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65709-7

No. 65709-7-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CHARLES B. THOMAS, JR.,

Appellant/Plaintiff,

vs.

PRINCE HALL GRAND LODGE  
F. & A.M., OF WASHINGTON AND  
JURISDICTION, and KENNETH B.  
ANTHONY, individually and in his capacity  
as Grand Master,

Respondents/Defendants.

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BRIEF OF APPELLANT

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SUBMITTED 11/2/55

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Appellant/plaintiff Charles B. Thomas, Jr. ("Thomas") respectfully submits his opening brief on appeal.

A. OVERVIEW

Thomas is a distinguished, but presently suspended, member of more than 28 years of respondent/defendant Prince Hall Grand Lodge (the "Grand Lodge"), a black Masonic organization. Thomas has served in various capacities on behalf of the Grand Lodge and his own subordinate lodge, including serving as a member of the Grand Lodge's Comptroller's Board, and as Chairman and member of the Comptroller Board's Budget Committee.

In 2009, Thomas was repeatedly and wrongfully suspended by respondent/defendant Kenneth B. Anthony ("Anthony"), the Grand Lodge's Grand Master. Thomas was thereafter denied a fair opportunity to challenge the wrongful suspensions according to the internal procedures, laws, and customs of the Grand Lodge.

Thomas' only mistake was in inquiring, as a former member of the Budget Committee and Comptroller's Board, about the propriety of certain expenses approved by Anthony during the

time he (Anthony) was serving as Chairman of the Grand Lodge's Grand Entertainment Committee. This led to a series of retaliatory actions, bringing us to Thomas' continuing, indefinite, suspension to this day.

This appeal raises the question of how far a private organization (such as the Grand Lodge) and its officers (such as Grand Master Anthony) may go in asserting the doctrine of exhaustion of remedies, and in using that doctrine as a shield against judicial scrutiny, when the internal due process rights of members (such as Thomas) have been trampled upon in retaliation for legitimate inquiries about possible financial irregularities of that organization?

B. ASSIGNMENTS OF ERROR

No. 1: The trial court erred in the entry of its June 11, 2010 "Order Granting Defendants' Motion to Dismiss" (CP 293-294), and July 23, 2010 "Order Denying Plaintiff's Motion for Reconsideration" (304).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

This case presents the following issues;

- (1) Was the trial court correct in dismissing Thomas'

claims for lack of jurisdiction for the alleged failure to exhaust internal remedies relating to his multiple suspensions?

(2) Was the trial court correct in dismissing, under the doctrine of exhaustion of remedies, not only Thomas' claim for reinstatement, but also his related claims for monetary damages for the unlawful suspension, defamation, negligence, and the tort of outrage?

(3) Was the trial court correct in dismissing not only all of Thomas' claims against all respondents/defendants, under the doctrine of exhaustion of remedies, but also in dismissing all claims for equitable and monetary relief with prejudice?

D. STATEMENT OF THE CASE

This is an action involving the flagrant denial and violation of the internal due process rights of a member of a private organization, when that member angered its chief executive officer by asking questions about that officer's irregular financial dealings.

All of the issues on appeal revolve around respondents' efforts to undermine Thomas' limited ability to challenge the illegal suspensions internally, and then their disingenuously standing

behind the doctrine of exhaustion of remedies to preclude the same member from pursuing more effective civil court remedies for the injustice done.

This is a case which requires a more equitable and balanced review of the doctrine of exhaustion of remedies. The trial judge gave this case a cold, hard, formalistic review, without consideration of the extraordinary unfairness of Anthony's and the Grand Lodge's actions, and the utter futility of any further internal remedies. Exacerbating the injury done, the trial court dismissed all of Thomas' claims with prejudice. (CP 293-294)

The Parties. Respondent Prince Hall Grand Lodge is a not-for-profit organization of black Masons, organized and existing under the laws of the State of Washington. (CP 122) Its jurisdiction includes all of Washington State, as well as certain outlying areas, and has 64 subordinate lodges (CP 123)

Thomas is a suspended member of Arthur Ury Lodge # 73, a subordinate lodge of the Grand Lodge, and has been a member since his initiation as a Master Mason in 1982. (CP 155) By virtue of the membership in his subordinate lodge, Thomas is also a member of the Grand Lodge. (CP 123)

Thomas was and remains a highly respected Mason. (CP 155, 159). During the administration of a number of Grand Masters of the Grand Lodge, he served on its Comptroller's Board, and the Comptroller's Board's Budget Committee, with oversight of the Grand Lodge's financial affairs. (CP 155. 159)

In 2009, Thomas was awarded the 33<sup>rd</sup> Degree of the Scottish Rites, one of the highest awards a Master Mason can receive, and was scheduled to fly back to the East Coast in May 2009 to receive this award. (CP 156)

Anthony was elected Grand Master, the highest ranking officer of the Grand Lodge, at its annual session in July 2008 for Masonic year 2008-2009. (CP 160) Prior to being elected Grand Master, Anthony served as Chairman of the Grand Entertainment Committee ("GEC") of the Grand Lodge for Masonic year 2006-2007. (CP 160) During this time, Thomas was Chairman of the Comptroller Board's Budget Committee, and had oversight over the expenditures of the GEC as well as the entire Grand Lodge. (CP 160)

