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COURT OF APPEALS
DIVISION ONE

69996-2

SEP 26 2013

No. 699962

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

RONALD WASTEWATER DISTRICT,
a King County Municipal Corporation,
Respondent,

v.

RODOLFO APOSTOL,
Appellant.

REPLY BRIEF OF APPELLANT

Rodolfo Apostol, pro se

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Lacey, Washington 98503
Home Phone No. (360) 491-3339

2013 SEP 25 11:12:19
COURT OF APPEALS
DIVISION ONE
CLERK OF COURT

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«1».	PLAINTIFF’S MOTION UNDER CR 60(b) (11) TO VACATE JUDGMENT.....CP1440-1451.
«2».	PLAINTIFF’S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION UNDER CR60 (b) (11) TO VACATE JUDGMENT.....CP1454-1455.
«3».	Apostol’s appeal was denied in 2011, and in January 2012 the Supreme Court denied review. Plaintiff’s Request for Judicial Notice (hereinafter “Request for Notice”). Exhibits 1- Opinion of the Washington Court of Appeal.....CP1417-1437, CP1714-1733. Exhibits 2- Order of the Washington Supreme CourtCP1734-1735.
«4».	DECLARATION OF RANDY BAKER, ATTORNEY FOR PLAINTIFF-APOSTOL.....CP1456-1458.
«6».	Prior to filing the suit Apostol approached several dozen attorneys to represent him. Each of them, including Attorney Susan Mindenbergs, who had represented Apostol in 2005 in negotiations with Defendant to end the workplace harassment, declined without reference to the merits of his case. Declaration of Randy Baker (hereinafter “Baker Declaration”), EXHIBIT 1, p. 11, EXHIBIT 2, pp. 1-2.....CP1459-1469.

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- «7». Mindenbergs has explained that, although she believed Apostol likely had a meritorious case, she declined, because he seemed too psychologically frail to withstand the stress of a discrimination suit.
Baker Declaration, EXHIBIT 2, p. 2.CP 1509.
- «8». In 2008, Apostol found one attorney who would represent him for a non-contingent fee, but still unemployed, he could not afford the fee.
Baker Declaration, EXHIBIT 1, p. 11.....CP1496.
- «9». In July 2011, the Social Security Administration found Mr. Apostol had become permanently disabled by mental illness no later than September 21, 2005 and awarded him benefits.
Baker's Declaration, Exhibit 1, pp. 1-11.....CP1459-1467.
Baker's Request for Notice, Exhibit 3, pp. 1-5...CP1470-1475.
Baker's Request for Notice, Exhibit 4, pp. 1-2...CP1476-1479.
- «10». Using these monies, after review was denied in January 2012, Mr. Apostol retained counsel that same month to explore the possibility of proceeding further with his lawsuit.
Baker Declaration, Exhibit 1, pp. 12-13.....CP1497-1498.

CITATIONS TO THE RECORD- cont.

- «11». Counsel arranged for Forensic Psychologist David Dixon, Ph.D., whose assessment had been relied upon by the Social Security Administration, to examine Mr. Apostol again in June 2012. Baker Declaration, p. 2; Request for Notice, Exhibit 3, p. 4.....CP1457,CP1474.
- «12». Dr. Dixon determined that Mr. Apostol’s longstanding mental illnesses had been aggravated by discrimination and harassment at Ronald Wastewater District and developed into post-traumatic stress syndrome by 2005. Baker Declaration, Exhibit 4, pp. 4-5....CP1479--1480.
- «13». As a consequence, from 2005 through at least 2008 Mr. Apostol was incompetent both to testify as a witness on his own behalf, and to represent himself in this litigation. Baker Declaration, Exhibit 4, pp. 46.....CP1479-1481.
- «14». Clinical psychologist Hanan Berman, Ph.D., who had treated Apostol in the late 1990’s and in 2006 substantially, shared Dr. Dixon’s assessment of Apostol’s condition. Baker Declaration, Exhibit 7, p. 3.CP 1546.
- «15». It also was consistent with the observations of Kenneth Mayeda, M.D., who had treated Apostol for depression, anxiety and insomnia since the late 1990’s, and who found these conditions became increasingly severe in 2004, and that this likely resulted from Mr. Apostol’s adverse treatment at work. Baker Declaration, Exhibit 9, pp. 1-2...CP1553-1554.

CITATIONS TO THE RECORD- cont.

