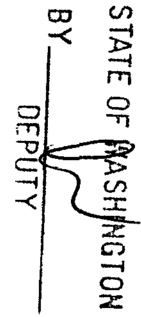

No. 48375-1-II

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

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG AND JOHN DOE HOFFENBURG,

Respondent.

OPENING BRIEF OF APPELLANT

ALANA BULLIS, PS
Alana K. Bullis, WSBA No. 30554
1911 Nelson Street
DuPont, WA 98327
(253) 905-4488
Attorney for Appellant

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I. INTRODUCTION

This case began in July 2008, as a straight-forward, low-value vehicle property damage claim in the amount of $5,044.00. CP 906-08; CP 846. Appellant Tori Kruger-Willis (Kruger-Willis) filed suit against Respondent Heather Hoffenburg (Hoffenburg)[1] after Hoffenburg hit Kruger-Willis' vehicle with Derek Lebeda's (Lebeda) vehicle. CP 906-08. Lebeda was insured by General Insurance Company (GEICO). CP 845. Hoffenburg was a covered driver under Lebeda's policy. CP 686.

The parties are now eight years into litigation and this is the third appeal in the case. The procedural history is long and convoluted because the GEICO-employed defense attorneys, Morgan Wais (Wais) and Paul Crowley (Crowley),[2] never communicated with Hoffenburg and they do not know her whereabouts. RP 7-12.

What is evident from the pleadings filed post-mandate since the first appeal is that the defense attorneys are defending this case on behalf of GEICO and not their purported client, Hoffenburg.

After the Court issued its opinion in the first appeal, the defense attorneys never argued that Hoffenburg should recover under RCW 4.84.250 the prevailing party attorney fees and costs, as follows:

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[1] The true name of Hoffenburg is Heather Hofferbert. CP 740. Kruger-Willis properly named Hoffenburg in the complaint. CP 906. The misidentification of Hoffenburg was not due to a scrivener's error; rather, it was by an affirmative representation of Wais, who moved the trial court to change the case caption from Hofferbert to Hoffenburg. CP 740.

[2] Wais withdrew as counsel on July 1, 2014, and Crowley substituted on the same date. CP 644. When Kruger-Willis refers to "the defense attorneys," she is referring to Wais and Crowley, collectively.

1. On June 6, 2011, the defense's position was that Hoffenburg was the prevailing party. Wais stated, "I'm asking the Court to enter judgment finding in favor of my client, the defendant..." CP 983-84; CP 1036.

2. On June 27, 2011, the defense's position was that Hoffenburg was the prevailing party. Wais argued:

> *Based upon the defendant being the prevailing party within the definition [of] RCW 4.84.250*, I'm now moving for reasonable costs and attorney's fees (emphasis added).[3] CP 1045
>
> Briefly, I want to just address plaintiff's reply, essentially to say that it relies upon information that's really not relevant to the proceeding. It talks about Geico this and Geico that; it talks about who the prevailing party is. *The fact is the prevailing party is the defendant, Ms. Hoffenberg*...I don't see that there's any real substantive argument about whether *she's entitled to the costs and fees* (emphasis added). CP 983; 1047.

3. While the matter was on appeal from July 27, 2011, through February 21, 2013, the defense's position was that Hoffenburg was the prevailing party. CP 983. Notably, in Hoffenburg's appellate response brief, Wais argued:

> Plaintiff attempts to misdirect this Court with regard to who the Defendant, in fact, is. Plaintiff, in her briefing, deceptively refers to Defendant's insurer, GEICO, rather than referring to Defendant, Heather Hoffenburg, as the party to the lawsuit. Plaintiff, having filed and served the underlying lawsuit, ought to know that GEICO has never been a party to the lawsuit, and GEICO is not a party to this appeal. GEICO is merely the insurance company indemnifying Defendant in the lawsuit and the present appeal. Thus, Plaintiff is correct when she argues that *GEICO was not an aggrieved party – GEICO is not a party at all*. The Plaintiff [sic] was indemnified by an insurance company was wholly immaterial to the case at trial, was wholly immaterial to the Trial Court's issuance of costs and attorneys fees, and it is wholly immaterial to this appeal (emphasis added). CP 778.

February 21, 2013 – The Court affirmed the trial court's order awarding Hoffenburg reasonable attorney fees and costs under RCW 4.84.250. CP 901-03; CP 895-900.

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[3] The definition being "the defendant." RCW 2.84.270.

4. February 27, 2013, through May 17, 2013, the defense suddenly changed its position, with Wais arguing that it was now GEICO and not Hoffenburg who was entitled to recover the prevailing party fees and costs. CP 983. According to Wais in a motion filed with the trial court:

> Plaintiff should issued [sic] immediate payment to GEICO General Insurance Company consistent with this Court's previous Order that was then subsequently affirmed by the Court of Appeals, Division II… CP 890.
>
> While Plaintiff will inevitably argued [sic] that she has, in fact, issued payment to the named Defendant, Heather Hoffenburg, Plaintiff's Counsel is doing so knowing full and well that 1) Ms. Hoffenburg **has never been involved in the defense of the case against her**, and that it was GEICO who indemnified and insured Ms. Hoffenburg who should receive the statutory litigation costs and reasonable attorney's fees. Without a doubt, Plaintiff's Counsel issued the payment to "Heather Hoffenburt" (sic) knowing that GEICO would not be able to deposit or otherwise collect the funds that it is entitled to for having indemnified and defended Ms. Hoffenburg. *Plaintiff will argue that Ms.Hoffenburg, not GEICO, is the aggrieved party, despite the fact that it is GEICO that incurred the costs of defending the lawsuit on behalf of Ms. Hoffenburg.* Significantly, the award of statutory litigation costs and reasonable attorney's fees are not somehow a windfall for GEICO. It was GEICO, not Heather Hoffenburg, that spent tens of thousands of dollars in attorney's time, copying costs, witnesses time, expert witness fees, and travel costs defending the case against Heather Hoffenburg. Since the case was valued at zero dollars by the jury, *GEICO legally is entitled to those costs and fees back* (emphasis added). CP 890-91.

5. On May 17, 2013, the trial court heard Wais' motion to order Kruger-Willis to issue payment to GEICO rather than to Hoffenburg.[4] CP 977. The trial court refused to enter judgment for GEICO. CP 977; CP 1016. The trial court ruled that judgment would be in favor of only Hoffenburg and the attorney for the judgment creditor can be the Mary E. Owens law firm. CP 977; CP 1017.

Wais then asked the trial court: "I guess what I would ask this Court to do, which would be consistent with the original order, is then to

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[4] Due to a scheduling irregularity, Kruger-Willis' counsel was not present at the hearing because she was not timely notified by the court clerk that the motion hearing had been changed from the afternoon calendar to the morning calendar.

make the judgment creditor Mary E. Owen & Associates, if that makes sense to Your Honor..." CP 978; CP 1016.

The trial court responded: "I'm not comfortable making the judgment creditor anyone other than Heather Hoffenburg...the judgment is going to be in favor – favor of the defendant, Heather Hoffenburg. The attorney for the judgment creditor can be the Mary E. Owens law firm." CP 978; CP 1017.

As Wais had prepared a proposed order with GEICO as the judgment creditor, the trial court continued the matter to June 3, 2013, for presentation of a judgment order with only Heather Hofferbert as the judgment creditor and Mary Owens law firm as attorney for the judgment creditor. CP 978; CP 1017-19.

6. On June 3, 2013, Wais presented to the trial court for its signature the renewed judgment order that he pre-signed in what he believed would be an *ex parte* matter. CP 67; CP 1000. Kruger-Willis' counsel insisted on being heard by the trial court with respect to the judgment itself due to the scheduling irregularity that occurred on May 17, 2013. CP 1000-02. Wais did not inform the trial court or Kruger-Willis' counsel that he failed to comply with the trial court's ruling of May 17, 2013, by adding Mary E. Owen & Associates as a judgment creditor on the renewed judgment order when the trial court had previously denied his motion "to make the judgment creditor Mary E. Owen & Associates." CP 67; CP 987; CP 1016-17. Instead, Wais misrepresented to the trial court and to Kruger-Willis' counsel that the only change he made to the renewed judgment order from the prior hearing was to its format by stating:

> This [motion hearing] was set following the motion hearing which was held the 17th of May where I appeared live before you [the trial court] and <u>you had essentially stated that you had no problem signing the order</u> *given that it was affirmed by the Court of Appeals*, <u>but it was in the wrong format at the time</u>[5] *and it wasn't* – <u>didn't have a judgment summary on the top as is required</u>. *So, I reformatted things such that it would comply with*

[5] The renewed judgment order was in the wrong format in that it did not list <u>*only*</u> Hoffenburg as the judgment creditor. Wais was aware of this fact, however, Kruger-Willis' counsel was not as she was not present at the motion hearing on May 17, 2013, due to the scheduling irregularity. Wais, however, would know that Kruger-Willis' counsel would not have any idea as to what transpired at the May 17th hearing, and, coupled with his expectation that the renewed judgment order was going to be presented *ex parte*, it is reasonable to conclude that Wais intentionally misled the trial court and Kruger-Willis' counsel regarding the form and the substance of the judgment to compel Kruger-Willis to issue the prevailing party fees and costs to a non-party to this action.

> *a judgment*, and so the Court then set it for today's presentation, which originally *I thought was going to be just done ex parte* but plaintiff's counsel wanted to be heard on some issues...(emphasis added). CP 987-88; CP 1000.

Significantly, on June 6, 2011, three weeks before the trial court entered its order of June 27, 2011, that has spawned years of litigation between the parties, Kruger-Willis raised the issue as to who the defense considered the prevailing party in this action – Hoffenburg or GEICO? CP 984; CP 1037. Kruger-Willis sought clarification from the defense prior to the entry of the order because it was foreseeable to Kruger-Willis' counsel that the defense's designation of the prevailing party would become an issue as the matter progressed through the initial appeal and it certainly would become an issue post-appeal (CP 985):

> So, we have to question who really is the defendant in this case. Is it the insurance company or is it the defendant, Ms. Hoffenberg? That is an issue that may have to be reserved (addressed) at a later time." CP 984-85; CP 1037.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Issue No. 1. The trial court erred when it denied Kruger-Willis' renewed motion under RCW 2.44.030.

Issue No. 2. The trial court abused its discretion when it denied Kruger-Willis' motion for reconsideration of its denial of her renewed motion under RCW 2.44.030.

Issue No. 3. The trial court erred when it granted the defense's motion for judgment.

Issue No. 4. The trial court abused its discretion when it denied Kruger-Willis' motion for reconsideration of entry of judgment.

Issue No. 5. The trial court denied Kruger-Willis the right to fair, impartial, and neutral hearings.

