

69847-8

69847-8

No. 69847-8-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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Patrick Smith,  
Respondent,

v.

Congruent Software Inc.,  
Appellant.

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APPELLANT'S REPLY BRIEF

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Katie J. Comstock  
Attorney for Appellant,  
Congruent Software, Inc.

Katie J. Comstock, WSBA No. 40637  
Levy von Beck & Associates, P.S.  
600 University St., Ste 3300  
Seattle, WA 98101-1129  
katie@levy-law.com  
(206) 626-5444

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STATE OF WASHINGTON  
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## **INTRODUCTION**

Appellant, Congruent Software Inc. (“Congruent”), replies to the Brief of Respondent (“Response Brief”) filed by Patrick Smith (“Smith”), plaintiff below, as follows.

### **REPLY TO SMITH’S STATEMENT OF THE CASE**

At page 1 of his Response Brief, Smith notes three additions to the Statement of the Case found at pages 2-5 of Congruent’s Brief on Appeal.

First, Smith asserts that the trial court erred in finding that his constructive discharge claim was frivolous and advanced without reasonable cause. However, Smith has not noticed any cross-appeal as to the question whether there was sufficient support for that finding, and therefore the issue is not presently before this Court.

Second, Smith notes that “[t]here was an e-mail in January 2012 that indicated some intent [on Congruent’s part] to file [the follow-up motion on its claim for CR 11 sanctions], but nothing was done until December 2012.” A copy of the January 2012 e-mail to which Smith refers is attached hereto as Appendix A. In fact, however, the trial court’s October 24, 2011 Findings and Conclusions Regarding Defendant’s Motion for Sanctions Under CR 11 (“October 2011 Order,” CP 34) did not require action within any specific period of time. Smith, of course, does not note that he himself had failed to file any motion for entry of final

judgment until more than five months after the trial court found in his favor at trial (*see* Docket #48A, Clerk's Minutes of 3/17/11 trial at page 9 of 9, copy attached as Appendix B), and then only after the Clerk of the Court filed her Notice of Clerk's Dismissal on August 15, 2011 (Docket #52, copy attached as Appendix C).

Third, Smith states that he "raised the argument of Latches[sic] that could have provided the court with yet another justification upon which to deny Congruent's motion as untimely" in addition to arguing CR 54(d) and RCW 4.84.185, which were cited specifically in the Court's ultimate January 2, 2013 Order Denying Defendant's Motion for Award of Sanctions Under CR 11 and RCW 4.84.185 ("January 2013 Order," CP 63-64). However, the January 2013 Order was drafted by Smith's attorneys, so any failure to include Smith's laches argument as a justification for the trial court's decision cannot be deemed an oversight attributable to the trial court Judge. Smith's argument on this point is therefore purely speculative rather than factual.

#### **REPLY TO SMITH'S SUMMARY OF ARGUMENTS**

Smith's Summary of Arguments at pages 1-2 of his Response Brief suggests that his sole argument rests on the fact that Congruent's December 12, 2012 Motion for Award of Sanctions Under CR 11 and RCW 4.84.185 ("December 2012 Motion," CP 35-60) was filed 14

months after the trial court entered its Findings of Fact and Conclusions of Law in Congruent's favor on October 24, 2011. But this argument completely ignores several important facts.

First, the trial court's October 2011 Order (CP 34) in favor of Congruent was entered based on [Congruent's] Motion for Award of Sanctions Under CR 11 and Costs and Attorney's Fees filed October 11, 2011 ("October 2011 Motion") (CP 17-29). Smith does not assert that this Motion was untimely. In fact, nowhere in his Reply Brief does Smith even acknowledge Congruent's October 2011 Motion or discuss its effect on the proceedings in the trial court, much less does Smith explain why this Court should ignore it.

