

. 64101-8

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Court of Appeals No. 64101-8-I

Court of Appeals, Division I  
of the State of Washington

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COURT OF APPEALS  
STATE OF WASHINGTON  
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In Re:

James Row, Respondent

and

Tye Barringer, Jennifer Barringer, and all other tenants,  
Appellants

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REPLY BRIEF OF APPELLANTS

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### **A. Introduction to Reply Brief**

As stated previously in the Brief of Appellant, this case illustrates the difficulties that tenants have before Snohomish County Court Commissioners when seeking to have the superior courts adhere to the applicable civil rules and statutes. It is a classic battle of the “haves” versus the “have nots.” The landlords can afford to hire an eviction service/attorney, while the tenants do not have the funds to pay rent or attorneys. These eviction service attorneys overwhelm the court commissioners with multiple judgments at one time, and the court commissioner must rely upon the attorney’s assertions that they are not seeking relief in excess of requested in the complaint or in excess of that allowed by statute or the civil rules. Here, the court commissioner relied upon Row’s counsel, and that reliance was misplaced because Row falsely represented the right to process server fees.

Legal uncertainty was created by Row through lax use of legal terms and deceptive excerpts of the civil rules throughout the pleadings and entry of orders. A confused court clerk then entered a judgment summary that reflects costs for an unregistered process server; and costs, attorney’s fees, and a monetary judgment not ordered by the Court. A confused court commissioner later

awarded the Landlord attorney's fees for time spent on issues that misrepresented and wrongly analyzed CR 60, CR 5, and Snohomish County local rule 7. In the Brief of Respondent this misunderstanding of CR 60 CR 5, and SCLR 7 by the Court Commissioner and Respondent was glossed over, but it is critical to the analysis of this appeal as a great amount of attorney's fees were awarded for the Respondent's counsel's faulty analysis of those rules.

It is also important to note that only Tye Barringer was represented prior to July, 2009. CP 158 (document title and lines 30 and 40), CP 167 (line 43). Representation of Jennifer Barringer by counsel did not begin until July 6, 2009. CP 113 (document title and line 30) and CP 114 (lines 7-8).

The Barringers request that this Court's opinion be published. While the Barringers believe that the improper process server fees, and judgment summary without an order awarding the monetary judgment, should be removed; if Row prevails, publication of an opinion holding that when an attorney misrepresents<sup>1</sup> to the court an entitlement to costs, the tenant only

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<sup>1</sup> Counsel for Row appears to rely upon Barringer being unable to prove that counsel knew that process server fees were not allowed

has one year to discover that misrepresentation, will enlighten tenants throughout the state.

### **B. Crucial facts**

The Barringers acknowledge that the summons and complaint were served on January 4, 2008. There were two response deadlines of January 11, and 12, 2008 (CP 190, and CP 165 respectively). Because the January 12, 2008 deadline was a Saturday, under CR 6(a), Barringer had until the following Monday, January 14, 2008 to respond. CP 160. January 14, 2008 was the date that the default judgment was entered. CP 160

Row also either attempts to mislead this Court as to the factual nature of the procedural history, or he does not understand the procedural history in this matter. Specifically, Row starts out by wrongfully asserting that “Tye and Jennifer Baringer make a third attempt to challenge a \$49 process server fee.” BR 1.

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by statute and civil rules, thus he did not make a misrepresentation to the court commissioner. This defies the old adage, as cited extensively in case law, that “[a] reasonable person is deemed to know the law, or, as the old cliché puts it, ‘ignorance of the law is no excuse.’” *Ret’d Pub. Empl. Counsel v. State*, 104 Wn. App. 147, 151-52, 16 P.3d 65 (2001). As attorneys, trained in law and legal research, and tested for competency prior to admission to practice by the WSBA, we are reasonable people. As attorneys are deemed to know the law, any false statement about the law is a misrepresentation.