Issues Pertaining to Assignment of Error

Issue No. 1:

a. Whether the trial court erred when it denied Kruger-Willis' renewed motion under RCW 2.44.030 when it held that absent any communication with Hoffenburg, the defense attorneys had authority under the omnibus clause of the insurance policy;

b. Whether the trial court abused its discretion when it improperly considered Hoffenburg's alleged declaration and held, *sua sponte,* that the declaration ratified the unauthorized acts of the defense attorneys;

c. Whether the trial court abused its discretion when it found that the defense attorneys did not surrender a substantial right of Hoffenburg's without special authority from her when a judgment was entered against Hoffenburg without her knowledge; and,

d. Whether the Court should apply the law of the case doctrine to the current appeal.

Issue No. 2:

a. Whether the trial court abused its discretion when it denied Kruger-Willis' motion for reconsideration when it held, *sua sponte,* that Hoffenburg's alleged declaration "ratified" the unauthorized acts of the defense attorneys when Hoffenburg did not have full knowledge of all material facts of the unauthorized acts of the defense attorneys; and,

b. Whether the trial court abused its discretion when it denied Kruger-Willis' motion for reconsideration because substantial justice has not been done in this matter due to irregularities in the proceedings.

Issue No. 3:

a. Whether the trial court erred when it granted the defense's motion for judgment when the record shows that the defense attorneys never considered Hoffenburg the prevailing party under RCW 4.84.250; and,

b. Whether the trial court erred when it entered judgment on February 8, 2016, finding that its order of June 27, 2011, contained a "scrivener's error," which is unsupported by the record.

Issue No. 4:

Whether the trial court abused its discretion when it denied Kruger-Willis' motion for reconsideration of entry of judgment because substantial justice has not been done in this matter due to irregularities in the proceedings.

Issue No. 5:

Whether the trial court, in the proceedings before it, denied Kruger-Willis the right to fair, impartial, and neutral hearings.

III. STATEMENT OF THE CASE

This action arises out of a motor vehicle collision that occurred on February 21, 2008. CP 907. Hoffenburg was the permissive driver of Lebeda's vehicle when she crashed into Kruger-Willis' legally parked and unoccupied vehicle, thereby causing property damage to Kruger-Willis' vehicle. CP 686; CP 907. Hoffenburg fled the scene of the collision and she was subsequently identified by witnesses as the driver who hit Kruger-Willis' vehicle. CP 845. Hoffenburg was cited by the Shelton Police Department for hit and run/property damage. CP 907. On the police report, Hoffenburg's name was properly written as Heather Hofferbert. CP 845.

Kruger-Willis filed a claim for diminished value of her vehicle with Lebeda's insurance company, GEICO. CP 845. The parties were unable to settle the claim and in July 2008, Kruger-Willis commenced this action against Lebeda and Hoffenburg. CP 845-46; CP 906-08. Thereafter, the parties entered into a stipulation at the defense's request to dismiss Lebeda as a party-defendant. CP 904-05. The case was subsequently transferred to mandatory arbitration. CP 846.

On February 23, 2010, an arbitration hearing took place. CP 846. GEICO presented no property damage experts to refute Kruger-Willis' property damage expert's valuation of her loss. CP 846. Kruger-Willis was awarded $5,044.00, the full amount of her pre-suit demand. CP 846; CP 454. GEICO filed a request for a trial de novo. CP 846. Prior to trial, the defense made an offer of judgment to Kruger-Willis in the amount of $1,000.00, which was declined. CP 846.

The case proceeded to a three day trial on an admitted liability case on April 26, 2011. CP 846; CP 454; RP 80. Wais moved for a directed verdict after Kruger-Willis presented her case-in-chief on damages only and rested. CP 454; RP 80. Wais moved for a directed verdict on the basis that Kruger-Willis could not prove liability, which forced Kruger-Willis to rush to court for less than five minutes of testimony regarding liability. CP 454; RP 80.

On April 28, 2011, the jury returned a verdict for Hoffenburg. CP 846. On May 26, 2011, the defense filed a motion for defendant's costs and reasonable attorney fees under RCW 4.84.250. CP 846. Kruger-Willis opposed the motion because it was not timely filed. CP 846. On June 6, 2011, the trial court heard argument from counsel regarding the motion and it continued the hearing to allow Wais to submit by declaration the time he expended on the case under the lodestar method. CP 846.

On June 15, 2011, Wais filed a second motion for costs and for reasonable attorney fees under RCW 4.84.250. CP 847. Kruger-Willis

opposed the motion on the basis that as the third party insurance company, GEICO was not an aggrieved party and it lacked standing to file a request for a trial de novo and similarly, it could not be considered the prevailing party entitled to reasonable attorney fees under RCW 4.84.250. CP 847.

On June 27, 2011, the trial court granted the defense's motion under RCW 4.84.250 in the amount of $11,490.00. CP 847; CP 901-03. Kruger-Willis appealed. CP 975.

On February 21, 2013, this Court affirmed the trial court, holding that Kruger-Willis "does not succeed in showing that the trial court erred in awarding Defendant Hoffenburg reasonable attorney fees and costs." CP 975-76; CP 895-900.

Immediately afterward, Wais made demand to Kruger-Willis' counsel for payment in the amount of $11,490.00, stating that the check should be made payable to GEICO. CP 742; CP 734; CP 735. A check was promptly tendered to Mary E. Owen & Associates made payable to Heather Hofferbert in the full amount demanded by Wais of $11,490.00. CP 742; CP 731-33; RP 53.

When Wais received the check, he advised Kruger-Willis' counsel that if a new check was not reissued to GEICO, he would move for interest on the award. CP 742; CP 736. Kruger-Willis refused because GEICO was not the prevailing party. CP 736. Wais then moved the trial court to order Kruger-Willis to issue payment to GEICO and to enter judgment for GEICO. CP 892.

The hearing on Wais' motion to enter judgment for GEICO was held on May 17, 2013. CP 977. During the hearing, the trial court remarked that "information subsequent to that tells me that...payment wasn't made." CP 977; CP 1016. Wais failed to inform the trial court that payment had indeed been made 71 days before the hearing date to him for Hoffenburg in the amount of $11,490.00. CP 977.

During the May 17, 2013, hearing, the trial court would not enter judgment for GEICO or for Mary E. Owen & Associates. CP 977-78; CP 1016-17. The trial court ruled that judgment would be in favor of <u>only</u> Hoffenburg and the attorney for the judgment creditor can be the Mary E. Owens law firm. CP 977; CP 1017. The trial court then continued the matter to June 3, 2013, for presentation of the judgment. CP 978; CP 1017.

The judgment presented to the trial court for its signature by Wais on June 3, 2013, which he believed was going to be presented *ex parte*, failed to comply with the trial court's rulings from the May 17, 2013, hearing. CP 67; CP 978; CP 1000. On Wais' renewed judgment order, which he pre-signed, he listed the judgment creditor(s) as "Heather Hoffenburg *<u>and</u>* her attorneys Mary E. Owen & Associates (emphasis added)" instead of Heather Hoffenburg. CP 67; CP 978. For the attorney for the judgment creditor, he listed "Morgan J. Wais" instead of "Mary E. Owens law firm." CP 67; CP 978.

At the hearing on June 3, 2013, Kruger-Willis' counsel argued an entry of judgment was not necessary as the award had been satisfied. CP 979; CP 1002. Kruger-Willis' counsel requested a continuance to properly address the issue regarding judgment. CP 1004. The trial court continued the matter to June 24, 2013. CP 979; CP 1006-08.

During the hearing on June 24, 2013, the trial court requested briefing from the parties regarding to whom the check for attorney fees and costs should be made payable. CP 979. Kruger-Willis provided her legal authorities and the defense did not. CP 979. The trial court also instructed Wais to present an order for its signature so that Kruger-Willis could deposit the disputed amount of the award into the court's registry. Wais failed to comply with the trial court's instruction. CP 979.

Based upon Wais' admission in the motion to enter judgment for GEICO that Hoffenburg has never been involved in the defense of the case against her, Kruger-Willis filed a motion under RCW 2.44.030 for Wais to prove his authority. CP 979.

On August 9, 2013, the trial court heard argument from counsel on Kruger-Willis' motion under RCW 2.44.030. CP 979. Wais argued:

> Well, Your Honor, it's not a secret at this point – I don't think it's ever been kept as a secret that there – *I have not had contact with the named defendant in this lawsuit*. The facts have been substantially outlined and gone over at length. But it seems that plaintiff's argument is simply that just because the – *I haven't spoken with the named defendant*, that there is no authority, but the fact is that the authority does exist pursuant to the contract... *That there hasn't been actual communication with that person* despite

my diligent efforts to accomplish that, doesn't, I believe, void coverage (emphasis added). CP 583.

Despite Wais' admission that he never communicated with Hoffenburg, the trial court denied Kruger-Willis' motion for Wais to prove his authority. CP 979; CP 655.

In an October 21, 2013, letter to the parties that accompanied the trial court's order denying Kruger-Willis' motion under RCW 2.44.030, the trial court held (CP 656-658):

> The issue post-mandate has been to whom the check for attorney fees and costs should be made payable. CP 657.
>
> The Order Granting Defendant her Costs and Reasonable Attorney's Fees entered on June 24, 2011,[6] provided in part on page 2 that "Plaintiff shall make payment to Defendant's Counsel, Mary E. Owen & Associates, a check in the amount of $11,490 not later than 14 days from the date of this order." CP 657.
>
> If payment has not yet been made, a judgment in favor of Mary E. Owen & Associates may be noted on for presentation. (The court notes that no proposed order has been received for deposit of the contested amount into the registry of the court.) CP 658.

Kruger-Willis appealed the trial court's denial of her motion under RCW 2.44.030.[7] CP 649-50. While the issue of authority was on appeal, Wais implied that he located Hoffenburg and that he allegedly obtained a declaration from her. CP 449. Wais submitted a letter to the trial court attached to Hoffenburg's declaration requesting that the declaration merely be "placed into the court file." CP 449; CP 590; CP 592-94.

On April 21, 2015, this Court held in the second appeal in this case that it was manifestly unreasonable for the trial court to deny Kruger-

[6] Correct date is June 27, 2011.
[7] The second appeal in this case. No. 45593-5-II.

Willis' motion for defense counsel to prove the authority under which he appears: "We hold that when, as here, a civil defense attorney states that he has never communicated with his client," it was manifest abuse of discretion for the trial court to deny Kruger-Willis' motion. CP 638-42. The Court reversed the trial court and remanded with instructions consistent with its opinion. CP 642. On June 8, 2015, the Court issued its mandate to the trial court for further proceedings in accordance with its opinion. CP 636-42.

Thereafter, the trial court scheduled a post-mandate status hearing for July 13, 2015. CP 560. Kruger-Willis filed a post-mandate status report prior to the hearing. CP 560-69. Regarding Hoffenburg's declaration, Kruger-Willis provided the trial court with a statement of facts regarding the "placement" of Hoffenburg's declaration into the court file and with her evidentiary objections regarding the admissibility of Hoffenburg's declaration. CP 564-65. Notably, Kruger-Willis pointed out to the trial court:

> [T]he issue with respect to the admissibility of the purported Declaration of Heather Hofferbert is now moot as defense counsel did not raise it or rely upon it in support of the Defendant's response to Plaintiff's motion under RCW 2.44.030 that was filed and served on July 8, 2015. CP 565.
>
> Although defense counsel has abandoned reliance on the declaration as evidence of the Defendant's authority to act on her behalf in defense of the case against her, it is Plaintiff's position that assuming the purported Declaration of Heather Hofferbert could be properly authenticated and admitted as evidence based upon an exception to the hearsay rule, the declaration clearly demonstrates that the Defendant lacked personal knowledge with respect to the entire proceedings in the case against her and that

defense counsel did not, and does not, have her authority to act on her behalf in defense of the case against her. CP 565.