Second, the trial court's October 2011 Order (CP 34) cannot be interpreted other than as indicating (1) the trial court's determination that Smith was liable to Congruent for Sanctions under CR 11 and (2) the trial court's intention to fix the "appropriate" (*id.*) amount of the sanctions on a future motion. Congruent's October 2011 Motion was limited to the issue of Smith's liability for CR 11 sanctions; it contained no information on the specific dollar amounts of attorney's fees and other expenses Congruent had incurred defending against Smith's baseless claims. *See* CP 17-33, *passim*. Presentation of such information would of course require another motion to bring the matter before the trial court with notice to Smith.

Third, the October 2011 Order (CP 34) was evidently drafted by the trial court. Therefore, any ambiguity as to the time within which the further motion to determine the specific amount of sanctions was required to be filed cannot be attributed to Congruent.

### **REPLY TO SMITH'S ARGUMENTS**

#### **1. CR 54(d) Did Not Bar Congruent's Motion for CR 11 Sanctions.**

In Smith's CR 54(d) argument, he seems to contend that CR 54(d) required Congruent to file its motion for sanctions under CR 11 within 10 days of the trial court's October 2011 Order (CP 34), which Smith himself refers to as an "order," and which, indeed, fits the CR 54(a)(2) definition of "Order":

Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.

CR 54(a)(1) defines "Judgment" as:

the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies.

Because the trial court's October 2011 Order (CP 34) clearly anticipated a subsequent motion by Congruent for a final determination of the amount of the award of sanctions, it cannot qualify as a "judgment" under CR 54(a)(1). Therefore, CR 54(d) cannot apply to set a 10-day deadline

running from entry of the trial court's October 2011 Order, because under CR 54(d)(2) it applies only to motions following a "judgment" as defined in CR 54(a)(1):

Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of *judgment*.

CR 54(d)(2) (emphasis added). The trial court's October 2011 Order can in no way be interpreted as a "judgment" under CR 54(d).

Smith also argues that "[t]he motion filed by Congruent on December 12, 2012 [the December 2012 Motion] was functionally the same as a motion for fees pursuant to CR 54(d)." Response Brief at 3. In its October 2011 Motion (CP 17-29), Congruent had separately sought, in addition to and distinct from sanctions under CR 11, costs under CR 54 as the prevailing party under RCW 4.84.010 -- because Congruent had prevailed on four of Smith's five causes of action, and Smith had recovered only \$277.00 on his fifth claim for relief (*see* CP 27-28). But nothing in Congruent's December 2012 Motion sought statutory attorney's fees and costs. It should also be noted that in its October 2011 Motion, Congruent candidly admitted that it had probably missed the ten-day deadline for a motion under CR 54(d), although it felt that the dealings between Congruent and Smith's attorneys presented mitigating circumstances. *See* CP 27-28 and 30-31.

The trial court's October 2011 Order concluded in the language of RCW 4.84.185 that Smith's constructive discharge cause of action "was frivolous and advanced without reasonable cause." *Id.* Based on this conclusion of the trial court, CR 54(d) would also not apply because it specifically excepts a motion from compliance with its 10-day deadline where "otherwise provided by statute." Where a claim is "frivolous and advanced without reasonable cause," RCW 4.84.185 provides a 30-day deadline for filing a motion for "the reasonable expenses, including fees of attorneys, incurred." But Smith does not contend that Congruent's original October 2011 Motion was untimely under RCW 4.84.185, only its December 2012 Motion.

**3.<sup>1</sup> RCW 4.84.185 Does Not Apply in Any Case to Congruent's Motions for Award of Sanctions Under CR 11.<sup>2</sup>**

It was unfortunate<sup>3</sup> that the trial court's self-drafted October 2011 Order awarding Congruent CR 11 sanctions (CP 34) concluded in the language of RCW 4.84.185 that Smith's constructive discharge cause of

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<sup>1</sup> Sic: Smith's Response Brief contains no section D.2.

<sup>2</sup> The last paragraph of this section of Smith's Response Brief (at page 5) suggests that Congruent will make an argument under CR 54(e) "because the judgment was not entered in this matter per 54(e)." Smith refers to the fact that, as the prevailing party, he failed to move for entry of final judgment until the Clerk of the Court filed her Notice of Clerk's Dismissal on August 15, 2011 (*see* Appendix C), five months after the trial court found Smith to be the prevailing party at trial. Congruent declines to make such an argument.