In fact, only Tye Barringer brought a motion to set aside the default judgment. CP 158-80. This motion was not brought on behalf of Jennifer Barringer, but solely by Tye Barringer as noted in the motion. CP 158, 164. The motion by Tye Barringer solely was based up declarations showing that the filed summons contained a different summons than the one served upon Tye Barringer. CP 160, CP 144-155. A copy of the summons with the “return date” changed to January 12, 2008, was attached to Tye Barringer’s declaration. CP 151. Further, Row never attached a copy of the summons to the return of service as required under CR 4(g). CP 159, 184-85.

Later, on July 6, 2009, a motion to “set aside and remove the process sever fee costs, and attorneys fees, entered in the judgment summary in this matter on January 14, 2008,” was brought. CP 106, 114. This time, the motion was brought on behalf of Tye Barringer, and for the first time on behalf of Jennifer Barringer. CP 112, 115. The prior motion to set aside the entire judgment was brought on behalf of Tye Barringer only.

It is interesting to note that certain facts are not disputed. First, Row was never entitled to a judgment for process server fees. Second, the Court Commissioner rubber stamped the request for

process server fees that was defective on its face because: (1) the process server was not registered as required by RCW 18.180.010(1); (2) the process server did not indicate his registration number and county of registration “on any proof of service the process server signs,” under RCW 18.180.010; and, (3) only registered process server costs are allowed under RCW 4.84.010.

With this admission by Row that his counsel wrongfully requested process server fees, and with the acknowledgment that the Court Commissioner wrongfully awarded process server fees, it is amazing that Row now seeks to penalize the Barringers and their counsel for seeking to have the wrongful amounts reduced.

Close review of the facts also shows that instead of Row agreeing to settle this matter by removing the process server fees from the January 14, 2008 judgment through amendment of that judgment; Row attempted to combine a subsequent attorney’s fee judgment against Tye Barringer with the January 14, 2008 judgment and include Jennifer Barringer in that judgment despite Jennifer Barringer never appearing in this matter at that time. These

actions greatly increased attorney's fees by Barringer far in excess of the improper \$49.00 process server fee.<sup>2</sup>

Finally, Row wrongfully asserts that Tye Barringer's motion to set aside the default judgment included a request to remove the process server fee. Close review of the motion reveals no such request. CP 158-80.

### **C. Standard of Review**

The most important standard of review in this matter will be on whether CR 60 requires an attorney to be served with a motion to set aside a judgment, even after the party was served through substituted service. This is a matter of law and it should be reviewed *de novo*. Once this *de novo* review determines that the Court Commissioner was deceived by Row into believing that CR 60 requires that opposing counsel be served a copy of the motion, then this Court should determine that it was an abuse of discretion

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<sup>2</sup> This Court should not fall for the "its only \$49.00" argument. If that were a legitimate position, the property owning landlord, the well paid court commissioner, or the Landlord's attorney, all would have paid the \$49.00. It is not justice for a tenant that cannot even afford to pay the rent (thus, an unlawful detainer action was brought for non-payment of rent), to have a judgment for wrongful fees against them. Its like a schoolyard bully kicking sand in the face of a smaller child who is already on the ground.

for her to not segregate legal expenses related to the deceptive arguments on CR 60 that were submitted by Row's counsel.

#### **D. Argument**

##### **1. The Barringer's never admitted that the Court Commissioner made a mistake under CR 60(b)(1).**

Row and the Court Commissioner continually tried to get the Barringers to admit that a "mistake" was made by Row and that this "mistake" requires an analysis under CR 60(b)(1).

Respondent's Brief tries to frame the issue as simply being that if any mistake is made, then there is a one-year limitation to bring the motion. BR 1. The analysis is not that simple, as explained in the Brief of Appellant. BA 11-20.

The Brief of Appellant states that the Court Commissioner erred in twelve (12) different assignments of error. BR viii-ix. It is surprising that Row does not now argue that because "erred" means to make a mistake, that the Barringers now admit that a mistake under CR 60(b)(1).

Instead, in the memorandum and argument before the Court Commissioner, and in the Brief of Appellant, it was continually argued by the Barringers that the trial court irregularities can be set aside by the court under CR 60(a) or (b)(4).

