge Plese opted to recuse herself, and she signed an order of recusal. Judge Plese identified no reason for the disqualification. Robert Critchlow

denies receiving a copy of the recusal order then. On July 16, the presiding judge appointed another superior court judge, Judge Michael Price, to preside over Critchlow's suit. Judge Price thereafter entered all further orders.

On September 25, 2014, Dex sent Robert Critchlow a CR 68 offer of judgment for $5,000, which amount was to include any reasonable attorney fees and costs incurred to date. On October 2, Critchlow recorded an acceptance of Dex's offer.

The status conference remained scheduled for October 10, 2014. On October 8, Dex sent Robert Critchlow a copy of the recusal order and the order of preassignment. Critchlow immediately sent a letter to Judge Plese objecting to her recusal, the case's reassignment to another judge, and the lack of notice. In the letter, Critchlow stated that he would not attend the October 10 status conference, and he requested a response to his letter or a hearing to address his protestation.

Neither Robert Critchlow nor one of his attorneys appeared at the October 10 status hearing. The superior court thus issued an order to show cause as to why the complaint should not be dismissed. The order stated, "If the plaintiff and defendant, or an attorney on their behalf, does not appear before this court on [November 7, 2014, at 8:30 a.m.], this matter will be dismissed." CP at 22. Robert Critchlow and his counsel deny receiving a copy of the order to show cause.

On October 17, 2014, Dex informed Robert Critchlow that Judge Price entered an

order to show cause. Dex also attached a proposed judgment and requested a W-9 tax form from Critchlow so that Dex could issue him a check. On October 20, Critchlow filed a formal objection to Judge Plese's recusal. On October 21, Judge Plese sent a letter responding to Critchlow's objection and informing him that the recusal stood.

On November 7, 2014, neither Robert Critchlow nor his counsel appeared at the show cause hearing, and the trial court dismissed his case with prejudice. On November 19, Alan McNeil, one of Critchlow's attorneys, wrote a letter to the trial court:

> At Mr. Critchlow's request, due to his unavailability, I appeared at your courtroom for what I had been told was a status hearing set for November 7, 2014 at 8:30 AM. No one was at your courtroom when I arrived and the door was locked.
>
> . . . I did in fact attempt to appear on behalf of plaintiff.
>
> . . . I believe the only thing remaining to do on this case is to formally enter the judgment. Plaintiff sent defendant a draft of a proposed judgment; but, apparently defendant has some qualms about the language of plaintiff's proposed Judgment.

Ex. 3, App. A (additional evidence brought in by commissioner's ruling of June 1, 2015).

On December 3, 2014, Dex's counsel wrote to the court:

> I attended the November 7, 2014 8:30 a.m. show cause hearing arriving in your courtroom at approximately 8:15 a.m. In your absence, Ashley, one of your courtroom clerks noted that Mr. Critchlow was not present and waited until 8:45 a.m. to allow Mr. Critchlow plenty of time to arrive. At 8:50 a.m., Ashely [sic] walked into the entry hallway outside your courtroom and called out Mr. Critchlow's name. Neither Mr. Critchlow, Mr. McNeil nor Mr. Lee answered, as none were present in or outside of your courtroom which was open and unlocked.
>
> . . . Between 9:00 a.m. and 9:10 a.m., I observed Mr. McNeil walking down the third floor hallway. I watched him to determine whether

> I needed to return to your courtroom. He did not enter your courtroom at that time.
>
> An Offer of Judgment was filed by Defendant with this court on September 25, 2014. An Acceptance was filed by Plaintiff on October 2, 2014. The Defendant did not agree to the language in the Judgment and proposed a revised Judgment which was ignored by Mr. Critchlow along with the request that he provide an executed W-9. Neither the judgment nor the W-9 have been forthcoming.

Ex. 3, App. B.

LAW AND ANALYSIS

Recusal

Robert Critchlow contends that Judge Annette Plese erred by recusing herself on her own motion. He argues that (1) the judge needed to afford each party an opportunity to object before the disqualification, and (2) the judge needed to disclose a reason for the recusal. We decline to address whether Judge Plese held the power to disqualify herself without presenting a reason and without earlier notice to the parties. Because we hold that the offer of judgment ends the litigation and because Robert Critchlow does not argue that he would have rejected the offer of judgment if Judge Plese continued to preside over the suit, our resolution of this assignment of error lacks no practical import on the outcome of the suit. Principles of judicial restraint dictate that if resolution of another issue effectively disposes of a case, we should resolve the case on that basis without reaching the first issue presented. *Wash. State Farm Bureau Fed'n v. Gregoire*,

162 Wn.2d 284, 307, 174 P.3d 1142 (2007); *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000).

Offer of Judgment

Robert Critchlow next assigns error to the trial court's dismissal of his case with prejudice. Critchlow argues that, due to his acceptance of the CR 68 offer of judgment, the court held a ministerial duty to enter a judgment. Critchlow also argues that the trial court erred by dismissing his suit without finding prejudice to Dex and without first reviewing whether a lesser sanction would address his failures to appear. We first address whether a judgment should be entered as a result of Dex's offer of judgment and Critchlow's acceptance of the offer. We hold that a judgment should be entered. We later address whether sanctions other than dismissal should be entered.