<sup>3</sup> It was unfortunate because it opened the door to Smith's unfounded RCW 4.84.185 arguments. Nevertheless, mislabeling the basis of a CR 11 request for sanctions will not

action “was frivolous and advanced without reasonable cause” and stated that sanctions would be awarded “[u]nder CR 11 and RCW 4.84.185,” even though Congruent had not relied on RCW 4.84.185 in its October 2011 Motion (CP 17-29). Despite this apparent endorsement of the applicability of RCW 4.84.185, however, Smith’s entire argument – namely, that because Congruent’s follow-up December 2012 Motion to quantify the amount of CR 11 sanctions to be awarded under the trial court’s October 2011 Order was barred under RCW 4.84.185 because the Motion was filed 14 months later – fails because RCW 4.84.185 does not apply for at least two reasons.

RCW 4.84.185 provides in its entirety:

**Prevailing party to receive expenses for opposing frivolous action or defense.**

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party **after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party.** The judge shall consider all evidence presented at the time

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operate to negate the deterrent function of the rule. *Biggs v. Vail*, 124 Wn.2d 193, 199, 876 P.2d 448 (1994) (“*Biggs II*”).

of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

Emphasis added.

Smith does not contend that Congruent's October 2011 Motion establishing his liability for CR 11 sanctions was untimely under RCW 4.84.185. Rather, he claims that Congruent's follow-up December 2012 Motion was subject to RCW 4.84.185 and failed to meet the 30-day deadline Smith posits began running from the October 24, 2011 date of entry of the trial Court's October 2011 Order on Congruent's October 2011 Motion. But RCW 4.84.185 could not apply to those facts in the first instance because the trial court's October 2011 Order did not constitute either "a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party" as specified in RCW 4.84.185.

Furthermore, in *Biggs v. Vail*, 119 Wn.2d 129, 136-37, 830 P.2d 350 (1992) ("*Biggs I*"), the Washington Supreme Court determined that RCW 4.84.185 applies only **when an action as a whole is deemed frivolous**. The trial court's October 2011 Order noted that Congruent had prevailed on four of five of Smith's causes of action, but specifically

concluded only that Smith's "Constructive Discharge cause of action . . . was frivolous and advanced without reasonable cause." CP 34. Therefore, under *Biggs I*, RCW 4.84.185 could not apply.

#### **4. Piecemeal Appeals**

Congruent does not take issue with the argument at pages 5-6 of Smith's Response Brief that piecemeal appeals are disfavored by the courts. However, Congruent does not understand how any action or inaction on Congruent's part prevented Smith from appealing "the underlying judgment pursuant to RAP 2.4(b)" (Response Brief at 5) or cross-appealing, under RAP 2.4(a), the trial court's findings that Smith filed a frivolous claim, if indeed Smith considers them "prejudicial error" (RAP 2.4(a)).

Furthermore, in the last paragraph of his argument, Smith appears to concede his awareness of the possibility that the very appeal Congruent filed could have occurred, given that Smith felt there was no motion he could file "to finalize the matter." Response Brief at 6. It does not appear, therefore, that he "reasonably considered the matter final." (*Id.*).

**5. Congruent's December 12, 2012 Motion Was Not Barred by the Doctrine of Laches.**

While the authorities Smith cites at page 6 of his Response Brief on the issue of laches<sup>4</sup> are unassailable for what they hold, they are simply not applicable to Congruent's December 2012 Motion for CR 11 sanctions. In *Biggs II*, 124 Wn.2d at 197, the Washington Supreme Court stated:

When fashioning appropriate sanctions, courts may consider whether a party bringing a CR 11 motion gave prior, timely, informal notice of the potential violation to the offending party, but **laches or waiver principles do not apply “because a CR 11 motion is not a ‘cause of action’ as contemplated by those doctrines.”**

Emphasis added.