The Underlying Dispute. When Anthony, then GEC

Chairman, submitted the GEC's report for Masonic year 2006-2007, Thomas was on the Budget Committee and properly noted and reported to the Comptroller Board that Anthony had allowed the purchase of a DLP projector without following the process of getting prior approval for it. (CP 160) Thomas attempted without success to have the projector purchase by Anthony reviewed by the Comptroller Board to ensure future compliance with the budgetary process. (CP 160)

When Anthony was subsequently elected Grand Master in July 2008, he did not re-appoint Thomas to his longstanding position on the Comptroller Board. (CP 160) This was unusual, considering Thomas' excellent history of working on that Board and his desire to continue working on the Board. (CP 160) Thomas was not re-appointed, apparently because of questioning the basis for Anthony's purchases, while Chairman of the GEC, without following established procedures. (CP 160)

Although no longer a member of the Comptroller Board after July 2008, or Chairman of its Budget Committee, Thomas was in attendance at a Comptroller Board meeting when the GEC Committee report was presented for Masonic year 2007-2008.

(CP 160-161) Thomas noticed that during this past year GEC Chairman Anthony had caused the GEC to pay himself, and another GEC officer, more money than budgeted and approved by the Comptroller Board (the "Additional Payments"). (CP 160-161) Thomas questioned these Additional Payments, and certain other expenditures, by the GEC for Masonic year 2007-2008 (CP 161)

With such a large organization, it has been imperative that the Grand Lodge have strict accounting and budgeting procedures in order to maintain order, discipline, and respect for its officers and institutions. Over the years, there have been numerous rumors and allegations of mis-use of funds, which could have been avoided by following the Grand Lodge's procedures. These rumors have been unnecessarily disruptive to the organization. (CP 161)

Ultimately, when his questions about the Additional Payments and other expenditures were not resolved, Thomas submitted a letter to the Comptroller's Board, dated March 7, 2009, addressing his concerns about these apparently unbudgeted and unauthorized expenditures. (CP 161, 196-197)

It was Thomas' right, as a Master Mason and member of the Grand Lodge, to address any financial and budgetary issues he had to the Comptroller's Board. (CP 161, 170) His actions and March 7, 2009 letter did not violate any rules or procedures of the Grand Lodge. (CP 161, 170)

The Three Suspensions. The next regularly scheduled meeting of the Comptroller's Board, after Thomas' March 7, 2009 letter was March 21, 2009. (162) By this time, the new Chairman of the Comptroller's Board had become Carlton B. Tucker, one of the former GEC officers (besides Anthony) who had received the questionable Additional Payments from the GEC. (CP 162) At the March 21 Comptroller's Board meeting, Grand Master Anthony appeared and during the meeting attempted to interrogate Thomas as to his March 7, 2009 letter - and the source of the information contained in his letter. (CP 162) Grand Master Anthony demanded that Thomas reveal his confidential sources of information, and Mr. Thomas respectfully declined. (CP 162) Thomas was at all times civil and courteous in his response to Grand Master Anthony, was at no times disrespectful, rude, or

confrontational towards Anthony or the Grand Lodge, on March 21, 2009. (CP 189)

At the end of the Comptroller Board's meeting, Thomas was suspended by Anthony for alleged contumacy, pursuant to a letter dated March 21, 2009 which apparently had been prepared during the meeting. (CP 162, 199) The letter alleges that Thomas committed "acts of contumacy towards the Grand Master during the Comptroller Board meeting." (CP 199)

As a matter of practice, there is a tape recording of the Comptroller's Board Meetings, and that tape recording should be dispositive of the facts and circumstances relating to the discussion between Anthony and Thomas at the March 21 meeting preceding Thomas' suspension. (CP 162) For more than a year after the meeting, the Grand Lodge and Anthony would not turn a copy of the tape over to Thomas or his Masonic counsel, William E. Spenser, Sr., despite requests for it. (CP 162, CP 181-182) The failure to make this tape available was highly irregular. (CP 162, 181-182)

Thomas ultimately had to bring a CR 34 document request for the still unproduced tape of the March 21, 2009 meeting, and

then a CR 37 motion to compel and for sanctions against the Grand Lodge and Anthony for their failure to provide it. (CP 39-72, 138-139, 140-141) In its first March 29, 2010 "Order Compelling Discovery and Awarding Terms," the trial court found that "Defendants' Response to Discovery has been inadequate or nonexistent." (CP 139) In a second, "Supplemental Order on Plaintiff's Motion for Reconsideration of March 29, 2010 Order Compelling Discovery," the trial court increased the CR 37 sanctions against the Grand Lodge and Anthony from \$495 to \$1,580. (CP 140-141)