On July 27, 2015, the trial court heard argument from counsel on Kruger-Willis renewed motion under RCW 2.44.030. The trial court noted that the defense filed a declaration from Hoffenburg. RP 4. Kruger-Willis' counsel argued that the declaration was inadmissible evidence of authority because it had been placed in the court file without any affirmative act from the defense to have it properly admitted into evidence and that Kruger-Willis had other evidentiary objections to the admissibility of Hoffenburg's alleged declaration. RP 4. The trial court granted Kruger-Willis one week in which to submit a brief regarding her objections to Hoffenburg's alleged declaration. RP 16. The trial court took the matter under advisement. RP 14.

On November 16, 2015, 113 days from the hearing on Kruger-Willis' renewed motion under RCW 2.44.030,[8] the trial court denied the motion, holding that the defense attorneys had authority to represent Hoffenburg under the omnibus clause in Lebeda's insurance policy; an omnibus clause was required to be present in Lebeda's policy under RCW 46.29.490(2)(b); defense counsel did not surrender any of Hoffenburg's substantial rights; and Hoffenburg ratified defense counsel's actions after the fact. CP 462-68. Kruger-Willis filed a motion for reconsideration,

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[8] This is time in which Kruger-Willis was assessed daily interest. It is also 16 days beyond the permitted time under RCW 2.08.240 (decisions shall be decided by a judge of a superior court within 90 days from the submission thereof) allowing for the one week time between the motion hearing and the submission of the parties' briefs. CP 449.

which was denied on December 15, 2015. CP 253. Kruger-Willis appealed on December 17, 2015. CP 242-43.

Kruger-Willis moved the trial court for relief from its order under CR 60(b)(6). CP 236-241. The defense filed a counter-motion for supplementary proceedings for an order to examine Kruger-Willis as a judgment debtor when no judgment had been entered in the matter. CP 211-15. A hearing was held on January 25, 2016, wherein the trial court struck Kruger-Willis' motion on the basis that Kruger-Willis did not first move for a show cause order and it denied the defense's motion examine Kruger-Willis as a judgment debtor when no judgment had yet been entered in this matter. RP 50.[9]

On February 1, 2016, the trial court heard argument on the defense's motion for judgment against Kruger-Willis. RP 52-67. Crowley moved the trial court to have judgment entered for his firm, Lockner & Crowley, Inc., P.S., a non-party to this action. CP 135.

During the hearing, the trial court found that its order of June 27, 2011, contained a "scrivener's error" where it stated that payment shall be made to Hoffenburg's counsel, Mary E. Owen & Associates. CP 980; RP 61. The trial court also found that Kruger-Willis' tender of the check in May 2013, to Mary E. Owen & Associates payable to Heather Hofferbert did not constitute an accord and satisfaction. CP 980-81; RP 62. It also held that judgment would be entered in favor of Hoffenburg against Tori

[9] Before Kruger-Willis could move for a show cause hearing as a prerequisite to moving to vacate the trial court's order of June 27, 2011, the trial court entered judgment against Kruger-Willis, effectively rendering such a motion futile before this court.

Kruger-Willis (relief that Crowley did not seek in the motion for judgment before the court) in the amount of $11,490.00 with interest accruing from June 27, 2011. CP 980; 61-62.

On February 2, 2016, a check was tendered to Crowley made payable to Heather Hofferbert in the amount of $17,685.00 as full satisfaction of the trial court's order of June 27, 2011, inclusive of interest from June 27, 2011.[10] CP 981.

On February 8, 2016, the trial court entered judgment against Kruger-Willis in the amount of $17,685.00. CP 981. The trial court ruled that Crowley could execute judgment immediately despite Kruger-Willis' counsel's argument that under CR 62(a), upon the filing of a notice of appeal which Kruger-Willis filed on December 17, 2015, enforcement of a money judgment is stayed until the expiration of 14 days after entry of judgment. CP 981.

On February 8, 2016, judgment was entered for Kruger-Willis against Hoffenburg in accordance with the Court's mandate. CP 636. RP 78.

On February 9, 2016, Kruger-Willis filed an amended notice of appeal under RAP 2.4 and a notice of cash supersedeas. CP 981; CP 1054-56.

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[10] The check was subsequently voided with Kruger-Willis opting to file a cash supersedeas. CP 1054-56.

VI. STANDARD OF REVIEW, LEGAL AUTHORITIES, AND ARGUMENT

A1. The trial court erred when it denied Kruger-Willis' renewed motion under RCW 2.44.030 when it held that absent any communication with Hoffenburg, the defense attorneys had authority under the omnibus clause of the insurance policy.

Kruger-Willis' renewed motion under RCW 2.44.030 is on remand from the Court. CP 636-642. The Court reversed the trial court and it remanded "for further proceedings consistent with this opinion:"

> We hold that when, as here, a civil defense attorney states that he has never communicated with his client, it is manifestly unreasonable for the trial court to deny opposing counsel's motion to require counsel to prove the authority under which he appears.

CP 641.

Notably, Wais argued in Hoffenburg's response to Kruger-Willis' initial motion under RCW 2.44.030 that the duty to defend clause in the insurance contract granted him authority absent any communication with her. CP 686-87. Similarly, Crowley argued in Hoffenburg's appellate response brief that the duty to defend clause in the insurance contract granted authority to the defense attorneys absent any communication with Hoffenburg. CP 617-21.

An appellate court can affirm on any basis supported by the record, whether or not the trial court considered that basis. *Amy v. Kmart of Wash. LLC*, 153 Wn. App. 846, 868, 223 P.3d 1247 (2009). RP 20. Despite the defense attorneys' reliance on the insurance contract as a basis for authority under RCW 2.44.030, the Court still reversed the trial court's denial of Kruger-Willis' motion under RCW 2.44.030. CP 638-42. RP 20.

1. STANDARD OF REVEW ON REMAND RCW 2.44.030

a. On Remand "For Further Proceedings:"

"[A] remand 'for further proceedings' signals this court's expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case." *Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 189, 311 P.3d 594 (2013), *review denied*, 179 Wn.2d 1027 (2014) (*citing In re Marriage of Rockwell*, 157 Wn. App. 449, 453, 238 P.3d 1184 (2010). When a mandate merely remands for further proceedings, compliance with that mandate is reviewed for an abuse of discretion. *State v. Kilgore*, 167 Wn.2d 28, 34, 42-43, 216 P.3d 393 (2009).

b. RCW 2.44.030:

This case involves the application of RCW 2.44.030:

> The court, or a judge, may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party...to produce or prove the authority under which he or she appears.

The statute states that the trial court "may" require an attorney to prove his or her authority. RCW 2.44.030. A court of review typically interprets the word "may" as a permissive word that confers discretion on the trial court. *See Angelo Property Co. v. Hafiz,* 167 Wn. App. 789, 817 n.49, 274 P.3d 1075 (2012); *In re Guardianship of Johnson,* 112 Wn. App. 384, 387-88, 48 P.3d 1029 (2002). Therefore, the Court reviews the trial

court's denial of Kruger-Willis' renewed motion under RCW 2.44.030 for abuse of discretion.

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 444, 458, 229 P.3d 735 (2010). A decision is manifestly unreasonable if the court, despite applying the correct legal standard, adopts a view no reasonable person would take. *Yousoufian v. Office of Ron Sims,* 168 Wn.2d at 458-59.

2. AUTHORITY OF ATTORNEY

The authority of an attorney to represent a client may be challenged under RCW 2.44.030 by the opposing party. RCW 2.44.030 provides:

> **Production of authority to act.**
>
> The court, or a judge, may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he or she appears, and until he or she does so, may stay all proceedings by him or her on behalf of the party for whom he or she assumes to appear.

Kruger-Willis argued that a reasonable interpretation of the Court's holding, "[w]e hold that when, as here, a civil defense attorney states that he has never communicated with his client...," the issue the Court focused on was communication – that the key to authority is some form of communication between attorney and client. CP 451.

The trial court did not address the issue of communication between the defense attorneys and Hoffenburg in its written decision. CP 462-68; RP 23.

In *In re Miller,* 95 Wn.2d 453, 625 P.2d 701 (1981), an attorney was disciplined for approving a stipulated judgment against his clients without their authority and allowing that judgment to be entered without advising the court of his lack of authority. CP 661. The court held that the attorney had a duty to disclose to the court his lack of authority when the attorney signed the judgment without authorization and allowed its presentation to the court for approval. *Id.* at 456. CP 661. "Simply permitting the entry of such a judgment without disclosure to the court is prejudicial to the administration of justice." *Id.* CP 661.

Here, we have two defense attorneys who have never communicated with the defendant after eight years of active litigation involving three appeals. Such actions are prejudicial to the administration of justice and the trial court abused its discretion when it denied Kruger-Willis' renewed motion under RCW 2.44.030.

3. STANDARD OF REVIEW FOR INSURANCE CONTRACTS

Interpretation of an insurance policy is a question of law and "[w]here the language in a contract for insurance is clear and unambiguous, the court should enforce the policy as written." *Matthews v. Penn-America Ins. Co.*, 106 Wn. App. 745, 747-48, 25 P.3d 451 (2001).

"Based on a review of the allegations against the insured *and the insurance policy provisions*, the trial court - and this court **on de novo review** - must decide as a matter of law either that the insurer has a duty to defend or that no duty to defend exists. While the duty to indemnify may depend upon resolution of factual issues, *there generally are no questions of fact for the duty to defend* (emphasis added)." *United Services Automobile Ass'n v. Speed*, 179 Wn. App. 184, 194-95, 317 P.3d 532 (2014).

4. THE INSURANCE CONTRACT

The relationship between an insurer and the insured is purely contractual. *McGregor v. Inter-Ocean Ins. Co.*, 48 Wn.2d 268, 292 P.2d 1054 (1956). Insurance contracts should be interpreted as an average insurance purchaser would understand them, giving undefined terms in these contracts their "plain, ordinary, and popular" meanings. *Diamaco, Inc. v. Aetna Cas. & Sur. Co.*, 97 Wn. App. 335, 338, 983 P.2d 707 (1999). Ambiguities in the insurance policy are *strictly construed* against the insurer (emphasis added). *Id.* CP 260.

Under the liability section of the insurance contract, which is applicable in this case (Section I, Liability Coverages), between GEICO and Lebeda, there are no words, or any references thereto, which would form a reasonable basis for the defense attorneys to believe they were permitted to act on Hoffenburg's behalf without her authority, which is required by law. See RCW 2.44.030. CP 693-96; CP 261.