- «16». Based on his June 2012 examination of Mr. Apostol, Dr. Dixon concluded that Apostol, although still substantially impaired, has improved sufficiently to testify on his own behalf in this suit, if represented by counsel.
Baker Declaration, Exhibit 4, p. 6.....CP1520.
- «17». Limitations imposed by Dr. Dixon’s schedule accounted for most of the 11-month delay between Mr. Apostol’s retaining counsel and the filing of this motion.
Baker Declaration pp. 2-3.....CP1481-1482.
- «18». Plaintiff –Apostol relies on the declarations of Attorney Randy Baker.
- Attorney Susan Mindenbergs [hereinafter “Baker Declaration, Ex. 2”].....CP1507-1509.
Forensic Psychologist David Dixon, Ph.D. [hereinafter “Baker Declaration, Ex. 4”].....CP1514-1520.
Clinical Psychologist Hanan Berman, Ph. D. [hereinafter “Baker Declaration, Ex. 7”].....CP1543-1547.
Kenneth Mayeda, M.D. [hereinafter “Baker Declaration, Ex. 9”].....CP1552-1554.
Stephen Paulis [hereinafter “Baker Declaration, Ex. 3”].....CP1510-1513.

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- Plaintiff Rodolfo Apostol [hereinafter “Baker Declaration, Ex. 1”].....CP1484-1497.
The Report and Vita of Forensic Psychologist David Dixon, Ph.D., [hereinafter “Baker Declaration, Ex. 5 and Ex. 6,” respectively].....CP1521-1542.
Vita of Clinical Psychologist Hanan Berman, Ph.D. [hereinafter “Baker Declaration, Ex. 8”].....CP1548-1551.
- «19». Opinion of the Washington Court of Appeals and the Order of the Washington Supreme Court, respectively in *Apostol v. Ronald Wastewater District*, No. 65434-9-1.....CP1715-1735.
- «20». *Apostol v. Ronald Wastewater District*, No. 86401-2 [hereinafter “Request for Notice, Ex. 1 and Ex2 respectively].....CP1715, CP1735.
- «21». June 22, 2011 Findings of the Social Security Administration in the case of Rodolfo Apostol.....CP1499-1503.
- «22». July 1, 2011 letter from the Social Security Administration awarding benefits to Mr. Apostol [hereinafter “Request for Notice, Ex. 3 and Ex. 4,” respectively].....CP1470-1478.
- «23». Ms. Mindenbergs, who believed Mr. Apostol likely had a meritorious case for discrimination and retaliation,

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declined Mr. Apostol's request in the fall of 2005 to represent him in a discrimination suit against Ronald Wastewater precisely because she deemed his mental condition rendered him incapable of enduring the stress of such a lawsuit. Baker Declaration, Ex. 2, p. 2.

<1>.....CP1509.

<1> That more than one dozen attorneys declined to represent Mr. Apostol in this suit, all citing reasons unrelated to the merits of his case, further indicates Mr. Apostol's inability to competently testify on his own behalf was manifest, and prevented him from obtaining counsel. See Baker Declaration, Ex. 1, p. 11. This incompetence rendered the one offer of representation Apostol received functionally useless. The non-contingent fee demanded, which Apostol could not afford, also rendered the offer. Baker Declaration, Ex. 1, p. 11....CP1495.

«24». Court of Appeals observed in affirming this Court's grant of summary judgment to the defendant. Request for Notice, pp. 2-6.....CP1455-1459.

«25». Indeed, Mr. Apostol had no litigation strategy and conducted no discovery. Baker Declaration, Ex. 1, p. 12.....CP1447.

«26». The harassment itself also is actionable, since it continued to within three years of his August 28, 2008 lawsuit, inter alia, by arbitrarily denying Apostol overtime eligibility beginning August 31, 2005 and the General Manager and Apostol's Supervisor falsely

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charging him with safety violations, on September 21, 2005, which was tantamount to announcing his discharge, since Apostol was on probation, and thus traumatizing him.

Baker Declaration, Ex. 1, pp. 6-10; Ex. 4, pp. 3- 5; Ex. 7, pp. 2-3; Ex. 9, pp. 1-2;.....CP1445-1449, CP1481-1483, CP1545-1546 ,CP1553-1554.

- «27». Apostol’s termination in 2006, putatively for failing to appear at work and for not appearing at a Loudermill hearing, also amounted to continued harassment and indeed, to a discriminatory as well as a retaliatory termination.
Request for Notice, Ex. 1, p.6[9].....CP1493.
- «29». The doctor’s notes Apostol provided sufficed to excuse him from work under the collective bargaining agreement; Defendant’s contention the notes were insufficient could reasonably be inferred to have been pretextual, particularly in light of the above-noted history of harassment and discrimination.
Baker Declaration, Ex. 1, pp. 7-10, Ex. 9, p. 2.....CP1491-1494, CP1554.
- «30». Additionally, the notes from Apostol’s doctor, Apostol’s communications to Defendant and Defendant’s having previously ordered, as a condition of employment, that Apostol receive psychotherapy gave Defendant reason to know that Apostol’s mental illness may have rendered him unable to defend himself at the hearing.
Baker Declaration, Ex. 1, p. 2.....CP1486.