Anthony's actions against Thomas were flawed in numerous ways. Among other things, Anthony had an irreconcilable conflict of interest in taking official action on behalf of the Grand Lodge against Thomas, with respect to the dispute over the GEC, the Additional Payments, and the interaction between the two of them at the Comptroller's Board meeting of March 21, 2009. (CP 163, 170-171) Custom and practice of the Grand Lodge made it absolutely necessary that Anthony submit any written complaint he may have had against Thomas to the Grand Secretary, as required by Section 200.02 of the Grand

Lodge's By Laws, and then defer any follow up action to the Deputy Grand Master, who should not have had these conflicts of interest. (CP 163, 211)

It was improper and irregular for Anthony, whose individual conduct while Chairman of the GEC was being called into question, to pursue disciplinary action against another Master Mason attempting in good faith to review his own conduct. (CP 163) Among other things, Section 12.13 of the Constitution of the Grand Lodge states that the power to punish a Master Mason by reprimand, suspension or expulsion is contingent "upon conviction, after an impartial trial." (CP 163, 204) (Emphasis added) There was nothing impartial about Anthony's actions against Thomas.

In addition to Anthony's personal involvement and inherent conflict of interest, Anthony suspended Thomas without a trial – in violation of Section 12.13 of the Constitution (CP 204), quoted in pertinent part above, and in violation of Section 200.13 of the Grand Lodge's By-Laws, which provides:

The Grand Lodge by-laws shall not deprive a brother of his rights, except as the result of a trial and

**judgment of a tribunal having jurisdiction** under  
the constitution and by-laws of this Grand Lodge. . . .  
[Emphasis added]

(CP 177, 214)

Anthony failed to file prior written charges with the Grand Secretary against Thomas, as required by Section 200.02 of the Grand Lodge's By-Laws, as a preliminary step leading up to a trial by commission. (CP 180, 211) Once written charges are filed with the Grand Secretary, the Grand Secretary is required pursuant to Section 200.02 to submit them to the Grand Master to determine if they are sufficient to warrant a trial (again, before any suspension). (CP 164-165, 211)

At the same time and at each step of the way, Anthony had an irreconcilable conflict in taking any actions pursuant to Section 200.02 of the Bylaws. It was improper for him to circumvent the requirement of first filing charges with the Grand Secretary. Even if he had filed written charges under Section 200.02, he could not make an "independent evaluation", in his capacity as Grand Master, of whether his charges against Thomas justified a trial and appointment of a trial commission.

(CP 165, 180) Instead of withdrawing from this clear conflict of interest, Anthony proceeded to wade deeper into the situation.

Apparently to cover up for some of these omissions, notice of the formation of a trial commission formed by the Grand Master was sent out by letter dated March 13, 2009 (CP 232), a date which was illogical and impossible because it pre-dated by eight days the Comptroller Board's Meeting of March 21, 2009 (allegedly forming the basis for Thomas' summary suspension). (CP 165) In addition to this curious irregularity, Anthony hand-picked his own, equally biased trial commission, selecting members who were going to be hostile or potentially hostile to Thomas, and then selecting a prosecutor for the Grand Lodge who was a member of Anthony's own subordinate lodge. (CP 165)

The back-dating of the notice of formation of the trial commission (CP 232) was significant for this dispute because appointment of the trial commission after a suspension was improper and illegal. (CP 180, 214) The Grand Lodge has had to confront this issue a number of times, and as recently as a lawsuit between Past Grand Master William Rheubottom and the Grand Lodge in 2004, King County Superior Court. (CP 165-166) In that

2004 proceeding, Superior Court Judge John Erlick entered an Order Granting Motion for Preliminary Injunction against the Grand Lodge, holding on page 2 that “an individual Mason has a right to have a Masonic trial before he may be punished with a penalty such as suspension”. (CP 165-166, 236)

Nor was it possible to cure or correct an already illegal suspension after the fact, by the Grand Master hand picking a trial commission to essentially rubberstamp the prior suspension already in place. (CP 166) All actions taken by the Grand Master and the Grand Lodge after the illegal suspension were similarly illegal and invalid under Masonic Law. (CP 166, 180)

This is a private organization, where proceedings are generally informal and fairly expeditious in nature, and the accused has a right to participate fully in the proceedings until his suspension has been confirmed. (CP 166) In this situation, Thomas was suspended indefinitely (CP 199), which immediately divested him of the ability effectively to pursue a defense of any charges against him. (CP 166, 181) Once suspended, a Master Mason is prohibited from having contact with other Master Masons, and other Master Masons are subject to discipline if they

do have contact with one who has been suspended, as Section 206.08 of the Bylaws makes clear:

All suspended or expelled Masons are strictly denied and forbidden the right and privilege of visiting any lodge, of affiliation, . . . of receiving assistance. . . . No Mason shall hold a Masonic communication or affiliation with a suspended or expelled Mason upon penalty of himself being suspended or expelled.