Under the liability coverage section of the policy, the insured has a duty of assistance and cooperation. CP 696; CP 261. The insured will cooperate and assist the insurer, if requested, in the investigation of the occurrences; in making settlements; in the conduct of suits; in enforcing any right of contribution or indemnity against any legally responsible person or organization because of bodily injury or property damage; and at trials and hearings; in securing and giving evidence; and by obtaining the attendance of witnesses. CP 696; CP 261. This provision expressly contemplates the participation and the cooperation of the insured with respect to the defense of a lawsuit against the insured. CP 696; CP 261.

Additionally, Section V – General Conditions of the insurance policy expressly provides: "Any terms of this policy in conflict with the statutes of the State of Washington are amended to conform to those statutes." CP 707; CP 262. Assuming that "authority to appear absent communication with the insured" can be read into the "duty to defend" provision of the policy, the authority to appear at the inception of the case without the insured's authority is in conflict with RCW 2.44.030, and under the express terms of the Section V – General Conditions, § 14 of the policy, strictly construed against the insurer, the policy is amended to conform to RCW 2.44.030. CP 262. Thus, without Hoffenburg's authority at the time the defense attorneys filed their notice of appearance, they proceeded in this matter in violation of RCW 2.44.030. CP 262.

5. THE INSURANCE DEFENSE PERSPECTIVE

a. Paul Crowley:

The – problem that I have with this case, your Honor, at first I thought it was a bit silly, and I thought it was a bit of a hassle for everybody involved. But now I'm more and more convinced that the approach that the plaintiff is taking is actually quite dangerous, both to plaintiffs and defendants. And there's been certainly an effort on my part to talk to talk about the implications of a decision in favor of the position the plaintiff is taking here. RP 27.

I've been doing defense work of this sort for about 15 years. And it was always represented to me by the attorneys who – who taught me, and who guided me in my professional development, that my primary task as an insurance defense attorney is to protect the insured, and to ensure that there is coverage. And that means that when the client is unavailable, when the client is uncooperative, when the client is gone, it's still my obligation to provide a defense to that individual. And it's definitely my obligation to make sure that coverage is preserved. And if that means that I have to get by without some of the assistance of my client that I would like to have, that's what I do. RP 27-28.

And that's not merely me fulfilling what I consider to be my ethical responsibilities to the client, that's me also fulfilling what case law in this State has developed to be those ethical obligations. The duty to defend is not something that exists solely on the part of the carrier. It's – I am part of the agency by which that duty to defend is fulfilled. RP 28.

So having spent 15 years doing this kind of work, your Honor, I can tell you on numerous occasions I have had uncommunicative, uncooperative clients, and I have proceeded doing the very best that I could do to protect their interests with either minimal or non-existent communication. I consider that to be not only a fulfillment of the contract, but also a fulfillment of my ethical obligation to protect them, sometimes protect them from themselves. RP 29-30.

b. Kruger-Willis' counsel in rebuttal:

I am really stunned by that argument. I'm not making law, your Honor. I'm asking that the Court apply the law, the law as it is in Washington. And when counsel misrepresents time and time again that he has contact with his client, and then shifts...[position]... that's an affirmative misrepresentation [a]nd I don't think it's

> proper for this Court to reward such misconduct. This case has gone off into the twilight zone of litigation [a]nd every time a pleading or an argument is made on behalf of..the defense, [it] just boggles my mind. RP 32-33.

6. THE RULES OF PROFESSIONAL CONDUCT

"In Washington it is clear that <u>legally</u> and <u>ethically</u> the client of the lawyer is the insured." Washington State Bar Association (WSBA) Advisory Op. 195 (1999) (*citing Tank v. State Farm,* 105 Wn.2d 381, 715 P.2d 1133 (1986); *Van Dyke v. White,* 55 Wn.2d 601, 349 P.2d (1960)) (emphasis added).

RPC 1.2(f) provides: "A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order." CP 743.

Further, a lawyer retained by an insurance company must have contact with the client before he or she has authority to act on the client's behalf. CP 743. See WSBA Advisory Opinion 928 (1985) (insurance defense attorney had no contact with client; thus, no authority to act as lawyer for client). CP 738.

RPC 5.4(c) provides that "a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." The WSBA provides guidance on the foregoing issue:

> [A] lawyer representing an insured client must follow the instructions of the client, and not the insurance carrier. Therefore, a lawyer could bring a motion for summary judgment at the request of the insurance carrier only if it was in the client's interest to do so *and the client consented after full disclosure* (emphasis added).

WSBA Advisory Opinion 974 (1986). CP 262.

Kruger-Willis has never disputed that GEICO had a duty to defend Hoffenburg under the terms of Lebeda's insurance contract once it determined that the collision at issue was a covered loss (CP 451); however, a liability insurance policy imposes upon *the insurer* (as opposed to the insurance defense attorney) two distinct duties: the duty to defend the insured against lawsuits or claims and the duty to indemnify the insured against any settlements or judgments. CP 604-05. See *United Services Automobile Ass'n v. Speed*, 179 Wn. App. 184 at 194. The defense attorneys are attempting to improperly align their unauthorized appearance and acts with duties imposed upon insurance companies instead of duties imposed upon attorneys by RCW 2.44.030 and by the RPCs, which are distinctly separate and independent duties. CP 604-05. By virtue of employment by an insurance company, an attorney merely interprets the policy, determines coverage, and performs other acts related to the insurer's duties to its insured, but the performance of those duties does not convert an attorney into an insurer any more than when insurance claims adjusters settle claims convert them into trial defense attorneys. CP 604-05.

A2. The trial court abused its discretion when it improperly considered Hoffenburg's alleged declaration and held, *sua sponte*, that the declaration ratified the unauthorized acts of the defense attorneys.

During argument on Kruger-Willis' renewed motion under RCW 2.44.030, the trial court noted that Hoffenburg's declaration was part of the court file. CP 486; RP 4. Although the defense took no affirmative act to have the declaration admitted into evidence, nor did it rely upon the declaration in its response brief to Kruger-Willis' renewed motion, the trial court appeared willing to consider the declaration as evidence of the defense attorneys' authority. CP 486. Kruger-Willis' counsel objected, arguing at length that the declaration had not been properly admitted into evidence because it had been merely placed into the court file; that a letter accompanying the declaration from Wais indicated that he intended to take a further step or act with respect to the admission of the declaration; it was inadmissible because it was based on hearsay; and it was inadmissible on other evidentiary grounds. CP 486-87; RP 4-5; RP 14. The trial court reminded Kruger-Willis' counsel that the proceeding at issue before the trial court was a motion hearing and it was not an evidentiary hearing. CP 487; RP 14. The trial court granted Kruger-Willis one week in which to submit her written objections to Hoffenburg's alleged declaration. CP 486.

Without addressing Kruger-Willis' evidentiary objections or without holding an evidentiary hearing, the trial court, *sua sponte*, held that Hoffenburg's alleged declaration ratified the unauthorized acts of the defense attorneys. CP 468. A court may abuse its discretion by failing to

hold an evidentiary hearing when affidavits present an issue of fact requiring a determination of witness credibility. *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994).

1. BURDEN

A party seeking to admit evidence bears the burden of establishing a foundation for that evidence. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). CP 489. The defense did not meet its burden to admit Hoffenburg's alleged declaration as evidence of the defense attorneys' authority because other than "placing" the declaration into the court file, the defense did not attempt to establish any foundation as to the declaration's admissibility under the rules of evidence. CP 489.

2. JUDICIAL NOTICE

The trial court noted that Hoffenburg's alleged declaration was in the court file and stated that "[i]t's filed with the Court...[t]he Court can look at all of the filings in the case file to be able to decide a motion...[s]o it's part of the record, and the Court will consider it in coming to a decision based upon your motion." CP 489-90; RP 14-15. Kruger-Willis' counsel objected on the grounds that the declaration had not been admitted into evidence. RP 14-15.

ER 201 governs the taking of judicial notice. It provides, in part:

> (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

State v. Duran-Davila, 77 Wn.App. 701, 703, 892 P.2d 1125 (1995). CP 490.

Generally, courts may take judicial notice of the record of a case presently before it or "in proceedings engrafted, ancillary, or supplementary to it." *Swak v. Department of Labor & Indus.*, 40 Wn.2d 51, 53, 240 P.2d 560 (1952). CP 490. The court, however, may not take judicial notice of such records to establish the truth of matters therein. *See Detention of Henrickson v. State,* 140 Wn.2d 686, fn.3, 2 P.3d 473 (2000); 5 Karl B. Tegland, Washington Practice: Evidence § 201.9 (5th ed. 2007 & Supp.2015). CP 490. "ER 201 sometimes permits a court to take judicial notice of court records. The reason is that the existence of such records (*as opposed to the truth of the contents of the allegations contained therein*) is not subject to reasonable dispute (emphasis added)." *Vandercook v. Reece*, 120 Wn. App. 647, 651, 86 P.3d 206 (2004). CP 490.

While it may have been proper for the trial court to take judicial notice that Hoffenburg's alleged declaration had been placed into the court file by the defense, it was improper and an abuse of discretion for the trial court to consider the truth of the contents contained in the declaration to decide Kruger-Willis' motion under RCW 2.44.030. CP 490.

3. WAIVER

A "waiver" is an "intentional relinquishment or abandonment of a known right or privilege." *State v. Frawley*, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014) (*citing Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019,

82 L.Ed. 1461 (1938)). CP 492. Under the doctrine of waiver, affirmative defenses may, in certain circumstances, be considered to have been waived by a defendant as a matter of law. "The waiver can occur in two ways. It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior. It can also occur if the defendant's counsel has been dilatory in asserting the defense." *Lybbert v. Grant County, State of Wash.*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000). CP 492.

The defense placed Hoffenburg's alleged declaration into the court file in June 2014. CP 492. Since then and through the current date, it has taken no action to admit Hoffenburg's alleged declaration into evidence, nor did it rely upon Hoffenburg's alleged declaration in its response to Kruger-Willis' renewed motion under RCW 2.44.030. CP 492. Thus, the defense has been dilatory with respect to admitting or to relying upon Hoffenburg's alleged declaration as evidence of authority and it has waived the right to rely on the declaration as evidence of authority.

4. THE DECLARATION DOES NOT MEET ADMISSIBILITY STANDARDS

a. ER 901: "It is fundamental that evidence must be authenticated before it is admitted." *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010), *overruled on other grounds by State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012). CP 493. Under ER 901(a), the proponent of evidence must produce proof "sufficient to support a finding that the matter in question is what the proponent claims." Documents offered as

evidence through a declaration must be authenticated in accordance with ER 901 in order to be admissible. *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745-46, 87 P.3d 774 (2004). CP 493.

A document can be authenticated with the testimony of a witness with knowledge that the document is what it claims to be. ER 901(b)(1); *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 366, 966 P.2d 921 (1998). CP 493. A party's attorney may testify to the authenticity or the contents of a document based upon personal knowledge. *Id.* at 365; ER 602. CP 493-94. However, in this situation, we do not even have that much because there is no declaration from either of the defense attorneys authenticating Hoffenburg's alleged declaration that it is what the defense purports it to be. CP 494. All we have is a letter from Wais instructing the court to place the declaration into the court file. CP 494.