As indicated in the Summary of Arguments in Smith's Response Brief (at pages 1-2), Smith's sole objection to the trial court's December 2012 Order awarding Congruent \$14,475.60 in attorney's fees (*see* CP 62) was that Congruent's 2012 Motion that generated the Order came 14 months after the determination of Smith's liability in October 2011. Yet in *Biggs II*,<sup>5</sup> the Washington Supreme Court allowed a motion for CR 11 sanctions that was made approximately 4-1/2 years after trial. Smith has produced no authority and Congruent has found none that establishes a

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<sup>4</sup> *Real Progress, Inc. v. City of Seattle*, 91 Wn. App. 833, 843-44, 963 P.2d 890 (1998), and *Davidson v. State*, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991).

specific deadline for the filing of a CR 11 motion, and certainly Congruent's timing in filing its motion was well within the bounds of that allowed under *Biggs II*. And the record (CP 58) shows that Smith and Congruent were in settlement negotiations at least until October 20, 2012. It was when those finally broke down that Congruent filed its follow-up December 2012 Motion.

### CONCLUSION

The trial court erred in denying Congruent's December 2012 Motion for CR 11 sanctions as untimely under CR 54(d) and RCW 4.84.185 (CP 63) and in vacating its December 2012 Order granting Congruent's December 2012 Motion (CP 61-62). This Court should reverse these decisions, vacate the trial court's January 3, 2013 Order Denying Defendant's 2012 Motion for Sanctions (CP 63-64), and reinstate the trial court's December 2012 Order (CP 61-62).

DATED this 1<sup>st</sup> day of January, 2014.

Respectfully submitted,

LEVY • VON BECK & ASSOCIATES, P.S.

  
Katie J. Comstock, WSBA# 40637  
Attorneys for Appellant  
Congruent Software, Inc.

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<sup>5</sup> 124 Wn.2d at 203.

APPENDIX

- A. December 12, 2012 Email from M. Krishnamurthy to the Court
- B. Clerk's Minutes of March 17, 2011 Trial
- C. August 15, 2011 Notice of Clerk's Dismissal

**From:** Byrd, Elizza [mailto:Elizza.Byrd@kingcounty.gov]  
**Sent:** Tuesday, January 10, 2012 8:52 AM  
**To:** Mani Krishnamurthy; Ian Johnson (ijohnson@cnrlaw.com)  
**Subject:** RE: Case No.: 09-2-26040-1 SEA: Pat Smith vs. Congruent

Thank you.

**From:** Mani Krishnamurthy [mailto:Mani@CongruentSoft.com]  
**Sent:** Tuesday, January 10, 2012 8:23 AM  
**To:** Byrd, Elizza; Ian Johnson (ijohnson@cnrlaw.com)  
**Subject:** Case No.: 09-2-26040-1 SEA: Pat Smith vs. Congruent

Ms. Byrd-

I am due for filing papers relating to cost recovery and sanctions as a result of certain findings under CR11. I have been involved as a pro se defendant in another lawsuit that has almost been to trial over the last two months, but settled just last week. I apologise for the delay this has caused, but I expect to work on this and file it within the next 3 weeks.

Thank you for your patience.

**Mani Krishnamurthy**  
**President**

Direct: 425.460.4930  
Cell: 425.785.8596  
Reception: 425.460.0172  
Fax: 425.460.0178  
India VoIP- Wk: 425-460-5206; Hm: 425-460-5233

Congruent  
4205 148th Avenue NE Suite 100  
Bellevue, WA 98007

[mani@congruentsoft.com](mailto:mani@congruentsoft.com)  
[www.congruentsoft.com](http://www.congruentsoft.com)

**Congruent**

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## CLERK'S MINUTES

SCOMIS CODE: NJTRIAL

Judge: Michael Heavey  
Bailiff: Lisa Zimmisky  
Court Clerk: Ed Gueco

Dept. 20  
Date: 3/17/2011

Digital Record: DR W711

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**KING COUNTY CAUSE NO.: 09-2-26040-1 SEA**

**Patrick Smith vs. Congruent Software**

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### **Appearances:**

Plaintiff present and represented by Counsel Ian Johnson  
Defendant appearing by Mani Krishnamurthy, President