(CP 166; see Sections 206.03 and 206.08 of the Bylaws at CP 218, 219)

While Thomas was allowed to retain a Master Mason to serve as his "counsel", he nevertheless was severely handicapped by the suspension in his ability to gather evidence, and pursue his defense. (CP 166)

Thomas, through his counsel, William E. Spenser, Past Chairman of the Grand Lodge Jurisprudence Committee, objected to the illegal suspension, trial commission, and subsequent proceedings, but at the same time showed his good faith by attempting to work with the suspect and illegal commission. (CP 166-167) However, in keeping with the utter contempt and disregard shown by Anthony and the Grand Lodge up to this point

in time, Thomas was not allowed by the commission to put on his evidence or call his witnesses. (CP 167, 181)

The exclusion of Thomas' evidence was contrary even to the curiously, backdated March 13, 2009 notice sent out by the Grand Secretary (CP 232), notifying him of the formation of the commission. This letter directed Thomas to produce his witness list and other items to be placed in evidence at the commission trial. (CP 242-243). It was also contrary to Section 204.09 of the Bylaws, requiring that the trial commission "hear and consider all evidence before voting upon the question of guilt or innocence, or punishment." (CP 167, 181, 216)

Two critical aspects of Thomas' defense were excluded from the commission trial. First, while the tape of the March 21, 2009 Comptroller's Board Committee meeting was identified in Thomas' April 26, 2009 designation of evidence (CP 242-243), the Commission never allowed it to be played to the trial commission members. (CP 181-182) Only excerpts were played to William E. Spenser, Sr. ("Spenser"), the Masonic counsel for Thomas, and Crumb, the prosecutor. (CP 181) Spenser demanded, to no avail, that the tape recording be played to the full commission, since in

his opinion the tape exonerated Thomas of any allegations of contumacy or insubordination. (CP 182)

Second, the key witness designated by Thomas for the trial was Kenneth Swanigan (“Swanigan”), a 39-year member of the Grand Lodge, a Past Grand Master, and former Chairman of the Grand Lodge’s Jurisprudence Committee for many years. (CP 158) Swanigan had regularly been consulted over the years by Master Masons, officers of the Grand Lodge, and third parties (including members of the legal community) for his expertise on the Grand Lodge’s Landmarks, Constitution, Bylaws, customs, and practices. (CP 158-159) Swanigan was called by Masonic counsel Spenser to give his expert testimony on the illegality of Thomas’ suspension and subsequent trial commission proceedings, but was not allowed to testify. (CP 159)

At the conclusion of the trial, and despite not having heard all of the evidence, the Commission announced that it had ruled against Mr. Thomas on the charge of contumacy, but that it had not addressed at that time other charges crafted by Anthony after the suspension and set forth in an undated letter by the Grand Lodge’s Junior Warden. (CP 181, 228-229). However, the

commission never did confirm whether the charge of contumacy had been upheld by the requisite vote of the total Commission, as required by Sections 200.06 and 205.01 of the Bylaws (CP 212, 217), or that the penalty decided upon (suspension of 90 days with credit for time served) had been approved by the requisite vote. (CP 182-183, 217) Nor do the minutes of the commission by trial shed any light on these requirements. Without a two-thirds vote of approval, Section 200.06 states that "otherwise the defendant will be declared innocent." (CP 183, 245-265)

Thereafter, for the balance of Masonic year 2008-2009 (i.e., coinciding with the annual Grand Sessions in July of each year), and for the remainder of calendar year 2009, Thomas was never presented with another oral, let alone written, report on the commission's findings on the other charges made against him (CP 183). He was not provided with a copy of a formal report dated June 1, 2009 (CP 183, 267-268). He was not provided with the minutes of the commission trial (CP 183). Such disclosures are required by the trial commission pursuant to Sections 200.07 and 200.08 of the Grand Lodge's Bylaws (CP 207-208).

Without this information, neither Thomas nor his Masonic counselor (Spenser) could fully evaluate the proceedings against him, nor how to proceed further. (CP 183) Nor did the June 1, 2009 report of the trial commission clarify whether the members had sustained any or all of the charges against him by a two-thirds' vote, as required by Section 200.06 of the Bylaws, (CP 212-213).

The continuing charade of the trial by commission, and Anthony's suspensions, was next evidenced by Anthony's June 3, 2009 letter to Mr. Thomas (CP 270), in which Anthony ignored the still undisclosed recommendations of the commission (for suspensions, but with credit for time already served), and unilaterally continued his suspension of Thomas another approximately 180 days to December 19, 2009.

By suspending Thomas further, Anthony ensured that

- (i) Thomas would not be able to participate in any challenges to the suspensions at the Grand Session the following month, and
- (ii) Anthony could run for re-election as Grand Master without the embarrassment of having to address the claimed financial irregularities.

Not unexpectedly, Anthony's June 3, 2009 letter (CP 270) was silent on what specific charges had been sustained against him, and by what vote, by the trial commission, and (ii) the penalty recommended by the commission, and by what vote.