Based upon the foregoing, the defense cannot meet its burden to authenticate Hoffenburg's alleged declaration and it was therefore inadmissible evidence that the trial court should not have considered. CP 494.

b. ER 602: ER 602 provides that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. at 742. CP 494. Evidence cannot be presented that an event occurred in the absence of a

witness with personal knowledge. *Yurkovich v. Rose*, 68 Wn. App. 643, 651, 847 P.2d 925 (1993) (a witness was not allowed to testify as to what had occurred at a meeting because the witness had not been present at the meeting). CP 494.

The proponent's burden – here, the defense – under Rule 602 is to produce evidence "sufficient to support a finding" of personal knowledge...[that] the witness had an adequate opportunity to *observe* the events in question (emphasis added)." 5 Karl B. Tegland, Washington Practice: Evidence § 602.3 (5th ed. 2007 & Supp.2015). "Under ER 602, a witness must testify concerning facts within his personal knowledge, that is, *facts he has personally observed* (emphasis added)." *State v. Vaughn*, 101 Wn.2d 604, 611-12, 682 P.2d 878 (1984). CP 494.

A careful review of Hoffenburg's alleged declaration shows that Hoffenburg states she "understands" that certain events transpired, but not that she personally observed the events in question. CP 494-95. Hoffenburg also states, "[a]t this time, with full knowledge of the events that have taken place in this lawsuit..." establishes that she was not even aware of the procedural history of the lawsuit against her until June 11, 2014, when she allegedly signed the declaration Wais drafted for her – nearly six years into this case. CP 495.

Based upon the foregoing, the defense cannot meet its burden to establish that Hoffenburg had personal knowledge to testify to the events expressed in her alleged declaration and it was improper for the trial court

to consider the declaration as evidence of the defense attorneys' authority. CP 495.

c. ER 801: "Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). CP 495. Hearsay is inadmissible unless it comes within an exception established by statute or common law. ER 802; *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007). CP 495.

Hoffenburg's entire declaration contains statements that violate the hearsay rule because of the numerous statements that she "understands" certain events transpired. CP 495.

For all of the foregoing reasons, the trial court abused its discretion when it improperly considered Hoffenburg's alleged declaration and held, *sua sponte*, that the declaration ratified the unauthorized acts of the defense attorneys.

5. HOFFENBURG'S DECLARATION SHOULD NOT HAVE PROSPECTIVE EFFECT UNDER RCW 2.44.030

The trial stated that RCW 2.44.030:

> [S]eems to have a self-effectuating process; that until they have authority to appear, then the Court may stay all proceedings. And so the fact now that they have filed a document purported to come from Ms. Hofferbert to indicate her position, why wouldn't the Court be able to forward now? RP 12-13

RCW 2.44.030 appears silent as to a period of time that such authority encompasses and there is no Washington case law that addresses

whether authority may be obtained from a client six years after the fact. A court, however, may consider as a matter of law whether an attorney's conduct violated the rules of professional conduct. *Eriks v. Denver,* 118 Wn.2d 451, 457, 824 P.2d 1207 (1992). CP 496; RP 25.

Under RPC 1.2(f):

> A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order. CP 496.

The WSBA provides further guidance on this issue: A lawyer retained by an insurance company must have contact with the client before he or she has authority to act on the client's behalf. WSBA Advisory Opinion 928 (1985). CP 496.

It is clear from the RPCs that the defense attorneys must consult with his or her client at the outset of representation and this standard should apply to RCW 2.44.030. Where the defense attorneys have stated that they have never communicated with their client, the trial court erred when it denied Kruger-Willis' renewed motion under RCW 2.44.030.

More importantly, if the Court applies a plain language construction to the statute, perhaps the statute is not silent to "time" after all. The meaning of a statute is a question of law reviewed de novo. *AllianceOne Receivables Mgmt. Inc. v. Lewis*, 180 Wn.2d 389, 393, 325 P.3d 904 (2014). The court's objective is to ascertain and carry out the legislature's intent. *Id.* at 393. The starting point is always the statute's

plain language, which may be discerned "'from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *Id.* at 393 (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)). The court considers a statute within the context of the entire statutory scheme to determine the plain meaning. *AllianceOne Receivables Mgmt. Inc. v. Lewis*, 180 Wn.2d at 393.

The relevant provision of RCW 2.44.030 provides: "...the authority under which he or she appears..." The plain meaning of the term, "appears," is not defined by RCW 2.44. To determine the plain meaning of a term undefined by statute, the court first looks at the dictionary definition. *AllianceOne Receivables Mgmt. Inc. v. Lewis*, 180 Wn.2d at 395. "Appear[s]" is defined as: (1) to be properly before a court; as a fact or matter of which it can take notice; (2) to be in evidence to be proved; and (3) coming into court by a party to a suit, whether plaintiff or defendant. See "appearance" (The formal proceeding by which a defendant submits himself to the jurisdiction of the court). Black's Law Dictionary 97 (6th ed. 1990).

The entirety of this definition indicates that "appears" is more often used in connection with the beginning of the case when a defendant submits to the jurisdiction of the court. It is clear from the facts that without communication with Hoffenburg, the defense attorneys had no

authority from Hoffenburg to submit to the jurisdiction of the trial court – that is, to appear for her under RCW 2.44.030 – in this matter.

A3. The trial court abused its discretion when it found that the defense attorneys did not surrender a substantial right of Hoffenburg's without special authority from her when a judgment was entered against Hoffenburg without her knowledge.

The trial court found that the defense attorneys did not surrender any of Hoffenburg's substantial rights, citing as authority *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980). CP 468.

The plain language of RCW 2.44.030 does not provide the surrender of a client's "substantial rights" as a defense to the unauthorized appearance of an attorney. The meaning of a statute is a question of law reviewed de novo. *AllianceOne Receivables Mgmt. Inc. v. Lewis*, 180 Wn.2d 389 at 393.

Notwithstanding the plain language of RCW 2.44.030, in *Graves v. P.J. Taggares Co.*, the court found a substantial right was the client's liability for the collision (dependent upon the theory of vicarious liability) which was invalidated by the court because the attorney "did not inform the defendant or obtain its consent to this stipulation." *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298 at 305. In this case, Wais conceded liability without Hoffenburg's knowledge or consent. CP 454.

Furthermore, in its mandate, the Court awarded Kruger-Willis costs and attorney fees with Kruger-Willis as the judgment creditor and

Hoffenburg as the judgment debtor.[11] CP 636. Hoffenburg would most likely consider a judgment against her a substantial right, particularly a judgment that has been entered without her knowledge. CP 457.

Additionally, Wais violated a substantial right of Hoffenburg's,[12] which is client confidentiality. There was no need to reveal to third parties that Hoffenburg was either incarcerated or homeless.[13] CP 275; CP 272. As Crowley attached and relied on Wais' declaration, he too has violated Hoffenburg's substantial right of client confidentiality. CP 272.

A4. The Court should apply the law of the case doctrine to the current appeal.

As noted, this appeal is the third of this case. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review. *Folsom v. County of Spokane*, 111 Wn.2d 256, 759 P.2d 1196 (1988).

The law of the case doctrine may apply where there has been a prior appellate decision in the same case. *Worden v. Smith*, 178 Wn. App. 309, 324, 314 P.3d 1125 (2013). The law of the case also applies to "decisions," "rulings," or "holdings" of an appellate court. *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008). "In its most common

[11] Judgment was subsequently entered into the court's execution docket on February 8, 2016, with Heather Hofferbert as the judgment debtor and Tori Kruger-Willis as the judgment creditor.
[12] RPC 1.6. Assuming that there was the formation of an attorney-client relationship.
[13] Which she would most likely find embarrassing.

form," the doctrine "stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Stated differently, when a prior appeal determined the applicable law, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal. *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996); *Sambasivan v. Kadlec Med. Ctr.*, 184 Wn. App. 567, 576, 338 P.3d 860 (2014). In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process. *Roberson v. Perez*, 156 Wn.2d at 41; see also 5 Am.Jur.2d Appellate Review § 605 (1995).

In the previous appeal, the Court held:

> [T]hat when, as here, a civil defense attorney states that he has never communicated with his client, it is manifestly unreasonable for the trial court to deny opposing counsel's motion to require counsel to prove the authority under which he appears. CP 641.

From the foregoing language, it appears the law of the case is that courts consider whether an attorney has the authority to appear for a client is if there has been communication between the attorney and his or her client. RP 21-22. If that is indeed the law of the case, Kruger-Willis requests that the Court apply the law of the case doctrine to the current appeal.

B1. <u>The trial court abused its discretion when it denied Kruger-Willis' motion for reconsideration when it held, *sua sponte*, that Hoffenburg's alleged declaration "ratified" the unauthorized acts of the defense attorneys when Hoffenburg did not have full</u>

knowledge of all material facts of the unauthorized acts of the defense attorneys.

1. STANDARD OF REVIEW

A trial court's denial of a motion for reconsideration is reviewed under the abuse of discretion standard. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008).

The trial court found, *sua sponte*, that Hoffenburg "ratified" the authority of the defense attorneys after the fact by way of her alleged declaration. CP 468. A trial court erred by effectively, *sua sponte*, interposing a defense which the defendant himself, and not the trial court, should have raised. *J-U-B Eng'rs, Inc. v. Routsen*, 69 Wn. App. 148, 150, 848 P.2d 733 (1993).

In its written decision, the trial court did not issue any findings of fact or conclusions of law in support of its decision that Hoffenburg ratified the unauthorized acts of the defense attorneys. CP 468; CP 452. RP 24. Furthermore, the trial court did not address whether Washington, which is one of only two states in the United States[14] which has enacted a statute which prohibits attorneys from appearing without authority, may rely upon the common law remedy of ratification for the unauthorized appearance of an attorney. CP 452. RP 24.

When it comes to ratification, the general rule is that there cannot be ratification unless full and complete disclosure of all facts and

[14] Alabama is the other state. Alabama's statute is nearly identical to Washington's statute. In Alabama, any attorney appearing for a person without being employed must, on conviction, be fined not less than $500 and shall be incompetent to practice in any court of this state. ALA. CODE § 34-3-22 (1975). CP 452.

circumstances is made by the fiduciary. See *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wn.2d 375, 385, 391 P.2d 979 (1964). CP 452. Likewise, it must be shown that the person sought to be bound by the alleged ratification has full knowledge of all material facts and has expressed an intent to ratify the unauthorized act. See *Thieme v. Seattle-First Nat. Bank*, 7 Wn. App. 845, 848, 502 P.2d 1240 (1972). CP 452.