Further, Row refuses to acknowledge that while Tye Barringer and his counsel, and Row and his counsel, knew as early as March, 2008 of the problems with the process server costs judgment; Jennifer Barringer was not represented in this matter until the motion to set aside the judgment was filed in July, 2009.

Finally, this Court should review the tenor of the transcripts before the Court Commissioner. The Court Commissioner never asked tough the tough questions of Row's counsel, and instead attacked Barringer's counsel.<sup>3</sup> Why? Most appellate cases involving reversal of unlawful detainer cases are from Snohomish County cases. The courts seem to accept the landlord's version of the rules and the law without question (e.g. the deceptive reading of CR 60 submitted by Row's counsel), and the courts seem to be afraid to remedy their own wrongs committed during the "rubber

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<sup>3</sup> The Brief of Appellant clearly shows that the Court Commissioner was deceived by Row's redacted version of CR 60, and that Row's response was untimely, being served less than 2 hours before Barringer's response was required to be filed and served. While the Court offered to continue the hearing to allow a written response by the Barringers, under SCLR 7, sanctions could have been awarded against the Barringers if they sought a continuance because they failed to file and serve a reply in less than 2 hours. This court, from all proceedings before it, appears amenable to sanction tenants, and it would have likely sanctioned the Barringers, despite the Barringers' compliance with CR 60 and Row's failure to comply with the response deadline of SCLR 7.

stamping” of court orders. The Court Commissioner attacked the innocent Barringers who merely wanted judgment entered in the appropriate amount. The Court Commissioner misread CR 60 and attacked Barringer’s counsel for not serving the motion on Row’s current counsel.<sup>4</sup> The Court Commissioner awarded Row attorney’s fees without addressing argument that much of the briefing time was spent mis-arguing CR 60. One can easily show that billable time was awarded to Row for that mis-argument because the Court Commissioner accepted as law the deceptive excerpt of CR 60 submitted by Row’s counsel. The Court Commissioner wrongly chastised the Barringer’s counsel for not serving Row’s counsel, despite CR 60 specifically requiring service upon Row only. This complete acceptance of Row’s mis-argument of CR 60 by the Court Commissioner indicates the lack of appearance of fairness, if not actual lack of fairness. Row’s counsel is a self-acknowledged expert on landlord tenant matters, having written the deskbook for the King County Bar Association: presumably Row’s counsel has mislead the courts hundreds or

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<sup>4</sup> Surprisingly, the Respondent continues to argue that the facts support that CR 60 and SCLR 7 were not followed by the Barringers, but that they were followed by Row. The facts are clear: the Barringers complied with CR 60; Row did not serve a timely response to the motion under SCLR 7.

thousands of times as to the award of process server fees. That is why Row's counsel blames others for his misrepresentation of entitlement for process server fees: if this Court holds that this misrepresentation entitles tenants to a reduction in judgment for costs awarded for process server fees, Row's counsel will be required to correct those hundreds or thousands of judgments where the courts "rubber stamped"<sup>5</sup> his improper request.

Finally, Row asserts that his attorney never claimed that the process server was registered. But, his attorney did claim that Row was entitled to a cost judgment for process server costs. CP 187. Further, Row drafted an order including process server costs. CP 182. Finally, as stated in the Brief of Appellant, under CR 11(a), signing a pleading verifies that it is "well grounded in fact" and that it is "warranted by existing law," after an "inquiry reasonable

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<sup>5</sup> Row implies that the assertion of "rubber stamped" impugns the Court Commissioner. The Barringers merely assert that had the Court Commissioner performed more than a perfunctory review of the motion for default, that she would have discovered that: (1) the motion was for a default, but the order was for a default judgment; (2) that there was no order for costs or attorney's fees; and, (3) the statutory and civil rule requirements for an award of process server fees were not met. The Barringers understand that the Court Commissioners sign the majority of all Superior Court orders, and that they must rely upon the attorney's seeking default orders to properly prepare the paperwork and to not make any misrepresentations as to the eligibility for costs.

under the circumstances.” CR 11(a). Row’s counsel certainly did not conduct a reasonable inquiry on his claim to entitlement to process server costs as three separate statutes require the server to be registered to claim costs. Thus, Row’s inquiry was not reasonable, the request was not well grounded in fact, and it was not warranted by existing law. Further, by failing to conduct this adequate inquiry, by representing to the Court Commissioner that the inquiry was adequate, Row’s counsel misrepresented his investigation, the law, and the facts.