The Grand Master's continuing conflicts of interest in this matter are apparent in the fact that, pursuant to Section 205.02 of the Grand Lodge's Bylaws, the Grand Master had the right to review any verdict and recommendations of the trial commission, and "render such judgment as he shall deem just and proper." (CP 217)

Section 207.11 of the Bylaws of the Grand Lodge state that the report of a commission and the related actions of the Grand Master are to be reported for final approval to the Grand Lodge's Grand Session in July of the following year, in this case July 2009 (CP 220) Thomas' Masonic counsel, Spenser, attempted to protest at the July 2009 Grand Session what he characterized was a "kangaroo court" and unjust trial and judgment against Thomas. But, Spenser was once again frustrated in his efforts to speak out on behalf of Thomas. Anthony controlled the gavel almost the entire time, and strictly controlled what was discussed

occurred and what information was to be presented. (CP 169-170, 184-185) Those presiding over the proceedings, including Anthony, cut off Spenser's attempt to voice a challenge to Thomas' suspension and the irregular trial by commission, and insistence on a new trial or rehearing before the Grand Lodge. (CP 169, 184-185) Inconsistently, the Commission's prosecutor, Edward T. Crumb, was allowed to interrupt Spenser during the limited time he was given, and to make disparaging comments about Thomas' defense. (Supra)

Nor were the proper excerpts of the tape recording of the March 2009 Comptroller Board meeting played to the members at Grand Session, as proposed. Instead of playing back the discussion between Thomas and Anthony, which would have revealed a respectful Thomas, the only excerpts played to the Grand Session were of a misleading and heated argument between another Master Mason, i.e. George Draper, and Grand Master Anthony, at the same March 21, 2009 Comptroller Board meeting. (CP 169-170)

Spenser also attempted to introduce at Grand Session letters from Thomas' outside, non-Masonic attorney, Terry E.

Thomson, Esq. (CP 184, 279-284) Anthony refused to allow these to be read to the members present at the Grand Session (Supra)

Nor did the Grand Lodge or Anthony otherwise attempt to provide full disclosure, or a full record, to the Grand Session of the facts and circumstances relating to the illegal suspensions by Anthony, the wrongfully appointed trial commission, the wrongful exclusion of evidence by the trial commission, and the withholding from Thomas of the final report and actions of the trial commission. (CP 173)

As a result, at Grand Session in July 2009, the members ending up affirming the illegal suspension by the Grand Master, based on the incomplete record, the misleading playing of a tape recording of any argument between Anthony and Master Mason George Draper, and the suppression of the evidence and arguments offered by Spenser, counsel for Thomas. (CP 185)

Even the minutes subsequently prepared of the Grand Session in July 2009 were not accurate or complete in numerous respects. (CP 170) Among other things, they do not fully reflect the limited amount of time allotted to Spenser to speak on behalf

of Thomas, nor the manner in which this discussion was prematurely disrupted. (CP 170)

Thomas next commenced this action, since all of his efforts to challenge his suspension internally had failed. By letter dated December 1, 2009 (CP 272), Anthony (re-elected at the Grand Session in July of that year) unilaterally continued Thomas' already illegal suspension indefinitely, i.e. "until the civil matter between you and this Grand Lodge is resolved."

The further suspension, extending beyond anything previously recommended, or approved, by the trial commission, Anthony, and the Grand Lodge, was in and of itself illegal, and could not have been effected (i) after the conclusion of Grand Session in July 2009, and (ii) in the absence of new charges, a trial, and related verdict and penalty - none of which occurred. (CP 170-171, 185)

Thomas anticipates that the Grand Lodge and Anthony will claim that he was required to appeal his suspensions to the Grand Lodge's Grievance and Appeals Committee, pursuant to Section 207.01 of the Grand Lodge's Bylaws. (CP 89) Section 207.01 relates, by its terms, to appeals of decisions by the "Master" of a

subordinate lodge, not a decision of the Grand Master of the Grand Lodge. (CP 89) In addition, because of his suspension from Masonry, Thomas was not permitted to utilize the normal grievance and appeal procedures. (CP 184)

Thomas anticipates that the Grand Lodge and Anthony will claim that the Grand Master could summarily suspend Thomas on March 21, 2009 pursuant to Section 203.04 of the Bylaws. (CP 215) However, this section applies only to extreme and urgent conditions, where there is a breach of the peace or threatened breach of the peace. Furthermore, even then, pursuant to Section 203.04, a member is to be given the opportunity "to show cause instantly why he should not be punished." (CP 215)

Thomas anticipates that the Grand Lodge and Anthony will claim his failure to comply with Section 15.08 of its Constitution, and the requirement that a member of the Grand Lodge exhaust all remedies "within the Order and in a manner provided by the Constitution, laws and regulations of this Grand Lodge" before resorting to the civil courts. Anthony's and the Grand Lodge's own actions and proceedings were not being conducted "in a manner" provided by its Constitution, by laws, customs or

procedures. Thomas was precluded from seeking redress in a manner provided by this organization's laws and procedures. He did all he could to work within the organization, despite the illegal suspensions, the irregular trial commission, the irregular trial proceedings and exclusion of key witnesses and evidence, non-disclosure of the commission proceedings and report, Thomas' inability to defend himself as a result of the suspension, and the obstruction of his Masonic counsel's presentation and appeal to the membership at the July 2009 Grand Session. (CP 173-174, 186)