The following material facts are absent from Hoffenburg's alleged declaration (CP 452):

<u>Abusive/Bad Faith Litigation Conduct</u>

This case was initially valued at about $5,000.00. CP 452-53. By its own admission, the defense has spent more than twice that amount in defense costs and fees. CP 453; 818-26. Essentially, this case involves a conscious decision by an insurance company, through its defense attorneys, to employ a bad faith litigation policy to a low-value property damage claim to discourage plaintiff attorneys from pursuing such claims, as demonstrated by the following (CP 452):

> a. Serving a Subpoena for Production of Documents on State Farm not permitted by mandatory arbitration rules. Kruger-Willis' counsel demanded that Wais quash the SDT. Rather than comply with MAR rules, Wais was of the opinion that "[c]ertainly and [sic] arbitrator would agree that we are allowed to at least see them ahead of time." When Kruger-Willis' counsel would not stipulate to the SDT, Wais requested a conference with the arbitrator. Pending the telephonic hearing with the arbitrator, Wais did not quash the SDT as Kruger-Willis' counsel demanded. When the telephonic hearing was held with the arbitrator, the arbitrator denied Wais' motion. Since Wais did not immediately quash the SDT upon Kruger-Willis' counsel's demand, Wais received the prohibited documents from State Farm because he was sure that the arbitrator would agree with his position. CP 453; CP 400-06.

b. Prior to arbitration, Kruger-Willis' counsel attempted to make arrangements to depose Hoffenburg. In response, on June 14, 2010, Wais stated that he had "a message in with my client to get back to me on whether this date works for her." Yet, as of August 9, 2013, Wais declared in open court that he had never spoken to Hoffenburg and could not locate her. CP 453; CP 400-07.

c. At arbitration, Wais did not retain an independent property damage expert witness to oppose the opinion of Kruger-Willis' property damage expert witness. Instead, Wais relied on testimony from two GEICO property damage adjusters, which the arbitrator rejected as expert witnesses. As a result, Kruger-Willis was awarded $5,044.00 by the arbitrator, which was the full amount Kruger-Willis requested in her pre-suit demand letter to GEICO. Wais did not retain an expert witness so that he could push Kruger-Willis into a trial de novo. Thereafter, Wais presented Kruger-Willis with an offer of judgment without Hoffenburg's knowledge or consent. CP 454; CP 409-15.

d. When Kruger-Willis' counsel informed Wais that she intended to call Hoffenburg as a witness at trial, Wais subsequently conceded liability (because, we now know, he never communicated with her and would not be able to produce her at trial) and it was understood that the parties would proceed to trial on damages only. After Kruger-Willis presented her case based upon damages only and rested, Wais moved for a directed verdict on the basis that Kruger-Willis could not prove liability, which forced Kruger-Willis' counsel to scramble and to have Kruger-Willis rush to court for less than five minutes of testimony regarding liability. CP 454; CP 417; RP 80.

e. In Kruger-Willis' opposition to the defense's second motion under RCW 4.84.250, Kruger-Willis argued that it was GEICO which filed a request for a trial de novo; that GEICO was not a named party to the action; that GEICO was not the aggrieved party; and that GEICO was not entitled to costs and fees. While Wais did not dispute Kruger-Willis' counsel's arguments, he had a duty of candor to the tribunal to advise the trial court that he never had communication with Hoffenburg. CP 454.

f. On appeal to the Court in No. 42417-7-II, Kruger-Willis made the same arguments regarding GEICO's standing to the Court. Rather than exercise his professional obligation of candor to the tribunal, Wais argued that Kruger-Willis "deceptively refers to Defendant's insurer, GEICO, rather than referring to Defendant, Heather Hoffenberg, as the party to the lawsuit...That Plaintiff was indemnified by an insurance company was wholly immaterial to the case at trial, was wholly

immaterial to the Trial Court's issuance of costs and attorneys fees, and it is wholly immaterial to this appeal." CP 455; CP 420.

g. Despite the foregoing argument by Wais that GEICO was "wholly immaterial to the case," it suddenly became material to the case when it came down to the award of costs and fees. When Kruger-Willis issued payment upon demand by Wais in satisfaction of the trial court's order, which was affirmed on appeal, Wais decided that he could unilaterally change the terms of a court order by demanding that Kruger-Willis issue the check to GEICO. When Kruger-Willis refused, Wais filed a motion with the trial court and sought additional sanctions against Kruger-Willis, whereby he totally reversed the position that he argued before the Court that Hoffenburg was the prevailing party. Additionally, the filing of such a motion was baseless and it was intended to harass Kruger-Willis. CP 455.

h. Wais argued to the trial court during Kruger-Willis' initial motion under RCW 2.44.030 that he was diligent in his efforts to accomplish communication with "that person" (his client, Hoffenburg) lacks candor. As Kruger-Willis provided to the trial court in various pleadings, Hoffenburg had numerous court activities in Mason County during the pendency of this action and it certainly would have been easier for Wais to locate her in Mason County than to track her down in Hawaii when he believed that to do so may save him from potential sanctions. CP 455-56; CP 423-25.

i. Wais argued to the trial court during Kruger-Willis' initial motion under RCW 2.44.030 that it was not a secret that he has "not had contact with the named defendant in this lawsuit." Wais misrepresented facts to the trial court when he made this statement. It is clear that Wais intended to keep secret from Kruger-Willis' counsel that he had not had contact with Hoffenburg. CP 456; CP 423; CP 407; CP 417.

On January 11, 2016, the defense moved the trial court for an order to examine Kruger-Willis as judgment debtor under RCW 6.32.010 when Kruger-Willis' counsel advised Crowley in response to his numerous demands for a date to examine Kruger-Willis that the trial court only entered an order, not a judgment, and that RCW 6.32.010 applies only to judgments and not to orders. CP 211-12; CP 202.

Kruger-Willis argued that Crowley's motion was brought in bad faith:[15]

> Defense counsel states in his declaration at ¶ 2 that Defendant obtained a judgment against the Plaintiff on June 27, 2011. Counsel is well aware from the face of the pleading itself that it is an order and not a judgment. CP 204. RP 47.
>
> Further, defense counsel states in his declaration at ¶ 2 that "[a]s of today's date, the judgment is wholly unsatisfied..." The foregoing statement, signed under the penalty of perjury, lacks candor. Counsel has expressly acknowledged that Plaintiff has long issued payment to Heather Hoffenburg, the Defendant and his client. Exhibit E. The order does not remain "wholly unsatisfied;" it remains "wholly un-negotiated" because the former defense counsel conceded in open court that he never had contact with his purported client, therefore, he was unable to deposit or to otherwise negotiate the check without the authorization from the Defendant. CP 204.
>
> Exhibit E provides:
>
> No payment was ever issued to Mary E. Owen & Associates. Payment was issued to Heather Hoffenburg.[16] CP 192.
>
> Lastly, Kruger-Willis argued:
>
> The defense's only purpose in filing this motion is to burden and to harass the Plaintiff. CP 207.
>
> This case is the poster child for why attorneys require authorization from their client prior to acting on the client's behalf. Although the Court has found that the insurance policy confers authority on defense counsel to act on behalf of the Defendant, an insurance policy cannot be deposed; it cannot be cross-examined; it cannot sign a release of claims; nor can it authorize the negotiation of a check. Since defense counsel conceded in open court that he never

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[15] Prior to filing the motion, Crowley was provided by Kruger-Willis' counsel with the report of proceedings from the May 17, 2013, hearing wherein the trial court ruled that judgment would be entered in favor of only Hoffenburg and with the judgment order of June 3, 2013, wherein Wais added Mary E. Owen & Associates as a judgment creditor despite the trial court's ruling of May 17, 2013. CP 192; CP 115. With full knowledge of the facts, Crowley still made the motion and the representations contained in the motion. CP 211-12.

[16] The named defendant, prevailing party, <u>and</u> Crowley's purported client, whose interest he is supposed to be advocating.

> had contact with his client and could therefore not negotiate the check made payable to the Defendant on March 4, 2013..., he moved the Court for an order to substitute GEICO as the judgment creditor... CP 207-08.
>
> The Court should not reward the blatant disregard of this Court's decision by defense counsel by permitting the defense to claim additional sums for interest or to attempt to substitute another party for the Defendant. CP 208.

Without addressing Kruger-Willis' arguments regarding bad faith or standing, the trial court denied Crowley's motion on the basis that RCW 6.32.010 applies to judgments and not to orders. RP 50.

2. DECLARATION OF MORGAN J. WAIS

In response to Kruger-Willis' motion for reconsideration, Wais submitted an intentionally vague declaration that implies he still has not had actual contact with Hoffenburg by stating that he was able to "have some communication" with her, "albeit with the assistance of her mother;" that Hoffenburg is "either incarcerated or homeless," *meaning that she still cannot be located* (emphasis added); and he made no attempt to authenticate Hoffenburg's declaration or Hoffenburg's signature on the declaration. CP 274-75.

Notably, with the exception of making a feeble attempt to argue that his efforts to locate Hoffenburg were diligent, Wais does not dispute the other claims that Kruger-Willis made that he engaged in abusive and bad faith litigation conduct. CP 274-75. "Where evidence has been introduced affording legitimate inferences going to establish the ultimate fact that the evidence is designed to prove, and the party to be affected by

the proof, with an opportunity to do so, fails to deny or explain such facts, they may well be taken as admitted with all the effect afforded by the inferences." *Wiard v. Market Operating Corporation,* 178 Wash. 265, 271, 34 P.2d (1934). Failure to deny an admission, after opportunity to do so, is convincing proof of the fact admitted. *Colford v. Kiso*, 51 Wn.2d 640, 320 P.2d 1077 (1958); *Griffiths v. Big Bear Stores*, 55 Wn.2d 243, 347 P.2d 532 (1959).

Thus, Wais had an opportunity in his declaration to deny Kruger-Willis' allegations that he intentionally engaged in abusive and bad faith litigation conduct on behalf of GEICO to chill legal claims such as Kruger-Willis' claim and he failed to do so.

B2. The trial court abused its discretion when it denied Kruger-Willis' motion for reconsideration because substantial justice has not been done in this matter due to irregularities in the proceedings.

As there is an overlap of the issues and the argument Kruger-Willis makes in this section of her brief with § E, this section will be addressed in § E below to conserve page length.

C1. The trial court erred when it granted the defense's motion for judgment when the record shows that the defense attorneys never considered Hoffenburg the prevailing party under RCW 4.84.250.

STANDARD OF REVIEW

The appellate court reviews de novo whether a trial court's findings support its conclusions of law. *Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App.878, 889, 351 P.3d 895, 901 (2015); *Gamboa v. Clark*, 183 Wn.2d 38, 44, 348 P.3d 1214 (2015); *Scott's Excavating*

Vancouver, LLC v. Winlock Props., LLC, 176 Wn. App. 335, 342, 308 P.3d 791 (2013), *review denied*, 179 Wn.2d 1011 (2014).

Where a party challenges a trial court's findings of fact and conclusions of law, an appellate court limits its review to determining whether substantial evidence supports the findings and whether those findings, in turn, supports the trial court's legal conclusions. *Panorama Vill. Homeowners Ass 'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000), *review denied*, 142 Wn.2d 1018 (2001).