CR 68 governs offers of judgment and provides, in pertinent part:

> [A] party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the defending party's offer, with costs then accrued. If within 10 days after the 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 thereof and thereupon the court shall enter judgment.

Robert Critchlow relies on the command that "the court shall enter judgment" to argue that simply filing the offer and acceptance of offer, pursuant to CR 68, imposes a ministerial duty on the court to enter a judgment. Dex contends that the trial court may

not enter a judgment because Robert Critchlow and it had not yet agreed on the form or content of the judgment. We agree with Critchlow.

We know from experience that parties continue to discuss the format of an agreement after having reached an agreement, with or without a precipitating formal offer of judgment. Sometimes a defendant even demands terms inserted into a final written document, which terms the parties never earlier discussed or placed in writing. This additional dickering does not preclude an enforceable agreement or the entering of a judgment after an offer of judgment. Rather than insisting on additional terms after the acceptance of the offer, the defense should incorporate all terms in the offer of judgment.

CR 68 sets forth a procedure for defendants to offer to settle cases before trial. *Lietz v. Hansen Law Offices, PSC*, 166 Wn. App. 571, 581, 271 P.3d 899 (2012). The rule aims to encourage parties to reach settlement agreements and to avoid lengthy litigation. *Dussault v. Seattle Pub. Sch.*, 69 Wn. App. 728, 732, 850 P.2d 581 (1993). A Rule 68 offer is not simply an offer of settlement, but an offer that judgment can be entered on specified terms. *Real Estate Pros, PC v. Byars*, 2004 Wy 2, 90 P.3d 110, 113 (Wyo. 2004). If the offer is accepted, the court automatically enters judgment in favor of the offeree. *Real Estate Pros, PC v. Byars*, 2004 Wy 2, 90 P.3d at 113.

When interpreting a CR 68 offer of judgment, we look at the parties' objective manifestations for contract formation, not their unexpressed subjective intentions to later

add other terms to the offer. *Wash. Greensview Apartment Assocs. v. Travelers Prop. Cas. Co. of Am.*, 173 Wn. App. at 679; *Lietz v. Hansen Law Offices, PSC,* 166 Wn. App. at 587. In *Washington Greensview Apartment Associates*, Travelers attempted to argue that the parties never reached mutual assent because they did not reach an agreement with regard to reasonable attorney fees and costs. The court still enforced the terms stated in the offer of judgment.

CR 68 does not hint of the need or even possibility of the parties to continue to negotiate terms of the settlement or the form of a judgment. Instead, the rule imposes an obligation on the trial court to enter a judgment for the amount offered. Thus, we direct the trial court to enter an unadorned judgment in favor of Robert Critchlow against Dex in the amount of $5,000 without any costs or attorney fees awarded.

We issue no ruling on whether Robert Critchlow or one of his attorneys must submit a W-9 form or the ramifications of any failure to timely tender the form. The need for such a form is a question otherwise controlled by federal tax law and not a subject to be inserted into the judgment in favor of Critchlow. If need be, the parties may litigate the need for a W-9 form by a motion after the filing of the judgment.

Attorney Fees

Robert Critchlow requests attorney fees under the Washington Consumer Protection Act (CPA), chapter 19.86 RCW. RCW 19.86.090 allows a prevailing party on

a consumer protection claim to recover reasonable attorney fees. Critchlow, however, waived any recovery of reasonable attorney fees when accepting the offer of judgment that expressly excluded any such recovery.

Washington's CR 68 is virtually identical to Federal Rule of Civil Procedure 68. *Lietz v. Hansen Law Offices, PSC*, 166 Wn. App. at 580 (2012). Thus, in the absence of controlling state authority, Washington courts look to federal interpretations of the equivalent rule. *Johnson v. Dep't of Transp.*, 177 Wn. App. 684, 692 n.5, 313 P.3d 1197 (2013), *review denied*, 179 Wn.2d 1025 (2014); *Lietz*, 166 Wn. App. at 580; *Hodge v. Dev. Servs. of Am.*, 65 Wn. App. 576, 580, 828 P.2d 1175 (1992). Consistent with its purpose of promoting settlements, CR 68 allows defendants to make lump-sum offers that are inclusive of attorney fees. *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 401 (8th Cir. 1988). When the offer of judgment reads that the offered amount includes all reasonable attorney fees and costs, the plaintiff may not recover reasonable attorney fees and costs, beyond the offered amount, even if a statute affords recovery for fees and costs. *Wilson v. Nomura Sec. Int'l, Inc.*, 361 F.3d 86, 90 (2d Cir. 2004).