The Lawsuit. Thomas commenced his civil suit in the summer of 2009, seeking reinstatement, and monetary damages for the unlawful suspension, and for defamation, negligence, and the tort of outrage. (CP 3-28) The damages are further detailed in correspondence submitted previously to the Grand Lodge, dated March 26, 2009 and July 2, 2009 (CP 279-284)

In 2010 the Grand Lodge and Anthony moved to dismiss all proceedings for lack of jurisdiction for the alleged failure of Thomas to exhaust all internal remedies available to him. (CP 85-121) In opposition to the motion, Thomas presented detailed

opposing declarations by Masonic law experts William E. Spenser, Sr. (CP 176-187) and Kenneth B. Swanigan (CP 158-175), as well as member and Master Mason Jasper R. Warren, which discussed the illegality of the underlying Grand Lodge actions and proceedings, and the futility of proceeding further at the Grand Lodge level.

The trial court granted the respondents' motion in all respects on June 11, 2010, and dismissed all claims against all defendants with prejudice. (CP 293-294) A later motion for reconsideration was denied as well by order entered on July 23, 2010. (304) Thomas thereafter timely noticed his appeal. (CP 308 - 313)

#### E. ARGUMENT

##### 1. Standard of Review on Appeal.

The Grand Lodge's and Anthony's original motion to dismiss was not characterized as a CR 12(b) or CR 56 motion, but simply claimed lack of jurisdiction due to failure of Thomas to follow internal remedies. (CP 85 – 121) Substantial proof, in the form of sworn declarations, was submitted by both Anthony and

the Grand Lodge in support of the motion to dismiss, and by Thomas in opposition to the motion.

Irrespective of whether treated as a CR 12(b) or CR 56 motion, the review of the trial court's dismissal for lack of jurisdiction and failure to exhaust internal remedies should be subject to review de novo.

Questions of law are reviewed de novo. Bishop v. Miche, 137 Wn.2d 518, 523, 973 P.2d 465 (1999). Whether a court has subject matter jurisdiction is a question of law that is reviewed de novo. Bour v. Johnson, 80 Wn.App. 643, 647, 910 P.2d 548 (1996). A CR 12(b) motion to dismiss on jurisdictional grounds is reviewed de novo. Reid v. Pierce County, 136 Wn.2d 195, 200-201, 961 P.2d 333 (1998).

The summary judgment dismissal of claims for administrative negligence, on the grounds of failure to exhaust administrative remedies, is reviewed de novo. Laymon v. Washington State Department of Natural Resources, 99 Wn.App. 518, 994 P.2d 518 (Div.Two 2000). Summary judgment is proper only where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. All facts

and inferences from the facts are considered in the light most favorable to the non-moving party. Taggart v. State, 118 Wn.2d 195, 199, 822 P.2d 243 (1992).

2. The Trial Court Erred in Dismissing Thomas' Claims for Failure to Exhaust Internal Remedies.

Despite the series of acts taken to impede and frustrate Thomas' efforts to remedy his suspensions at the Grand Lodge level, Anthony and the Grand Lodge disingenuously claim that Thomas failed to take the additional step of appealing to the Grievance and Appeals Committee pursuant to Section 207.01 of the Bylaws. (CP 219) The trial court erred in accepting Anthony's and the Grand Lodge's claim on this record.

The appeal and grievance procedures proposed by respondents were not available in the circumstances. (CP 175) Section 207.01 addresses actions of a "Master", not the Grand Master. It addresses appeals from a "chartered lodge", not by a member against the actions of the Grand Master or Grand Lodge. Furthermore, Thomas' suspension deprived him of any other remedies he might otherwise have had as a member. (CP 173, 175, CP 184)

Thomas, indirectly and through his civil lawyer and his Masonic counsel, Spenser, attempted to challenge the irregularities in Anthony's suspensions. Letters of complaint were written. (CP 279-280, 281-284) Spenser attempted to present Thomas' case at the suspect trial by commission. Spenser attempted to address these matters when the trial commission's report and Anthony's actions were submitted for approval at the Grand Session in July 2009.

At each turn, and each step of the way, Thomas and his counsel were impeded, or obstructed, in seeking relief for him.

Two experts on Masonic law, Kenneth B. Swanigan and William E. Spenser, Sr., submitted declarations stating that Thomas did all he reasonably could be expected to do at the Grand Lodge level to remedy his illegal suspensions. (CP 173, CP 184). They further stated that since the trial commission, and trial, were established after Thomas' suspension they were of no legal effect, and that the membership had no legal right or authority at the July 2009 Grand Session to approve Thomas' suspensions, and no legal right or authority to approve the

recommendations and penalties handed down by the illegal trial commission. (Supra)

Mr. Swanigan attested in this regard:

All of the actions taken by the Grand Master and the Grand Lodge after Mr. Thomas' illegal suspension were illegal and invalid under Masonic Law.