Substantial evidence is "'defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.'" *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006) (quoting *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). The party challenging a finding of fact bears the burden of showing that it is not supported by the record. *Panorama Vill. Homeowners Ass 'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. at 425.

The meaning of a statute is a question of law reviewed de novo. *AllianceOne Receivables Mgmt. Inc. v. Lewis*, 180 Wn.2d 389 at 393. The court's objective is to ascertain and carry out the legislature's intent. *Id.* at 393. The court considers a statute within the context of the entire statutory scheme to determine the plain meaning. *Id.*

RCW 4.84.250 is the starting point for determining which party, if any, is entitled to attorney fees in small claim actions. *AllianceOne Receivables Mgmt. Inc. v. Lewis*, 180 Wn.2d at 394. Only after the

judgment can a court assess whether the plaintiff or defendant meets the definition of a "prevailing party" by examining a recovery after judgment and comparing it to settlement offers. *Id* at 395. The plain language of the statute discloses that the legislative intent of RCW 4.84.250 contemplates that the prevailing party under the statute is either the plaintiff or the defendant. *AllianceOne Receivables Mgmt. Inc. v. Lewis* at 393.

In their motions to enter judgment for GEICO, and alternatively, for the law firms purportedly representing Hoffenburg,[17] the defense attorneys ignore the fact that the "statutory litigation costs and reasonable attorney's fees" were granted under RCW 4.84.250, which awards the foregoing costs and fees to the *prevailing party*, in this case, the defendant, and not to the insurance company that indemnified and insured the defendant. RCW 4.84.270. CP 886-92; CP 129-36; RP 56-59.

Despite his arguments to the trial court and to this Court that Hoffenburg was the prevailing party entitled to recovery of fees and costs under RCW 4.84.250 before the Court affirmed the trial court's order of June 27, 2011, Wais subsequently argued to the trial court on May 17, 2013:[18]

> [E]ssentially plaintiff's counsel is arguing that Geico, the insurance company, has indemnified and defended Ms. Hoffenburg throughout this case, and that I work for – I'm staff counsel – because the apparent – the defendant, Ms. Hoffenburg, and now there's some question as to her name, wasn't – or was the aggrieved party and not Geico... CP 1013.

[17] But not for Hoffenburg after February 21, 2013, when the Court affirmed the trial court in No. 47417-7-II.

[18] An attorney should know who his client is. CP 845.

> And so it's my position here and what I'm asking the Court to do, is that the order should direct the plaintiff to issue the check to Geico Insurance Company as opposed to the named defendant, and that seems to be the thing that the plaintiff takes issue with. CP 1013-14.
>
> Now, obviously Geico is not the named defendant. CP 1014.

While Kruger-Willis found no Washington case law on point that permitted the trial court to award costs and reasonable attorney fees to any party other than Hoffenburg, Kruger-Willis consulted federal law and found cases which held that under a fee-shifting statute, the costs and reasonable attorney fees are payable only to the prevailing party (CP 664-69):

> RCW 4.84.250 provides for the allowance of reasonable attorney fees and costs to the *prevailing party* and not to the *prevailing party's attorney*. Unless the statute specifies payment to the prevailing party's attorney, payment goes to the prevailing party. In *United States of America v. $186,416.00 in U.S. Currency*:[19]
>
> Direct payment to the attorney is the exception, not the rule. "The Supreme Court has made it clear that, in general, statutes bestow fees on parties, not upon attorneys." *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment*, 89 F.3d 574, 577 (1996). Unless the statute specifies payment to the litigant's attorney, payment to the attorney is not assumed.

United States of America v. $186,416.00 in U.S. Currency, 642 F.3d at 756. CP 665-66.

Of significance to this issue are the words and the conduct of the defense attorneys themselves. Courts look to an attorney's words or actions to determine whether an attorney/client relationship exists.

> The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal

[19] *United States v. $186,416.00 in U.S. Currency*, 642 F.3d 753, 757 (2011).

> matters...The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct.

Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). CP 745.

For example, Crowley states in open court:

> [T]he defendant is not the one paying the bills...[b]ut at the end of the day, it – Heather Hofferbert didn't pay a penny for the defense of this case because she was being indemnified by her insurance company. And so the suggestion that contrary to this Court's order a check should be issued to her is – is – it's just silly.[20] Beyond that, counsel has said that she tendered – ignoring the fact that she tendered a check that couldn't be cashed...[21] RP 48.

There is substantial evidence in the record to show that after this Court issued its opinion in the first appeal, the defense attorneys, by way of their words and their conduct, openly abandoned their efforts to conceal from the trial court and from Kruger-Willis' counsel that in this case, they represented Hoffenburg in name only. RP 7-9.

C2. <u>The trial court erred when it entered judgment on February 8, 2016, finding that its order of June 27, 2011, contained a "scrivener's error," which is unsupported by the record</u>.

As there is an overlap of the issues and the argument Kruger-Willis makes in this section of her brief with § D1(b), this section will be addressed in § d1(b) below to conserve page length.

D1. <u>The trial court abused its discretion when it denied Kruger-Willis' motion for reconsideration of entry of judgment because substantial justice has not been done in this matter due to irregularities in the proceedings</u>:

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[20] But it is the law. RCW 4.84.250; RCW 4.84.270.

[21] Because the check was made payable to the prevailing party, Hoffenburg, and the check could not be cashed because the defense attorneys have not had communication with her and cannot locate her.

STANDARD OF REVIEW

A trial court's denial of a motion for reconsideration is reviewed under the abuse of discretion standard. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483 at 497.

a. The trial court granted Hoffenburg relief which she did not request in her motion for judgment;

The defense moved for judgment in favor of Lockner & Crowley, Inc., P.S., the law firm currently defending Hoffenburg.[22] CP 135. At the February 1, 2016, hearing on the defense's motion, the trial court held that judgment would be in favor of Hoffenburg – relief which the defense did not seek. CP 129-36; CP 987; RP 61. A trial court abused its discretion by invoking a statute for the first time in its oral ruling that neither party contemplated or argued. *In re Marriage of Watson*, 132 Wn. App. 222, 233 130 P.3d 915 (2006). See also *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 603-04, 229 P.3d 774 (2010) (SEIU did not seek this relief. Without a request in the petition for a specific writ ...we will not, on our own, craft such a remedy). Crowley acknowledged that Kruger-Willis issued a check on March 4, 2013 in the amount of $11,490, but (RP 53):

> There were two problems with the check. The first was that it was made payable to Heather Hofferbert...Secondly it was a problem because as this Court is aware, Ms. Hofferbert was not easily located at that time, despite counsel's best efforts to find her. RP 54.
>
> Typically speaking, when pay is made of attorney's fees, it is made to the individual who has accrued them. And that, generally speaking is the client. In this case, however, Heather Hofferbert was an insured under the Geico policy..., but Ms. Hofferbert did

[22] In place of Mary E. Owen & Associates. CP 136.

> not...incur...any costs...Geico is the party that pays for all of that. RP 55.
>
> And so when this Court entered its order in June of 2011 providing that payment be issued to Mary E. Owen and Associates, that was the correct course of action. It was paying the party that had incurred the expense, not paying a party who had incurred no expense... RP 55.
>
> So I stand here in front of you – rather sit, your Honor, asking that this Court order the...the plaintiff to pay the $11,490...to the attorney's firm who's handling this case... RP 55.

It was an abuse of discretion for the trial court to grant the defense relief which it did not seek in its motion for judgment.

b. <u>The trial court's letter of October 21, 2013, caused further prejudice to Kruger-Willis;</u>

Due to the defense's continually changing position as to whether Hoffenburg, GEICO, or Mary E. Owen & Associates was the party entitled to the award of costs and fees under RCW 4.84.250, and due to the misconduct of Wais on June 3, 2013, when he improperly added Mary E. Owen & Associates as a judgment creditor to a judgment order he presented to the trial court for its signature, the defense was successful in obtaining a written ruling from the trial court which appeared to modify its order of June 27, 2011. CP 67; CP 987; CP 1016-17; CP 656-58; RP 56-59. In an October 21, 2013, letter to the parties, the trial court held that "Plaintiff shall make payment to Defendant's Counsel, Mary E. Owen & Associates, a check in the amount of $11,490.00 not later than 14 days from the date of this order. CP 657; CP 656-58.

For nearly three years, Kruger-Willis vigorously disputed that Mary E. Owen & Associates was entitled to the prevailing party costs and fees under the trial court's order of June 27, 2011. CP 986. Suddenly, on February 1, 2016, the trial court found that its order of June 27, 2011, contained a "scrivener's error" where it stated that payment shall be made to "Defendant's counsel, Mary E. Owen & Associates." CP 986; RP 61. During that period, interest accrued to Kruger-Willis' detriment[23] while she disputed the trial court's ruling in its October 21, 2013, letter awarding Mary E. Owens and Associates the prevailing party costs and fees which it now attributes to a "scrivener's error." CP 986.

c. The trial court disregarded the misconduct, the misrepresentations, and the omissions of Wais to Kruger-Willis' detriment in the form of substantial interest on a judgment brought about by delays caused by Wais' misconduct;

Wais consistently argued from June 6, 2011, through February 21, 2013, that Hoffenburg was the prevailing party entitled to the award of costs and fees. Suddenly, when it came time to cash the check for those costs and fees, GEICO became "legally entitled" to the costs and fees. CP 983-84.

When the trial court refused to enter judgment for GEICO, Mary E. Owen & Associates became the party to whom the award of costs and fees was owed, which became the official, and permanent, position of the defense since May 17, 2013 – that the trial court's order of June 27, 2011,

[23] As well as legal expenses associated with motions and hearings related to opposing the ruling.

always contemplated that the award of costs and fees was to be made payable to Mary E. Owen & Associates. CP 983. According to Wais:

> [T]he original order says the Law Office of Mary E. Owen and Associates is what the order says. It doesn't say Heather Hoffenburg. It doesn't say Geico. It says the Law Office of Mary E. Owen and Associates, which is my employer, and that was entered June 27th, 2011. So here we are in June, 2013 and we still haven't gotten a check for the amount of the original order that was done two years ago,[24] despite going – down from the Court of Appeals... CP 985; 1006.

Wais made the foregoing argument despite the following:

1. On June 6, 2011, Wais stated, "I'm asking the Court to enter judgment finding in favor of my client, the defendant...;" CP 983-84. CP 1036.

2. On June 27, 2011, Wais argued: Based upon the defendant being the prevailing party within the definition [of] RCW 4.84.250, I'm now moving for reasonable costs and attorney's fees.[25] CP 1045...The fact is the prevailing party is the defendant, Ms. Hoffenberg...I don't see that there's any real substantive argument about whether she's entitled to the costs and fees; CP 983. CP 1047.

3. GEICO...should receive the statutory litigation costs and reasonable attorney's fees. CP 890.

4. GEICO legally is entitled to those costs and fees back. CP 891.

At the hearing on June 3, 2013, Kruger-Willis argued an entry of judgment was not necessary as payment had already been tendered to Hoffenburg and, therefore, the award had been satisfied. CP 988; CP 1002. Additionally, Kruger-Willis' counsel argued:

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[24] Which is a misrepresentation because Wais was in possession since May 8, 2013, of a check in the amount of $11,490.00, ***the amount of the original order***, made payable to Hoffenburg. CP 976; CP 1025-27.