**2. The Barringers brought their motion to set aside improper costs for justice, and Row’s opposition and obstinacy unnecessarily increased his legal fees.**

Tye Barringer sought to have the process server fees removed by agreement, as shown in the proposed order amending the January 14, 2008, judgment. CP 75. Row wrongfully believed that amending the January 14, 2008 judgment would affect the subsequent attorney’s fees judgment entered against Tye Barringer. There was no legal basis for that conclusion, as only the January 14, 2008 order was to be amended by the order proposed by Row.

Had Row accepted that offer, we would not be here today. Thus, it was Row’s intransigence that required the Barringers to seek removal of the wrongfully included process server fees.

Had the Barringers known that the Court Commissioner would be deceived initially and award costs to which Row was not entitled, and later as to the meaning of CR 60, they may not have sought removal of those fees. But, a party should be able to rely upon the court commissioner to properly enter a default judgment and to rely upon the court understanding the civil rules.

The Barringers' motion was brought to remove wrongful process server fees, which was Tye attempted to do it previously through an agreed amended order.

**3. Tye Barringer, and later Tye Barringer and Jennifer Barringer, did not bring identical motions before the Court Commissioner. Row merely never understood CR 60, and still tries to deceive the Court as to the nature of CR 60.**

Row wrongly asserts that the Barringers brought identical motions before the Court Commissioner. Row wrongly states that "Tye and Jennifer Barringer made a third attempt to challenge a \$49 process server fee and \$714 in statutory attorney fees and costs awarded as part of a default judgment." BR 1. This is wrong because the first motion, brought solely by Tye Barringer as explicitly noted in the motion, was based upon lack of jurisdiction. CP 158-180. The second motion brought on behalf of both Tye

Barringer and Jennifer Barringer was limited to “remove the process server fee costs and attorney fees”. CP 113-14.

**4. The Barringers never requested the removal of \$2,000 in attorneys’ fees, despite attempts by Row before the Court Commissioner and this Court to deceive the Court.**

The Barringers never requested removal of \$2,000 in attorney’s fees, despite the wrongful assertion by Row.

Specifically, the Tye Barringer requested that both Row and Barringer “jointly move this Court for an Order Amending the Judgment dated January 14, 2008. A true and correct copy of that judgment is attached as exhibit 8.” CP 75, lines 7-11. This was to be done in a document entitled “Motion and Order Amending Judgment.” CP 74-76. This document was submitted to Row’s counsel with Tye Barringer’s counsel’s signature on it, so that all Row had to do was sign and file it with the court.

Nothing here would have removed \$2,000 in attorney’s fees as this was merely for the purpose of “Amending the Judgment dated January 14, 2008.”

Further, any request by Row to include Jennifer Barringer on a judgment for \$2,000 in attorney’s fees would be improper as

Jennifer Barringer's first appearance in this matter was in July, 2009. Jennifer was not represented.<sup>6</sup>

**5. The federal court action was a dismissal without prejudice as despite the impropriety of the process server fees, a federal court cannot change state court rulings.**

Row attempts to deceive this Court as to the content of the order of dismissal in the federal lawsuit.

Specifically, United States District Court Judge Robert S. Lasnik stated that the Barringer's "cannot use the FDCPA to collaterally attack or appeal that determination" that the "state court [determined] that Mr. Loeffler was entitled to those amounts proves that his representation of that debt was accurate." CP 96, lines 3-5. Those claims were dismissed without prejudice. CP 96, lines 10-11.