(CP 180)

The Grand Lodge possibly could have remedied this situation by rejecting the Grand Master's actions, and/or by conducting its own trial at Grand Session, reaching its own conclusions on the propriety of the charges of contumacy against Thomas, and handing down its own penalties. It did not do so. The Grand Lodge possibly could have attempted to amend its Constitution and Bylaws to permit a suspension of a member by the Grand Master, in the circumstances relating to Thomas, and ratifying after the fact Anthony's actions against Thomas. (CP 170) It chose not to do so.

The trial erred in sending Thomas back to an uncooperative, incorrigible, and intransigent, Anthony and Grand Lodge. No public policy or judicial policy or fundamental act of fairness compelled such a result on this record. As thirty-nine year

member, Past Grand Master, and Past Jurisprudence Committee member Kenneth B. Swanigan attempted to inform the trial court:

The shabby treatment of Mr. Thomas by the Grand Master and the Grand Lodge is the worst I have seen in my 30+ years as a Master Mason and member of the Grand Lodge.

(CP 171)

Nor do appellate court decisions on exhaustion of remedies, or the general rule against interfering in the internal affairs of a private organization, justify dismissal of Thomas' claims on this record. The Courts have long recognized exceptions to the application of the doctrine of exhausting remedies when "it is outweighed by fairness or practicality." Orion Corp. v. State, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985).

In the first place, there is no credible remedy available to Thomas at this point. The Grand Lodge has already approved, at the July 2009 Grand Session, the Grand Master's illegal suspensions of Thomas, despite the original lack of a trial, the flawed trial by commissions, and the denial each step of the way of Thomas' rights to due process. How many more times is Thomas required to address the same issues, in the face of the

disregard and contempt already shown for the Grand Lodge's Constitution, Bylaws, customs and procedures?

Second, the Grand Lodge and Grand Master should not be allowed to deny Thomas judicial review of their ongoing illegal actions and behavior, by claiming the failure on his part to go through the "motions" and the "process" created by one more illegal suspension, one more flawed trial, or one more obstructed appeal to the Grand Lodge at Grand Session.

At what point does application of the doctrine of exhaustion of remedies become more of a club in favor of respondents and against Thomas, than furthering the otherwise legitimate goal of the courts of not interfering in the internal affairs of a private organization? Thomas respectfully submits we are well past this point, and the trial court's dismissal of his claims under the exhaustion doctrine was fundamentally unfair and should constitute reversible error on this record.

In Fowlkes v. International Brotherhood of Electrical Workers, Local No. 76, 58 Wn.App. 759, 772, 795 P.2d 135 (Div. Two 1990), petition for review denied 117 Wn.2d 1019, 818 P.2d 1098 (1991), the Court of Appeals determined that a plaintiff's

eight-month long struggle to attempt to resolve a dispute with his union was long enough, that the union had failed to provide any authority which required a union member to spend more than four months exhausting his internal remedies, and declined to stay the trial court proceedings under the exhaustion doctrine. Application of the same logic and principles to Thomas' situation would be reasonable and appropriate, where it is plain by this time that the Grand Master and Grand Lodge have no intention of acknowledging the illegality of their suspensions of Thomas, the trial by commission, or the penalties imposed, nor redressing the injustice done to Thomas.

Third, the appellate courts have recognized on a number of occasions that the exhaustion doctrine may not apply when questions exist as to whether a private "organization's proceedings were regular, in good faith, and not in violation of the laws of the order or the laws of the State." Anderson v. Enterprise Lodge No. 2, 80 Wn.App. 41, 47-48, 906 P.2d 962 (Div. Three 1995), petition for review denied 129 Wn.2d 1015, 917 P.2d 576 (1996) (quoting from Grand Aerie, Fraternal Order of Eagles v. National Bank, 13 W.2d 131, 135, 124 P.2d 203 (1942)).

Fourth, futility is another recognized exception to the exhaustion doctrine.

. . . if resort to the administrative remedies would be futile, exhaustion is not required.

Orion Corp. v. State, supra at 103 Wn.2d 456.

The futility exception to the exhaustion doctrine is premised upon the rationale that courts will not required vain and useless action. Clearly, the administrative remedies which must be exhausted are only those which promise adequate and timely relief. If the available administrative remedies are inadequate, or if they are vain and useless, they need not be pursued before judicial relief is sought.

Orion Corp. v. State, supra at 103 Wn.2d 458. Here, the trial court, in dismissing Thomas' complaint, with prejudice, not only erred in determining that he should have pursued more futile proceedings at the Grand Lodge level, but also erred in concluding that all of his claims for relief should be dismissed, with prejudice, for the failure to do so.

Unlike the facts in Anderson v. Enterprise Lodge No. 2, supra, where there was no evidence that further internal appeals would be unfair or futile, Thomas (i) had no remaining, available appeals from Anthony's March 2009 and June 2009 suspensions, and (ii) the efforts to challenge the suspensions at the Grand

Lodge level were obstructed, inherently unfair, and tainted by the playing of misleading and incorrect excerpts from the tape recording of the March 21, 2009 Comptroller's Board meeting. As to the December 2009 suspension, Thomas was faced for the third time with an illegal suspension, without Anthony's prior filing of charges, appointment of a commission, or trial. This suspension was plainly an extension of the first and second suspensions, and exemplified a continuing pattern of retaliatory actions against Thomas at the Grand Lodge level.