[25] Wais concedes that the definition of the prevailing party *is* the defendant.

> And then it goes off into this bizarre area where Mr. Wais wants to substitute Geico for the judgment...creditor instead of Ms. Hoffenburg, and...if you don't...change it from Ms. Hoffenburg to Geico then we're going to move for... interest on the judgment. And it's like, wait a minute, that is a form of extortion... If you don't pay Geico, we're going to demand the additional sum. That's money he should have asked for up front and plaintiff would have certainly satisfied it. CP 988; CP 1002-03.
>
> [W]hen I explained to Mr. Wais...I couldn't attend the May 13th hearing that he initially set up then he said...we don't have to go forward with this motion. All you do is have to reissue the check... CP 988; CP 1003.
>
> [T]he order was not for Geico. The order was for Ms. Hoffenburg... CP 988-89; CP 1003.

Additionally, Kruger-Willis argued that she was harmed in terms of the interest assessed against her due to Wais' misconduct. CP 920. It was Wais who created the issue of whom to make the check payable by his intentional disregard of the trial court's ruling of May 17, 2013. CP 920. Rather than address Kruger-Willis' argument of satisfaction of the award, the trial court held hearings and requested additional briefings from the parties regarding to whom the check for attorney fees and costs should be made payable, even though it had already ruled on May 17, 2013, that only Hoffenburg could be named as the judgment creditor and it denied Wais' motion to name Mary E. Owen & Associates as judgment creditor. CP 920. If the trial court had considered Kruger-Willis' argument of satisfaction of the award, then if a dispute existed between the parties, it would have been to the amount owed allowing for accrued interest rather than to whom to make the check payable. CP 920.

When an attorney – an officer of the court – intentionally disregards a court's ruling in order to further his own agenda – that is misconduct. CP 989. Kruger-Willis provided the trial court with evidence that Wais intentionally disregarded the trial court's ruling of May 17, 2013, when he presented to the trial court for its signature the renewed judgment order against Kruger-Willis. CP 989. The trial court not only did not acknowledge such misconduct, the trial court continued to assess Kruger-Willis for interest accrued during the delay in proceedings caused by such misconduct. CP 989.

Furthermore, on June 3, 2013, Kruger-Willis' counsel argued that Wais attempted to use the interest on the award as a form of coercion to force Kruger-Willis to reissue a check made payable under a statute to a prevailing party for an award granted by a court order, affirmed on appeal, to a non-party (GEICO), which Wais previously represented to the trial court and to this Court that the non-party was not entitled to under the same order. CP 989; CP 1003. Again, the trial court did not address the issue.

E. Based upon the proceedings before the trial court, Kruger-Willis did not receive fair, impartial, or neutral hearings.

The trial court is presumed to perform its functions regularly and properly without bias or prejudice. *Wolfkill Feed and Fertilizer Corp. v. Martin,* 103 Wn. App. 836, 841, 14 P.3d 877 (2000). CP 990. A judicial proceeding is valid only if it has an appearance of impartiality, that is, that a reasonably prudent and disinterested person would conclude that all

parties obtained a fair, impartial, and neutral hearing. *State v. Bilal,* 77 Wn. App. 720, 722, 893 P.2d 674 (1995). CP 990. This appearance of fairness doctrine seeks to prevent the problem of a biased or potentially interested judge. *State v. Carter,* 77 Wn. App. 8, 12, 888 P.2d 1230 (1995). A violation of the appearance of fairness doctrine requires evidence of a judge's actual or potential bias. *Id.* at 11. CP 990.

Neither party argued ratification in their briefs to the trial court regarding the issue of Hoffenburg's alleged declaration. CP 452. The trial court, without any findings of fact or conclusions of law, reached that decision on the defense's behalf and to its favor *sua sponte*. CP 452; 468.

Additionally, it was prejudicial for the trial court to place the burden on Kruger-Willis to argue against its consideration of Hoffenburg's alleged declaration when the defense did not move by motion or any other pleading to admit it into evidence; it was hearsay; and there was no disclosure to Hoffenburg by the defense attorneys regarding all material facts of their unauthorized acts. CP 459. Significantly, the trial court did not question the authenticity of Hoffenburg's alleged declaration or her signature in light of Wais' declaration wherein he made no attempt to authenticate Hoffenburg's declaration or her signature; he implies that he still has not had actual contact with Hoffenburg by stating that he was able to "have some communication" with her, "albeit with the assistance of her mother;" and that Hoffenburg is "either incarcerated or homeless," *meaning that she still cannot be located* (emphasis added). CP 274-75.

The trial court could have ended this matter in 2013 by either finding that Kruger-Willis satisfied its order of June 27, 2011, by issuing payment to Hoffenburg in the amount of $11,490.00 demanded in writing by Wais, or it could have address the issue as to the amount of interest Kruger-Willis owed at that point in time. CP 458; CP 986-87; CP 920; CP 921; RP 33.

Instead, the trial court prolonged the litigation for nearly another three years to Kruger-Willis' detriment in terms of additional interest and substantial legal expenses by considering the defense's motion to order Kruger-Willis under RCW 4.84.250, a small claims prevailing party fee-shifting statute, to issue payment to non-prevailing parties: GEICO; Mary E. Owen & Associates; and Lockner & Crowley, Inc., P.S. CP 458; CP 135.

In opposition to the defense's motion to issue payment to GEICO, Kruger-Willis argued judicial estoppel, which the trial court ignored. CP 795-98. Further, Kruger-Willis moved for CR 11 sanctions against Wais on the basis that the defense motion was not well-grounded in law because Wais cited no law whatsoever in support of the motion. CP 458; CP 798-99. Again, the trial court ignored Kruger-Willis' argument and her prayer for relief; instead, the trial court gave the parties time to file a brief with legal authorities as to who could be named on the check. CP 458. Kruger-Willis timely filed her legal authorities. CP 664-69. Wais filed no legal authorities, yet on October 21, 2013, the trial court issued a letter that

granted the defense the relief it sought and reversed without explanation its own oral ruling of May 17, 2013. CP 458; CP 656-58. On February 1, 2016, nearly three years later, the trial court ruled that its order of June 27, 2011, designating payment to Mary E. Owen & Associates contained a "scrivener's" error – nearly three years in which interest accrued to Kruger-Willis' detriment. RP 61.

On February 1, 2016, Kruger-Willis' counsel inquired of the trial court if it would consider entering an order of satisfaction of the court's order of June 27, 2011, rather than a judgment if full payment to Hoffenburg inclusive of interest was tendered the following day to Crowley. The Court replied that defense counsel would most likely want to resolve this matter (which payment and an order of satisfaction would have accomplished) and, in spite of the fact that Crowley declared in open court that he would need to find his client, indicating that its response was negative. CP 923.

During the entry of judgment hearing on February 8, 2013, the trial court acknowledged that Kruger-Willis recently filed an appeal that encompassed the order upon which the judgment is based,[26] but held that Kruger-Willis was not entitled to the 14 day automatic stay from enforcement of judgment under CR 62(a)[27] because the judgment itself has

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[26] But the Court states in response to the party's argument that the notice of appeal will be supplemented to include the judgment is not an issue before the court despite the issue's material relevance with respect to the party's rights and the court disregards in entirety the party's argument that she is entitled to an automatic stay. RP 76.

[27] CR 62(a) provides in relevant part: (a) Automatic Stays. [N]o execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration

not been appealed manifests extreme bias against Kruger-Willis. CP 991. The trial court ruled that Kruger-Willis was not entitled to the 14 day automatic stay from enforcement of judgment under CR 62(a) based upon the specious argument by Crowley that Kruger-Willis did not appeal the judgment at issue and it advised Crowley that he may immediately execute the judgment. CP 991; RP 75. The problem with the foregoing argument by Crowley, and the subsequent ruling by the court, is that the trial court was in the process of signing the judgment order, so at that point in time, Kruger-Willis was in no position to appeal a judgment order that had not even been signed by trial court, much less officially filed with the office of the clerk from which an appeal could be taken. CP 991.

When a court fails to consider the misconduct of an officer of the court when such conduct harms an opposing party, the trial court is neither fair nor unbiased. CP 991. When a trial court does not even acknowledge the misconduct of an officer of the court, it certainly does not promote the integrity of the judiciary or the attorneys that appear before it. CP 991.

V. ATTORNEY FEES

When a party successfully challenges the authority of an attorney to appear for his opponent, an award of damages, including attorney fees, is a means of repairing the injury under RCW 2.44.020, which authorizes a trial court to compel an attorney to "repair the injury" resulting from the

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of 10 days after its entry. Upon the filing of a notice of appeal, enforcement of judgment is stayed until the expiration of 14 days after entry of judgment.

attorney's unauthorized appearance. *Johnsen v. Petersen,* 42 Wn. App. 801, 806, 719 P.2d 607 (1986).

RCW 2.44.020 provides:

> **Appearance without authority -- Procedure.**
>
> If it be alleged by a party for whom an attorney appears, that he or she does so without authority, the court may, at any stage of the proceedings, relieve the party for whom the attorney has assumed to appear from the consequences of his or her act; it may also summarily, upon motion, compel the attorney to repair the injury to either party consequent upon his or her assumption of authority (emphasis added).

It is clear that the defense attorneys have never had the authority to appear in this matter for Hoffenburg. Kruger-Willis requests fees for this appeal under RCW 2.44.020.

VI. CONCLUSION

For the reasons stated, Kruger-Willis requests that this Court reverse the trial court's denial of her motion under RCW 2.44.030 and find that the defense attorney do not and did not have the authority under RCW 2.44.030 to appear for Hoffenburg in this matter; to remand to a *different trial* court for proceedings under RCW 2.44.020 for the defense attorneys to "repair the injury" from their unauthorized appearance; and, to find that the trial court erred when it entered judgment against Kruger-Willis and remand to a *different trial court* for proceedings under CR 60(b)(6) for relief from the judgment order.

Finally, Kruger-Willis requests to reserve for a later date a ruling on attorney fees under RCW 2.44.020 for appeal Nos. 42417-7-II and 45593-5-II.

RESPECTFULLY submitted this 19th day of May, 2016.

ALANA BULLIS, PS

/s/ Alana K. Bullis

Alana K. Bullis, WSBA No. 30445
Attorney for Appellant

ALANA BULLIS, PS
1911 Nelson Street
DuPont, WA 98327
Telephone: (253) 905-4488
Fax: (253) 912-4882

CERTIFICATE OF SERVICE

I certify that on May 19, 2016, I caused a true and correct copy of this Opening Brief of Appellant to be served on the following by legal messenger.

Counsel for Respondent:

Paul L. Crowley
Lockner & Crowley, Inc., P.S.
524 Tacoma Avenue South
Tacoma, WA 98402

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

/s/ *Alana K. Bullis*
Alana K. Bullis

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