The offeror of a judgment is the master of its offer. A defendant, if it wishes, deserves the opportunity to avoid payment of an indeterminate amount of attorney fees by offering a lump sum in total. The offeree is the master of his acceptance of an offer of judgment. The offeree remains at liberty to reject the offer if he desires payment of an

additional sum for reasonable attorney fees. Robert Critchlow chose to accept Dex's offer of judgment that did not afford additional recovery for fees.

We note that CR 68 directs that the offer of judgment be for "money or property. . . with costs then accrued." Therefore, the rule may require the offeror to pay court costs to the offeree despite the language of the offer. We render no ruling on this issue, since Robert Critchlow does not advance this contention. This court does not review issues not argued, briefed, or supported with citation to authority. RAP 10.3(a); *Valente v. Bailey*, 74 Wn.2d 857, 858, 447 P.2d 589 (1968); *Avellaneda v. State*, 167 Wn. App. 474, 485 n.5, 273 P.3d 477 (2012).

We vacate the trial court's dismissal of Robert Critchlow's complaint. We remand for entry of judgment in favor of Robert Critchlow against Dex in the sum of $5,000 and for entry of such sanctions, if any, other than dismissal, that the court deems appropriate for Robert Critchlow's violation of the court order to show cause.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with RCW 2.06.040, the rules governing unpublished opinions.

Sanctions

Robert Critchlow next contends that the trial court lacked discretion to dismiss the case, because once he filed the CR 68 offer and acceptance, the trial court had a

ministerial duty to enter the judgment. Our ruling on the enforcement of the offer of judgment compels our adoption of the argument. Absent an enforceable judgment, we would otherwise remand the case to the trial court to address whether Dex suffered prejudice as a result of Mr. Critchow's failure to attend the hearings and whether a lesser sanction is more appropriate. A trial court exercising its authority to dismiss a case for violation of court orders and rules must explicitly find that a party's failure to comply was willful and prejudiced the opposing party. *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 131-32, 896 P.2d 66 (1995).

The trial court had yet to enter a judgment by the day of the status conference. Robert Critchlow needed to obey the court order to appear both at the status conference and the show cause hearing, despite having accepted an offer of judgment. We thus remand for the entry of appropriate sanctions short of dismissal of the case.

We note that Robert Critchlow objected to the recusal of Judge Annette Plese and Judge Michael Price will preside upon remand. Therefore, Robert Critchlow could claim prejudice resulting from our failure to address the recusal of Judge Plese. We remand anyway to the second assigned judge since the failure to appear before Judge Price cannot be excused by demanding another judge. Regardless of whether Critchlow had a pending objection to the first judge's recusal, Judge Price deserved the courtesy of an appearance and obedience to his court order.

CONCLUSION

We reverse the trial court's dismissal of Robert Critchlow's complaint. We remand for entry of judgment in favor of Robert Critchlow against Dex in the sum of $5,000 and for entry of such sanctions, if any, other than dismissal, that the court deems appropriate for Robert Critchlow's violation of the court order to show cause.

Fearing, J.

WE CONCUR:

Siddoway, C.J.

Lawrence-Berrey, J.

APPENDIX B

CRITCHLOW MOTION FOR RECONSIDERATION

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 Motion for Reconsideration

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

I. MOTION FOR RECONSIDERATION

Division III Court of Appeals should reconsider its Opinion dated Feb. 18, 2016 (attached hereto as Appendix "A") that Appellant Critchlow is not entitled to an award of reasonable attorney fees as prevailing party on appeal based on its determination that there was a waiver of attorney fees based on the language in Dex Media's Rule 68 Offer of Judgment.

A. Dex Media's Breach of their own agreement. This Court should find, as a matter of law, that Dex Media materially breached its CR 68 Offer of Judgment by not entering it with the trial court, by allowing a dismissal to be entered by the trial court and by arguing to Division III (in their Response Brief) that the order of dismissal should be affirmed.

B. Due to this material breach by Dex Media Mr. Critchlow is excused from having to comply with or be bound by the attorney fee provisions in the offer.

C. No waiver of right to attorney fees on appeal. Even if the Rule 68 Offer of Judgment was not breached, these attorney fees provisions must be construed against the drafter of the offer, Dex Media, and in favor of Mr. Critchlow. CR 68 offers differ from contracts with respect to "attorney fees" and any waiver or limitation must be **clear and unambiguous** which is not the case here. Nothing was stated in Dex Media's CR 68 Offer of Judgment about Mr. Critchlow agreeing to waive

any rights to attorney fees on appeal to a higher court. Indeed at this point no appeal to a higher court was contemplated by either party and the universal expectations by both parties were that this $5000.00 judgment would be entered with the trial court.

D. Attorney fees can be awarded on appeal independent of any CR 68 Offer of Judgment.

Dex Media's Offer of Judgment is not controlling per *Lietz, supra,* on the issue of whether attorney fees can be awarded on appeal and in fact is "independent" of any CR 68 considerations and may be based on any statutes such as RCW 19.86 et seq, (Consumer Protection Act) RCW 9.71 et seq. (Privacy Act) and RCW 4.84.250 (Small Claims Statute) which authorize awards of attorney fees to prevailing parties. Public policy considerations favor an award of attorney fees to prevailing parties in cases involving $10,000.00 or less to encourage out of court settlements and to punish parties who unjustifiably resist small claims (and the entry of judgment thereof) such as in the case at bar.