At the very least, the trial court was faced with substantial and genuine issues of material fact on the reasonableness of any further proceedings at the Grand Lodge. The trial court also had a history of respondents' obstruction of Thomas' discovery at the trial court level, which sought to secure copies of the tape recording, and trial commission proceedings, denied him at the Grand Lodge level. With all reasonable inferences construed in favor of Thomas, there was a compelling argument to be made that at that point in time it would have been a vain and useless act to send Thomas back to the Grand Lodge for further proceedings. The trial court erred in granting respondents' motion on this

disputed record, where credible and knowledgeable experts on Masonic law attested to the illegality of respondents' actions and the futility of any further proceedings at the Grand Lodge level.

3. The trial court erred in dismissing, under the doctrine of exhaustion of remedies, not only Thomas' claim for reinstatement, but also his demands for monetary damages for the unlawful suspension, defamation, negligence, and the tort of outrage.

Besides seeking reinstatement, Thomas' complaint demands monetary damages for his unlawful suspension, as well as for respondents' defamatory acts, and the negligent and intentional infliction of emotional distress. (CP 8)

The claims and monetary damages are referenced in the Complaint for this action (CP 8), in the March 26, 2009 and July 2, 2009 letters submitted by Thomas's civil counsel to Anthony and the Grand Lodge (CP 279 – 284), and in Thomas' May 31, 2009 Declaration in opposition to respondents' motion to dismiss.

In his May 31, 2009 declaration, Thomas stated at Paragraph 3 (CP 156):

There are no administrative remedies available through the Grand Lodge for my economic losses, nor my emotional and physical distress.

There is no evidence to the contrary.

Sending Thomas back to the Grand Lodge to address monetary damages, which were not within its jurisdiction to resolve, clearly fell within the exceptions under the exhaustion doctrine for acts which were futile, or where there was no adequate or effective remedy. Orion Corp. v. State, supra at 103 Wn.2d 458

Respondents have made no argument to the contrary. There is no evidence in the record to the contrary. The dismissal of these claims and damages constituted reversible error.

Even assuming, arguendo, Thomas failed to exhaust all appeals for the illegal suspensions at the Grand Lodge level, that failure does not alone necessitate or dictate the denial of all damages suffered from respondents' retaliatory actions and wrongful suspensions. Damages were incurred commencing with the very first suspension on March 21, 2009, well before any appeals could have been presented to the Grand Session for final resolution in July 2009. And, the Grand Lodge's unauthorized and in effect ultra vires approval at Grand Session of the illegal suspensions, all in clear violation of its own Constitution and

Bylaws, does not make Thomas' suspensions any more valid or proper.

4. The trial court erred in dismissing all claims of Thomas with prejudice.

The trial court's dismissal of all of Thomas' claims, with prejudice, was exceedingly harsh and unjustified on this record. The dismissal, with prejudice, for all intents and purposes ended any ability of Thomas to seek further redress for his suspensions and damages. A dismissal with prejudice absolved the Grand Lodge and Anthony of any further responsibility for their actions, despite the three unlawful suspensions of Thomas, multiple violations of Masonic law, and denial of Thomas' internal due process rights.

A dismissal with prejudice is "equivalent to a final judgment on the merits to which res judicata principles may apply." Krikava v. Webber, 43 Wn.App. 217, 219, 716 P.2d 916 (Div. Two 1986).

In entering a dismissal on the merits, with prejudice, the trial court unfairly precluded any further proceedings on Thomas' behalf not only at the Grand Lodge level, but also at a later date in civil court, irrespective of the adequacy,

reasonableness, or final outcome of any further, mandated proceedings at the Grand Lodge level.

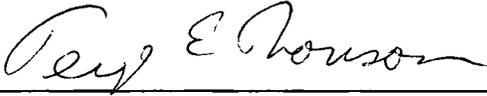
The dismissal, with prejudice, should, if nothing else, be held to constitute judicial error, and the trial court's order of dismissal reversed to that extent.

**F. CONCLUSION**

Thomas respectfully submits that the trial court's June 11, 2010 "Order Granting Defendants' Motion to Dismiss" (CP 293-294), and July 23, 2010 "Order Denying Plaintiff's Motion for Reconsideration" (CP 304), constitute judicial error and should be reversed, and this matter should be remanded to the trial court for proceedings consistent therewith.

DATED: December 14, 2010

STERNBERG THOMSON OKRENT  
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By   
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Attorneys for Appellant Charles B. Thomas, Jr.

CERTIFICATE OF SERVICE

The undersigned counsel of record for appellant Charles B. Thomas, Jr., certifies that he caused the original of this Brief of Appellant to be filed with the Clerk of the Court, and a true and correct copy to be delivered by legal messenger to counsel for respondents, James C. Fowler, Esq., Vandenberg Johnson & Gandara, 600 University Street, Suite 2424, Seattle, WA 98101-1192, on or before the close of business on December 14, 2010.



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