### **MINUTE ENTRY**

This cause comes on for trial for Breach of Contract

9:21:06 Court Convenes

9:22:10 The Court and respective counsel discuss scheduling witness and Mani Krishnamurthy representing the defendant

9:26:30 Plaintiff's motion in Limine:  
1. Probable Testimony of Absent Witnesses is Granted  
2. Employment of Attorney is Granted  
3. Witnesses Equally Available is Granted  
4. Parol Evidence is Granted

9:29:01 Plaintiff motion to admit Plaintiff's exhibit #31 is reserved

9:39:30 The Court and respective counsel discuss scheduling

9:41:10 Plaintiff present opening statements

9:42:40 The Court rule that witnesses are excluded from the courtroom



**Patrick Smith vs. Congruent Software  
King County Cause No. 09-2-26040-1 SEA**

**Date: 3/21/2011**

Judge: Michael Heavey  
Bailiff: Lisa Zimnisky  
Court Clerk: Ed Gueco

Digital Record: DR W711

**Continued from: 3/17/11**

**MINUTE ENTRY**

Parties and counsel present

9:48:47 The Court admonish the defense counsel for being late

9:51:10 Patrick Smith is sworn and cross examination continues

Defendant's exhibit #121 Offered and Admitted

10:43:42 Break recess to 11:08:20

11:34:42 Lunch recess to 01:17:48

Re-direct examination

Re-cross examination

2:18:01 The Court ask questions to the witness

Re-direct examination

Re-cross examination

2:35:09 Break recess to 2:57:14

2:57:20 Plaintiff rests

2:57:35 Defendant motion to dismiss is granted as to Breach of Contract,  
Constructive Discharge and Willful Failure to Pay Wages