E. Void recusal/reassignment order and due process issues. The Court of Appeals should reconsider its decision not to address the issues of the due process violations and the void nature of Judge Plese's order of recusal/reassignment since Mr. Critchlow continues to be prejudiced by the failure to consider and deal with these issues. Division III should

vacate this void order and remand the case to Judge Plese for the simple ministerial and "automatic" act of entering Mr. Critchlow's $5,000.00 judgment. The Court should not remand the case to Judge Price for any determinations as to whether Mr. Critchlow should be sanctioned since the case ended up with Judge Price as a result of this void order. By failing to consider these issues the Division III is allowing these initial due process violations to be compounded further prejudicing Mr. Critchlow.

F. Automatic and timely entry of Mr. Critchlow's judgment would have mooted these other orders which arose from the initial void recusal/reassignment order.

The case should never have been with Judge Michael Price since CR 68 required Mr. Critchlow's judgment to be entered with the trial court 'forthwith' and 'automatically' after Mr. Critchlow had formally accepted Dex Media's offer on October 2, 2014, eight days before Judge Price sent out his Order to Show Cause on October 10, 2014. Judge Plese's void order of recusal/reassignment should be vacated and this case should be remanded to Judge Plese for the ministerial act of simply and "automatically" entering Mr. Critchlow's $5,000.00 judgment.

II. PROCEDURAL SUMMARY

Mr. Critchlow filed suit against Dex Media 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. Statutory and Reasonable Attorney Fees were requested via this complaint. A case scheduling order was issued assigning the case to Judge Annette Plese which set 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. Mr. Critchlow's case was reassigned to Judge Michael Price.

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 and timely 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.

Since Mr. Critchlow was unaware that Judge Price was handling this case 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. 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 Anette 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 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 Plese would surely respond to his request for a hearing on the recusal as per his letter and her legal and ethical[3] duties. Instead, 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

---

[1] Judge Plese's Memorandum opinion dated October 21, 2014 clearly 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.

[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.

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 Opinion 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 issued his Show Cause Order on October 10, 2014 for Mr. Critchlow's to appear in his court. 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."

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 (see McNeil letter dated November 19, 2014). Dex Media's attorney Kim Kamel was also 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 (see Kamel letter dated Dec. 3, 2014). There was no verbatim record produced by the court reporter for this hearing on November 7, 2014 so the only record are the letters of attorneys McNeil and Kamel. 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 CR 68 issues, due process and abuse of discretion violations that occurred during the issuance of the recusal/reassignment, show cause and dismissal orders.

III. DIVISION III COURT OF APPEALS OPINION

Division III issued its Opinion on February 18, 2016. The Court found that Mr. Critchlow was correct in his argument that, once his Offer of Acceptance was filed in compliance with CR 68, the trial court had a "ministerial" and "automatic" duty to enter the judgment "forthwith." Opinion 6-8. Division III ruled that the trial court had no discretion to involve itself in matters concerning the "form" of the judgment or whether Mr. Critchlow was going to provide Dex Media with a W-9 form for tax purposes. Opinion 9. Rather than on insisting on additional terms the Court ordered that the "defense should incorporate all the terms in the Offer of Judgment." Opinion 7. The Court ruled that a CR 68 offer is not simply an

offer of settlement but an offer than judgment can be entered on specified terms. Opinion 7. It held that "if the offer is accepted the court **automatically**[4] enters judgment in favor of the offeree." Opinion 7.

On the issues of due process and recusal/reassignment violations by Judge Annette Plese Division III declined to address these issues because it felt that the offer of judgment ends the litigation and "our resolution of this assignment of error lacks no practical import to the outcome of the suit." The Court applied the doctrine of "judicial restraint." Opinion 5.

On Mr. Critchlow's request for an award of attorney fees on appeal the Court denied his request and held that Mr. Critchlow "waived any recovery of reasonable attorney fees when accepting the offer of judgment that expressly excluded any such recovery." Opinion 9. Division III held that "when the offer of judgment reads that the offered amount includes all reasonable attorney fees and costs, the plaintiff may not recover reasonable attorney fees beyond the offered amount, even if a statute affords recovery for fees and costs." Opinion 9.

Finally, the Court held that "absent an enforceable judgment we would otherwise remand the case to the trial court to address whether Dex suffered

---

[4] Accord *Mallory v. Eyrich,* 922 F.2d 1273 (6th Cir. 1991)[offer of judgment rules leaves no discretion in district court to anything but enter judgment once offer has been accepted by directing that clerk shall enter judgment after proof of offer and acceptance have been filed]

prejudice as a result of Mr. Critchow's failure to attend the hearings and whether a lesser sanction is more appropriate." Opinion 11. The Court held that Judge Michael Price would preside upon remand and that "Critchlow could claim prejudice from our failure to address the recusal of Judge Plese." The Court then remanded for entry of judgment in favor of Robert Critchlow against Dex in the sum of $5000.00 and for entry of such sanctions, if any, that the trial court deems appropriate for Robert Critchlow's violation of the court order to show cause. Opinion 12.