Thus, the Barringers were free to re-file the suit in federal court once the trial court in this matter determined that Loeffler had wrongfully represented to it an entitlement to process server fees.

Despite Loeffler's admission to the trial court that he was not

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<sup>6</sup> Row appears to assume that the Barringers are a married couple, and that Tye Barringer was acting on behalf of Jennifer Barringer when seeking to have the judgment set aside for lack of jurisdiction; however, Tye Barringer's motion to set aside made it very clear it was only on his behalf. CP 158-180. The record does not reflect anything on the relationship between Tye and Jennifer; however, they are not married.

entitled to those process server fees, the trial court would not remove those fees.

**6. A judgment summary is not a court order, despite attempts by Row to characterize it as such.**

Row is wrong to assert that the Judgment Summary is the order of the court. This was argued in the Brief of Appellant, pages 7-11.

As the term “judgment summary” implies, it is a summary of the order or judgment of the trial court. In the present matter, Row only requested an order and judgment, in the order drafted by Row,<sup>7</sup> as follows:

**IT IS HEREBY ORDERED ADJUDGED AND DECREED** that the Defendants is adjudged to be in default herein, and that in accord with RCW 59.18.370 et seq., **a Writ of Restitution shall be immediately issued forthwith by the clerk of this Court . . .**

While the trial court may have made findings and conclusions, the only information to be contained in the judgment summary, under RCW 4.64.030(2), is “a succinct summary on the first page of a judgment of the “amount of the judgment . . . taxable costs and attorney fees, if known at the time of the entry of the judgment . . .”

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<sup>7</sup> This had to have been drafted by Row as this was a default judgment because neither Barringer had appeared to defend this action.

Here, the court's order only addressed the Barringers being in default and that a Writ of Restitution shall issue. This is perfectly acceptable as the exact amount of costs and damages were not fully known at that time (for example, the sheriff refunds part of the sheriff fee depending on the time expended performing a physical eviction, but the refund amount is unknown at the time the judgment is taken).

In conclusion, a judgment summary is not an order, just as an order is not a judgment summary under RCW 4.64.030. Thus, this "judgment summary" incorrectly summarized the court's order, and it should not have been docketed by the clerk of the court because it was incorrect.

**7. This appeal is not frivolous, as shown most easily by the erroneous entry of attorney's fees for deceptive briefing on CR 60 at the trial court level, or the case of first impression on a judgment summary that does not correctly summarize the courts judgment.**

Row and his trial court counsel are merely seeking attorney's fees from *pro bono* opposing counsel through their request that this Court find this appeal was frivolous. The pattern of Row's counsel producing sloppy pleadings, against *pro se* tenants, and presenting them to a court commissioner that provides cursory review, should not be encouraged by this Court. This

Court should encourage *pro bono*<sup>8</sup> representation of wronged tenants, as for every tenant that contests a \$49.00 wrongful process server fee cost, there is likely another 500 tenants that did not know this was a wrongful cost.

As previously argued, the conduct of Row in presenting sloppily prepared legal pleadings, and of the court commissioner in not adequately reviewing these pleadings – partially in reliance upon the factual and legal information provided by Row’s counsel – is wrong. The Barringers were entitled to rely upon the trial court only making an award of fees, costs, and damages that were fully supported by the record and the law.

Then, the court commissioner awarded Row attorney’s fees which consisted in large part of fees related to the Court Commissioner’s determination that the Barringer’s wrongfully failed to serve Row’s counsel with the motion as allegedly required

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<sup>8</sup> There was no legal basis under RCW 59.18 for the Barringers to request attorneys fees. Landlords can request monetary judgments in excess of that allowed by statute with impunity as the tenant will never be entitled to attorney’s fees under RCW 59.18.290, as tenants will never be the prevailing party if they owe rent – even if the tenant proves the requested rent is substantially lower than that requested. The landlord also failed to provide the lease agreement for the trial court, despite claiming that there was a lease agreement between the parties. CP 192. The lease agreement may contain provisions that alter the attorney’s fees provision of RCW 59.18.290.

under CR 60. While Row still argues that the Court Commissioner was correct in chastising the Barringer's counsel for failing to serve Row's counsel under CR 60, merely obtaining substituted service through Row's daughter in the manner a summons and complaint would be served; the court commissioner did not segregate out attorney's fees for that drafting the deceptive brief (the brief where Row omitted critical language from CR 60), then arguing the deceptive brief before the trial court; and then briefing CR 60 again for argument for attorney's fees.