3:22:10 Julie Hysmith sworn and examined on behalf of the defendant

**Patrick Smith vs. Congruent Software  
King County Cause No. 09-2-26040-1 SEA**

Cross examination

Re-direct examination

3:58:20 The Court ask questions to the witness

4:02:58 This cause is continued to 3/22/11 at 10:00 am

Court adjourn

**Patrick Smith vs. Congruent Software  
King County Cause No. 09-2-26040-1 SEA**

**Date: 3/22/2011**

Judge: Michael Heavey  
Bailiff: Lisa Zimnisky  
Court Clerk: Ed Gueco

Digital Record: DR W711

**Continued from: 03/21/2011**

**MINUTE ENTRY**

Parties and counsel present

10:15:03 The Court and respective counsel discuss witnesses and scheduling

10:19:31 Tom Strickland sworn and examined on behalf of the defendant

Cross examination

Re-direct examination

10:31:20 The Court ask questions to the witness

Re-direct examination

Re-cross examination

10:35:49 Patricia Griffith sworn and examined on behalf of the defendant

Cross examination

Re-direct examination

Re-cross examination

Re-direct examination

11:25:05 The Court ask questions to the witness

Re-direct examination

**Patrick Smith vs. Congruent Software  
King County Cause No. 09-2-26040-1 SEA**

Re-cross examination

11:34:20 Lunch recess to 1:09:33

1:10:30 Amanda Wong sworn and examined on behalf of defendant

Cross examination

Re-direct examination

2:34:55 The Court ask questions to the witness

2:35:42 Break recess to 2:58:10

Re-direct examination continue

Defendant's exhibit #122 for Identification Only

Re-cross examination

3:08:55 Mani Krisnamurthy sworn and examined on behalf of the defendant

Defendant's exhibit #123 for Identification Only

3:52:30 Cross examination continued to 3/23/11 at 9:30 am

3:52:30 Court adjourn

**Patrick Smith vs. Congruent Software  
King County Cause No. 09-2-26040-1 SEA**

**Date: 3/23/2011**

Judge: Michael Heavey  
Bailiff: Lisa Zimnisky  
Court Clerk: Ed Gueco

Digital Record: DR W711

**Continued from: 3/22/2011**

**MINUTE ENTRY**

Parties and counsel present

9:54:55 Defendant motion to reopen direct examination is granted

Defendant's exhibit #124 for Identification Only

10:32:40 Cross examination

Plaintiff's exhibit #34, 35 for Identification Only

10:55:03 Break recess to 11:14:35

Re-direct examination

Re-cross examination

12:00:30 Court and respective counsel discuss scheduling

12:01:41 This cause is continued to 3/24/11 at 9 am

Court adjourn

**Patrick Smith vs. Congruent Software  
King County Cause No. 09-2-26040-1 SEA**

**Date: 3/24/2011**

Judge: Michael Heavey  
Bailiff: Lisa Zimnisky  
Court Clerk: Ed Gueco

Digital Record: DR W711

**Continued from: 3/23/2011**

**MINUTE ENTRY**

Parties and counsel present

9:11:10 Court convenes

9:11:41 Cross examination of Mani Krishnamurthy continues

Re-direct examination

9:26:06 Patrick Smith is recalled to the witness stand on behalf of defendant in  
rebuttal

Plaintiff's exhibit #36 for Identification Only

9:37:10 The Court admits all exhibits

Plaintiff's exhibit #37 Offered and Admitted

Cross examination

Re-direct examination

Re-cross examination

10:41:56 Defendant rest

10:42:26 The Court and respective counsel discuss scheduling

10:43:10 Court in recess to 2:15 pm

2:19:34 Court convenes

**Patrick Smith vs. Congruent Software  
King County Cause No. 09-2-26040-1 SEA**

2:20:22 Plaintiff presents closing arguments  
2:47:00 Defendant presents closing arguments  
3:15:10 Plaintiff closing rebuttal  
3:21:19 The Court finds for the Plaintiff in the amount of \$277  
3:41:40 Court adjourn

FILED

11 AUG 15 AM 11:25

KING COUNTY  
SUPERIOR COURT CLERK  
E-FILED  
CASE NUMBER: 09-2-26040-1 SEA

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR THE COUNTY OF KING

SMITH

Plaintiff/Petitioner,

vs.

CONGRUENT SOFTWARE

Defendant/Respondent.

NO. 09-2-26040-1 SEA

**NOTICE OF CLERK'S DISMISSAL**  
(CMDWP)

**I. BASIS**

- 1.1 Pursuant to Administrative General Order, dated August 17, 1994, the Clerk may send a Notice of Dismissal of an action if no dispositive order is filed within 90 days of adjudication of a matter after trial.
- 1.2 The case was called for Trial on 03/17/2011 before the following Judge:  
JUDGE MICHAEL J. HEAVEY, DEPT 20
- 1.3 The Clerk has examined the record and determined that 90 days has elapsed from said adjudication and no final judgment, order or decree has been entered.

**II. ORDER**

- 2.1 The above case will be dismissed by the Court for want of prosecution unless within 14 days after the notice is mailed; a) a dispositive document is filed, or b) a party makes written application to the Court showing good cause why the case should not be dismissed and the approximate date final dispositive documents will be entered.
- 2.2 If neither of these is received, the Clerk will present an Order of Dismissal to the trial court, without further notice to the parties.
- 2.3 An invoice from the King County Office of Finance for a non-compliance fee will be mailed to you within 30 days of this Notice, pursuant to King County Code 4.71.050. Entry of a Final Disposition Order WILL NOT cancel this fee.

Mailed: 8/15/2011

BARBARA MINER  
KING COUNTY SUPERIOR COURT CLERK

Contact: David Smith ((206) 296-7872)

**(NAMES AND ADDRESSES OF ALL PARTIES)**

COGDILL, W. MITCHELL  
3 THIRTY TWO SQ  
3232 ROCKEFELLER AVE  
EVERETT, WA 98201-4317

JOHNSON, IAN M  
3232 ROCKEFELLER AVE  
EVERETT, WA 98201-4317

KRISHNAMURTHY, MANI  
4205 148 AVE NE SUITE 100  
BELLEVUE, WA 98007

WALKER, JERRY E  
2820 NORTHUP WAY STE 130  
BELLEVUE, WA 98004-1419