IV. ARGUMENTS

A. Dex Media's material breach of contract of their own CR 68 Offer of Judgment excuses Mr. Critchlow from being bound by any attorney fee provisions in their offer.

"A CR 68 offer operates as a **contract** in that the terms of the offer control the extent to which attorney fees and costs may be awarded." *Johnson v. Dept. of Transportation*, 177 Wn. App. 684 (Div. I, 2013) citing *Guerrero v. Cummings*, 70 F.3d 1111, 1114 (9th Cir. 1995). The policy favoring fair settlements under CR 68 is promoted by certainty and the **elimination of unintended results**. *Wallace v. Kuehner* 111 Wn. App. 808 (Div. II, 2002) citing *Hodge*[5] *v. Dev. Services of* America, 65 Wn.

[5] This is one of the cases cited by Dex Media in their Offer of Judgment on the issue of how it is intended to be construed.

App. 576, 584 (1992). Absent disputed facts a court determines the construction or legal effect of a contract as a **matter of law**. *Pierce Co. v. State*, 144 Wn. App. 783 (Div. II, 2008). A breach of contractual terms so material as to constitute a failure of consideration **discharges** the nonbreaching party from his obligations under the contract. *Don L. Cooney Inc v. Star Iron and Steel Co.*, 12 Wn. App. 120 (Div. I, 1974). A party to a contract is **relieved of his duty** to perform when the other party, by word or act, indicates he will not perform. *Sherman v. Lunsford*, 44 Wn. App. 858 (Div. I, 1986)

In this case Mr. Critchlow unconditionally accepted Dex Media's Offer of Judgment and filed his acceptance/proof of services pleadings with the trial court on Oct. 2, 2014. Even so, Dex Media breached their own agreement and failed to enter it with the trial court when their attorney Kim Kamel 1) Failed to notify Critchlow attorney Al McNeil (who was out in the hall) that Judge Price was ready to conduct the status conference 2) failed to notify Judge Price's bailiff that Mr. McNeil was outside in the hall 3) failed to notify Judge Price's clerk that the case was settled and that only a judgment needed to be entered and 4) argued to Division III in its Response Brief that Judge Price's order of dismissal of Critchlow's case with prejudice should be "affirmed." In his Reply Brief (pg 9) Appellant Critchlow argued that these actions by Dex Media

constituted (and still constitute) a "breach of contract." Due to this breach of contract Mr. Critchlow is now excused from being bound by the terms of this CR 68 Offer of Judgment and its provisions about attorney fees.

B. Mr. Critchlow is the prevailing party on appeal and Division III should reconsider its decision denying him attorney fees based on its determination that Mr. Critchlow waived his rights to attorney fees via the attorney fees provisions in the CR 68 Offer of Judgment since these attorney fee provisions are construed against the drafter and are also not clear and unambiguous.

C. Nothing was stated in the Offer of Judgment about Mr. Critchlow agreeing to waive any rights to attorney fees on appeal and this failure shows that this agreement is not clear and unambiguous on the issue of attorney fees if construed against the drafter Dex Media

Mr. Critchlow is the "prevailing party" on appeal since the Court of Appeals has ordered his case remanded to the trial court for entry of his $5,000.00 Judgment. Generally, a prevailing party is one who receives an affirmative judgment in his favor. *Mayer v. Sto. Idus. Inc.* 123 Wn. App. 465 (2004) citing *Riss v. Angel*131 Wn.2d 612, 633 (1997). Where a statute allows an award of attorney fees at trial, an appellate court has the authority to award fees on appeal. *Standing Rock Homeowners Assn v. Misich* 106 Wn. App. 231, 247 (2001) 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) and *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, (1983).

Mr. Critchlow followed the requirements of RAP 18.1 and devoted a section of his Appellate Brief to his request for attorney fees to be awarded to him as prevailing party on appeal. Nonetheless the Court of Appeals denied his request finding that Mr. Critchlow "waived any recovery of reasonable attorney fees when accepting the offer of judgment that expressly excluded any such recovery." Opinion 9.

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). 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). See also *Nusom v. Comh Woodburn Inc G Cit* 122 F.3d 830 (9th Cir. 1997) citing *Erdman v. Cochise County*

926 F.2d 877, 880-81. But "Rule 68 offers differ from contracts with respect to attorney fees", *id* at 880; as to them, **any waiver or limitation must be clear and unambiguous**. *Nusom, supra* citing *Guerrero v. Cummings* 70 F.2d 1111, 1113 (9th Cir. 1995) and *Erdman v. Cochise County* 926 F.2d 877 (9th Cir. 1991).