**8. Row's framing of issue 3 in its brief is not supported by the record.**

Row states that the Court Commissioner acted within her discretion in finding that Barringers' CR 60 motion was frivolous when: (1) there is no basis in law or fact; (2) it is time barred; (3) it is identical to a motion previously denied; and, (4) it is designed to drive up attorney's fees for Row. The problem is, *inter alia*, that even were allegations 1, 2, and 4, correct, the current motion brought by Tye Barringer and Jennifer Barringer was not identical to the motion solely brought by Tye Barringer. As discussed *infra*, Jennifer Barringer never appeared in this matter until July 6, 2009.

**9. The Barringers and their counsel have not violated any rules to support sanctions under RAP 18.9.**

Row bases his motion for attorneys' fees solely on RAP 18.9, not RAP 18.1, despite the heading stating that fees are requested under both appellate rules.

No attorney's fees can be awarded under RCW 59.18.290 as they were not requested under statutory authority, there was just a bald request. No attorney's fees should be awarded under the lease because no lease has been provided to this court. This does not mean that this Court cannot hold that attorney's fees would have been awarded, but that Row failed to ask for fees under RAP 18.1.

Here, Row is attempting to get fees solely from the Barringer's counsel. The reason is clearly that Row knows that his attorney initially took advantage of two low income persons that could not even afford to pay their rent. So, an award is sought solely against Barringer's counsel.

This Court should not be swayed by the conclusory arguments of Row that "[t]he issues presented by the Barringers on appeal are so devoid of merit as to be frivolous and advanced without reasonable cause." BR 24.

While the Barringers present many strong arguments in this appeal, the four strongest are: (1) that attorney's fees were not

properly calculated under *Mahler* as the Court Commissioner was wrongfully deceived as to the service requirements under CR 60, and she based attorney's fees with only a \$50 reduction (a reduction made without explanation) without segregating time spent on the wrongful argument by Row that CR 60 required service upon Row's counsel, and that Row's wrongful response to the motion was timely; (2) that the Court Commissioner never considered a clerical mistake under CR 60(a); (3) that Row's initial counsel made false statements to the Court Commissioner to wrongfully obtain a process server fee judgment in violation of CR 11 and under the axiom that "ignorance of the law is no excuse" . . . especially for an attorney since reasonable people are presumed to know the law; and, (4) the case of first impression on whether a judgment summary constitutes an order/judgment, or whether it is what it states it is, a summary of the judgment entered.

Finally, Row strategically did not request attorney fees under a specific statute, e.g. RCW 59.18.290. This Court should not fall into the trap set by Row whereas the only possible attorney's fee award that this Court can now consider is sanctions against Row's counsel under RAP 18.9.

**10. This Court should not consider personal attacks against the Barringers and their counsel.**

Our Supreme Court has spoken loudly on *ad hominem* attacks, stating “[i]f these ad hominem attacks were meant to persuade this court they have failed.” *Discipline of Dann*, 136 Wn.2d 67, footnote 4, 960 P.2d 416 (1998).

Specifically, Row claims that the Barringers “impugned” (BR 4) Court Commissioner Jacalyn D. Brudvik. Further, Row claims “several botched attempts by the Barringers to note and re-note a motion.” BR 4.

First, Commissioner Brudvik was not “impugned.” The trial court motion stated that “the plaintiff asserts that the Court found ‘that service of the Summons and Complaint was duly made upon the Defendants as is more particularly shown in the Return of Service on file herein.’” CP 131. Because there was not a proper return of service on file (detailing that the server was registered, county of registration, and with the summons attached), the Barringers concluded that:

this Court acted as a mere ‘rubber stamp (as stated in the defendant’s motion to set aside). Had this Court thoroughly reviewed the pleadings it would have noticed that the plaintiff failed to comply with CR 4(g). Specifically, CR 4(g) requires that proof of service shall be endorsed upon or attached to the summons.’