In this case Dex Media served its Offer of Judgment and Appellant Critchlow unequivocally accepted their offer. CP 18-21. Dex Media's Offer of Judgment in pertinent part reads as follows:

> Pursuant to CR 68 as well as any other applicable cost shifting provisions of Washington State statutes, Defendant Dex Media West Inc. hereby offers to settle and to permit a judgment against it for any and all claims arising out of the above-referenced case for the sum of Five thousand and No/100 Dollars ($5,000.00) **including all reasonable attorney fees and costs incurred to date.** (Emphasis Added in Bold)

Their Offer of Judgment also states that it is "intended to come within the purview" of the following cases: *Merek v. Chesney*, 473 U.S. 1; *Hodge v. Development Service of America*, 65 Wn. App. 576 (1971) and *Minger v. Reinhard Dist. Co., Inc*, 87 Wn. App. 941 (1947). Their Offer of Judgment also cited the case of *Magnuson v. Tawney*, 109 Wn. App. 272 (2001). None of these cases involve fee shifting statutes under the Consumer Protection Act, nor Washington's Privacy Act, as pleaded in Mr. Critchlow's

Complaint. More importantly, unlike Appellant Critchlow's case (where the offer was immediately and unconditionally accepted) all of Dex Media's cited cases involved parties that actually **proceeded to trial and obtained judgments** and then appealed to a higher court on the issue of attorney fees and the application of CR 68. Mr. Critchlow's case never went to trial since he accepted Dex Media's Offer of Judgment and thus any discussion about his waiving any post offer attorney fees in the context of Dex Media's cited cases simply does not apply. Mr. Critchlow cannot be construed to have "waived" his rights to attorney fees in this context and based on this offer drafted by Dex Media.

C. Aside from and independent of the CR 68 Offer Mr. Critchlow is entitled to an award of attorney fees as the prevailing party on appeal based on any applicable fee shifting statutes.

Where a statute allows an award of attorney fees at trial, an appellate court has the authority to award fees on appeal. *Standing Rock Homeowners Assn v. Misich* 106 Wn. App. 231, 247 (2001) Appellant Critchlow has previously discussed (in his Opening and Reply Briefs) *Lietz v. Hansen Law Offices, PSC* 166 Wn. App. 571 (Div. II, 2012) involving the construction of CR 68 Offers of Judgement and the award of attorney fees on appeal. Like Mr. Critchlow's case. Mr. Lietz appealed the

trial court's decision refusing to enter appellee Hansen Law Offices Offer of Judgment which Lietz, like Critchlow, 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 and could not be entered. Division II of the Court of Appeals reversed the trial court 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]

Division II, in *Leitz, Id*, clearly ruled that they were awarding attorneys to Mr. Leitz on appeal "independent" of "the parties CR 68 judgment." Thus assuming arguendo that that the Court of Appeals in this case is correct that Mr. Critchlow waived his right to attorney fees via the CR 68 Offer of Judgment, this Court still has the authority to award them to Mr. Critchlow as the prevailing party on appeal "independent" of the CR 68 Offer of Judgment and based on these fee shifting statutes.

D. Public policy applicable to claims involving small amounts in controversy support an award of attorney fees to Mr. Critchlow on this case to encourage out of court settlements and penalize parties who unjustifiably resist small claims.

It is undisputed that the amount in controversy in this case is $5000.00. In their Offer of Judgment Dex Media notifies Mr. Critchlow that it is being made pursuant to CR 68 "as well as any applicable cost shifting provisions of Washington State statutes." CP 18 One of these "cost shifting" statutes is RCW 4.84.250 (attorney fees in actions for $10,000.00 or less) which reads as follows:

> Notwithstanding any other provisions of chapter 4.84 and RCW 12.20.060, in any action where the amount pleaded by the prevailing party, as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

The purpose of RCW 4.84.250 is to encourage our-of-court settlements and to **penalize parties who unjustifiably bring or resist small claims**. *Last Chance Stable v. Stephens*, 68 Wn. App. 710 (Div. III) citing *Valley v. Hand*, 38 Wn. App. 170 (1984) and *Harold Meyer Drug v. Hurd*, 23 Wn. App. 683 (1979). Another appellate court referred to the statute's purpose as "the obvious legislative intent is to enable a party to pursue a meritorious claim **without seeing his award diminished in whole or in part by legal fees.**" *Last Chance Stable, supra* quoting *Northside Auto Serv. Inc. v. Consumers*

United Ins. Co., 25 Wn. App. 486, 492 (1980). The prevailing party is not necessarily required to have specifically pleaded RCW 4.84.250 nor to have asked for attorney fees before trial in order to be entitled to recover under the statute. All that is required is some type of notice that reveals the risk of going to trial and that encourages a nonjudicial settlement of the dispute. *Pubic Util Dist. No. 1 v. Crea*, 88 Wn. App. 390 (Div. II, 1997) citing *Beckman v. Spokane Transit Authority*, 107 Wn.2d 790 (1987). Indeed this notice requirement does not require the party to plead RCW 4.84.250 nor to even ask for attorney fees. *Lay v. Hass,* 112 Wn.App. 818 (Div. II, 2002) citing *Pubic Util Dist. No. 1 v. Crea*, 88 Wn. App. 390 (Div. II, 1997) Actual notice is sufficient. *Pubic Util Dist. No. 1, Id.* Further, these notice requirements can be satisfied via offers of settlement, *Beckman, Id,* or interrogatory answers and need not even consist of formal pleadings, *Pierson v. Hernandez*, 149 Wn. App. 297 (Div. III, 2009).

In this case actual notice was properly given to Dex Media via Mr. Critchlow's formal pleading entitled Acceptance of Defendant's CR 68 Offer of Judgment that the amount in controversy was $5,000.00. And, Dex Media themselves set forth notice that their offer was being made pursuant to "any applicable cost shifting provisions of Washington State statutes" CP 19 proving that Dex Media was well aware of the requirements of RCW 4.84.250 governing attorney fee awards for **claims under $10,000.00**

In this case it is undisputed that Dex Media's attorney Kim Kamel (see her letter dated Dec. 3, 2014) attended the Nov. 7, 2014 Show Cause hearing in front of Judge Price and saw Critchlow's attorney Alan McNeil wandering around in the hall. Even so, she made no effort to get Mr. McNeil's attention so that this hearing could be commenced nor did she inform Judge Price's bailiff or clerk that Mr. McNeil was out in the hall so that he could be brought into the courtroom for the hearing, nor did Ms. Kamel inform Judge Price or his clerk of the status of the case, viz., that it was settled and merely awaiting entry of the $5000.00 judgment. Instead, Ms. Kamel blithely left the courthouse knowing that an order of dismissal would be entered since this was stated as a consequence of failing to appear in Judge Price's written Order to Show Cause setting this hearing. As such, Dex Media (and their counsel) have unjustifiably resisted the entry of this $5000.00 judgment in violation of the public policy concerning cases involving amounts less than 10,000.00 Attorney fees should be assessed since these fees incurred have already diminished and eclipsed Mr. Critchlow's pending (and still yet to be entered) judgment of $5000.00.

E. Failure by Division III to address the due process and recusal/reassignment issues does not fully and fairly dispose of the issues in this case because the order of recusal/reassignment was void and all subsequent orders, including those of Judge Price, flow from this initial void order and due process violations. This void order needs to be vacated and the case remanded to Judge Plese for the automatic entry of the $5,000.00 Judgment.

Division III's Opinion states that "regardless of whether Critchlow had a pending objection to the first judge's (Plese) recusal, Judge Price deserved the courtesy of an appearance and obedience to his order. Mr. Critchlow does not disagree with this and in fact his attorney Alan McNeil (see his letter dated Nov. 19, 2014) did in fact appear at Judge Price's courtroom on November 7, 2014 but according to McNeil "no one was at the courtroom and the door was locked." This record shows that there was no disrespect to Judge Price's order. Dex Media's previous contentions that Mr. Critchlow somehow disrespects and has disputes with Judges Price and Plese is wholly without any merit and has been proffered to this Court to excuse their actions in failing to enter the judgment, breaching this contract and causing this case to have to be appealed to Division III. Mr. Critchlow respects all judges as well as the entire judicial process and the law and his actions in the record support this view.

Procedural due process demands that a deprivation of life, liberty or property be preceded by notice and an opportunity for a hearing appropriate to the nature of the case. *Halstead v. Sallee* 31 Wn. App. 193 (Div.III, 1982) citing *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 313 (1950) "An order based on a hearing in which there was not adequate notice or opportunity to be heard is **void.** *Halstead v. Sallee* 31 Wn. App. 193 (Div.III, 1982) citing *Esmieu v. Schrag*, 88 Wn.2d 490, 497 (1976) See also *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); *In Re Clark* 26 Wn. App. 832, 837, 611 P.2d 1343 (1980) and *Tatam v. Rodgers*, 170 Wn. App. 76, 99 (Div. III, 2012).

A motion to have a judge recuse him or herself requires notice of the motion and of the time for the hearing thereon. *State v. Perala* 132 Wn. App. 98, 130 P.3d 852 (Div. III, 2006). 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 trial 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 and did give notice to the parties,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, notified the parties thereof and her reasons were deemed to be sufficient.

In the case under review, Judge Plese 1) failed to give 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 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 or his attorney Al McNeil. As such, Judge Plese's Order for Recusal is void since it was made ex parte and without notice to Appellant to 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/reassignment was void Mr. Critchlow should not have been subjected to any other orders that flowed therefrom.

G. The void order of recusal/reassignment compounds Mr. Critchlow's original injury and due process violations by subjecting him to possible sanctions by Judge Price who never would have been on this case except for the void recusal/reassignment order.