CP 131-32. This is a correct statement.

Further, this Court of Appeals has previously “impugned” Commissioner Brudvik for using “circular reasoning” in denying tenants the right to a meaningful opportunity to be heard under both United States Constitution and Washington Constitutions. *Leda v. Whisnand*, 150 Wn. App. 69, 83-84, 207 P.3d 468 (2009). This Court also indirectly impugned Commissioner Brudvik for entering judgment without jurisdiction in *Jahed v. Russo* 61653-6-I November 24, 2008) (Commissioner signed default order when the summons clearly showed only six (6) days elapsed between the date of service and the return date; and seven (7) days is required by RCW 59.12.070.

Second, Row cites “several botched attempts” by Tye Barringer in setting up the initial motion to set aside the default judgment. BR 4. The delays in the actual hearing are explained very well, and “botched” is an inappropriate description. CP 117-126.

Third, footnote 2 of the Brief of Respondent includes an unreferenced personal attack that this Court should not consider. A separate motion will be brought to remove that footnote from appearing in the briefs submitted to this panel. BR 27, footnote 2.

In conclusion, it is requested that this Court ignore personal attacks on counsel. Opposing counsel Talmadage certainly agrees, as he concurred with the opinion in *Discipline of Dann*, 136 Wn.2d 67, footnote 4, 960 P.2d 416 (1998), that addressed *ad hominem* attacks.

**11. Neither Tye Barringer nor Jennifer Barringer's motion to set aside the process server fee judgment is *res judicata***

Row argues for the first time on appeal that the Barringers motion to set aside the process server fees was *res judicata*. This Court should not consider this defense raised for the first time in the Brief of Respondent. It was never raised before the trial court.

Neither Tye Barringer nor Jennifer Barringer's motion to set aside the process server judgment is *res judicata* because Tye never brought that motion when he sought to set aside the judgment previously, and Jennifer Barringer sought to have the process server fees set aside in her initial appearance before this Court (she was not a party to Tye Barringer's motion to set aside the default judgment).

Again, while Row asserts that "[t]he Barringers admitted that they knew all of the relevant facts in March 2008," in fact,

Jennifer Barringer's first motion to this Court was to set aside the process server fees.

**12. Barringer moving separately to strike footnote 2 as it is an inappropriate attempt to sway this Court and it is not supported by the record.**

The Barringes will bring a separate motion to strike the unreferenced statements in footnote 2. Row seeks that this Court take judicial notice of a matter that was not before the trial court, and that is merely intended to prejudice this Court in a matter that is unrelated to this present appeal.

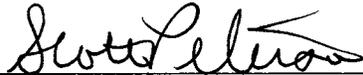
#### **E. Conclusion**

As previously concluded, this entire matter is marked by imprecise use of legal terms and wrong legal decisions. Starting with entry of a default judgment under CR 60 (b) after the Landlord only requested entry of default under CR 60(a); through not ordering, but including in the judgment summary, costs for an unregistered process server; through the Court falling into the deception weaved by the Landlord to change the meaning of CR 60; through blaming the Tenants' counsel for a late response under the Snohomish County Local Rules and late filing in response to the CR 60 motion. But, the only mistake of the Tenants was to rely upon the judicial system to limit the award to what was requested

and to follow the court rules and statutes. With hindsight, the Tenants were naïve.

But, the naiveté of the Tenants should not stop this Court from reversing the trial court decision, and remanding this matter back to the trial court to remove the \$49.00 unregistered process server fee under CR 60(b)(4) or CR 60(a), to vacate the attorney's fees and costs awarded on September 14, 2009, and to reverse the finding that the Tenants' motion was frivolous.

Respectfully submitted June 23, 2010



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