H. Division III's ruling that CR 68 requires that the judgment be automatically entered forthwith after Mr. Critchlow filed his formal acceptance on October 2, 2014 means that his case would have ended at that time and there would never have been any additional orders such as Judge Price's order to show cause sent out on October 10, 2014 and Mr. Critchlow has, and continues to be, prejudiced by this.

Not only must justice be done be done in a given case and set of circumstances, justice must also "appear to be done." In this case it does not appear that Mr. Critchlow is getting the full justice that he deserves because

this Court has decided that the issue of the due process violation and the void order of recusal/reassignment does not need to be addressed since the resolution of the CR 68 Offer of Judgment issue fully and fairly decides this case. However Division III itself recognizes that "Critchlow could claim prejudice from our failure to address the recusal of Judge Plese." Opinion 11. Indeed Mr. Critchlow was, and continues to be, prejudiced the void recusal/reassignment order. If not for that void order this case would never have ended up in front of Judge Michael Price and no orders by Judge Price would have been issued in this case, including his order to show cause. Further, if the CR 68 judgment had been entered "automatically" and "forthwith" when Mr. Critchlow accepted it on October 2, 2014 the case would have ended at that time and there would not have been a Show cause Hearing and Mr. Critchlow would not still be facing the prospect of imposition of sanctions for a failure to appear at this hearing.

V. CONCLUSION

The Court of Appeals should reconsider its Opinion that Appellant Critchlow is not entitled to an award of reasonable attorney fees as prevailing party on appeal based on its determination that Mr. Critchlow waived his rights to recovery of reasonable attorney fees due to the attorney fee provisions contained in Dex Media's CR 68 Offer of Judgment. This Court should find

that Dex Media materially breached their own CR 68 agreement as a matter of law and that Mr. Critchlow is excused from and not bound by any attorney fee provisions in that agreement. Further these attorney fee provisions must be construed against the drafter of the offer, Dex Media, and in favor of Mr. Critchlow. Civil Rule 68 offers differ from contracts with respect to "attorney fees" and any waiver or limitation must be **clear and unambiguous** which is not the case here. Nothing was stated in Dex Media's CR 68 Offer of Judgment about what would happen if Mr Critchlow's did not go to trial nor was anything said about Mr. Critchlow agreeing to waive any rights to attorney fees on appeal to a higher court. In fact Mr. Critchlow's case never went to trial and he had no intention of appealing his case at that time he accepted this offer. Indeed, his intention was that his judgment of $5000.00 be entered with the trial court. Further, the Offer of Judgment is not controlling per *Lietz, supra,* on the issue of whether attorney fees can be awarded on appeal and in fact is **"independent"** of any CR 68 considerations and may be based on any fee shifting statutes such as RCW 19.86 et seq, RCW 9.71 et seq. and RCW 4.84.250 which authorize awards of attorney fees to prevailing parties. Finally, public policy considerations favor an award of attorney fees to prevailing parties in cases involving $10,000.00 or less to encourage out of court settlements and to punish parties who unjustifiably resist small claims (and the entry of judgment thereof) such as in the case at bar.

The Court of Appeals should also reconsider its decision not to address the due process violations and the void nature of Judge Plese's order of recusal/reassignment since Mr. Critchlow continues to be prejudiced by the failure to consider and deal with these issues. Division III should vacate this void order and remand the case to Judge Annette Plese for the simple ministerial act of "automatically" entering the $5,000.00 judgment.

The Court should not remand the case to Judge Price for any determinations as to whether Mr. Critchlow should be sanctioned since the case ended up with Judge Price as a result of the void recusal/reassignment order and due process violations by Judge Plese and thus Mr. Critchlow continues to be prejudiced by her actions. By failing to consider these issues the Court is allowing these initial due process violations to be compounded and continue unabated potentially resulting in an unnecessary award of sanctions against Mr. Critchlow. Finally, the case would never have been with Judge Michael Price since CR 68 required Mr. Critchlow's judgment to be entered with the trial court 'forthwith' and 'automatically' after Mr. Critchlow had formally accepted this offer on October 2, 2014, eight days before Judge Price sent out his Order to Show Cause on October 10, 2014.

Attorney fees should be awarded to Appellant Critchlow under these fee shifting statutes as the prevailing party. Judge Annette Plese's void order of

recusal/reassignment should be vacated and this case should be remanded back to Judge Annette Plese for the ministerial act of simply and "automatically" entering Mr. Critchlow's $5,000.00 judgment.

DATED THIS ___ day of March, 2016

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 C

ORDER DENYING MOTION FOR RECONSIDERATION

FILED
APRIL 26, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

ROBERT W. CRITCHLOW, individually and d/b/a CRITCHLOW LAW OFFICE,	)	No. 33038-9-III
Appellant,	)	
v.	)	ORDER DENYING MOTION FOR RECONSIDERATION
DEX MEDIA WEST, INC., a foreign corporation,	)	
Respondent.	)	

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of February 18, 2016 is hereby denied.

PANEL: Judges Fearing, Siddoway, Lawrence-Berrey

FOR THE COURT:

George B. Fearing

GEORGE B. FEARING, Chief Judge