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- «31». Apostol was not even informed, and did not know the object of the hearing was to determine whether he would be terminated.
Baker Declaration, Ex. 1, pp. 9-10.CP 1493-1494.
- «32». Finally, since Apostol can show he was terminated, although he was performing his job well, was replaced by a non-Filipino, and the above-noted history of mistreatment, his evidence already suffices to overcome summary judgment on a discriminatory termination claim based on race.
Baker Declaration, Ex. 1, pp. 3-4, 7, 10; Ex. 3, pp. 1-3.....CP1462-1463, CP1466, and CP1471-1473.
- «33». Lacking both counsel and the competence to represent himself, it was reasonable that plaintiff attempted to preserve his rights by timely appealing the judgment, and then seeking review in the Supreme Court.
Baker Declaration, Ex. 1, p. 12.....CP 1496.
- «34». Apostol used money he obtained from his 2011 award of social security benefits to retain counsel.
Baker Declaration, Ex. 1, pp. 12-13...CP1496-1497.
- «35». The intervening 11 months were required principally to accommodate the schedule of the forensic psychologist, David Dixon, Ph.D., who already was familiar with Mr. Apostol's condition and his harassment at work, and therefore uniquely well-suited to provide expert evidence for this motion.

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Baker Declaration, pp. 2-3, [Page3-4], Ex. 4, pp. 2-6;
Request for Notice, Ex. 3, p.
4.....CP1456-1457, CP1516-1520.

- «36». PLAINTIFF’S OPPOSITION TO DEFENDANT’S
MOTION TO STRIKE
DECLARATIONS.....CP1737-1748.
Dixon Declaration, pp. 1:26- 2:1.....CP1515-1520,
CP1522-1531.
- «37». Dr. Berman received his Ph.D. in psychology from the
University of Arizona in 1981 and practiced as a clinical
psychology for more than 25 years.
Berman Declaration, p. 1:1-4.....CP1544-1547.
- «38». Dr. Berman examined and treated Mr. Apostol in 1997,
1999 and in 2006 in conjunction with problems Mr.
Apostol experienced from his employment at Defendant
Ronald Wastewater District.
Berman Declaration, p. 2: 1-3, 9-23....CP1739-1740,
CP1544-1546.
- «39». Based thereon Dr. Berman stated that Mr. Apostol’s
mental health deteriorated in 1997 and 1999 to the year
2006, that the symptoms he observed in 2006
.....and that the deterioration he observed in
Mr. Apostol’s mental health appeared to have been
caused largely by harassment Mr. Apostol believed
himself to experienced working at Ronald Wastewater.

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- Berman Declaration, p. 3: 5-23.....CP 1546,
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- Mayeda Declaration, p. 1: 18-22.CP 1553-1554,
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- Mayeda Declaration, p. 1:22- 23.....CP 1553-1554,
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- Mayeda Declaration, p. 1:24-2:20.....CP1553-1554,
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- Mindenbergs Declaration, p. 1:17-19.....CP1508-1509,
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- Mindenbergs Declaration, p. 2:1-17.....CP1508-1509,
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- Paulis Declaration, p. 1: 20-22.....CP1511-1513,
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- Paulis Declaration, p. 2:1- p. 3: 15.....CP1511-1513,
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- Apostol Declaration, p. 4:5-6.....CP1485-1497, *infra.*
- Apostol Declaration, p. 11:9-14.....CP1485-1497, *infra.*
- Mayeda Declaration, p. 2:18-20.....CP1553-1554, *infra.*
- Plaintiff’s Opposition to Defendant’s Motion to Strike
Declarations, p. 4.....CP1737-1748, *infra.*
- «40». EXHIBIT 3, Medical Release Authorization to Hanan
Berman, Ph.D.,.....CP1680-1681.
- «41». Apostol’s letter to Hanan Berman, Ph. D Subject:
Worker’s Compensation Claim for Mental
Injury.....CP1682.

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- «42». Hanan Berman, Ph. D Reply.....CP1683-1686.

- «43». EXHIBIT 4, Medical Release Authorization to Kenneth Mayeda, M.D.....CP1687-1713.

- «44». EXHIBIT 5, Apostol v. Ronald Wastewater District, No. 65434-9-1, “Baker Declaration, Opinion of the Washington Court of Appeals [hereinafter “Request for Notice, Exhibit 1].....CP1714-1733.

- «45». EXHIBIT 6, Apostol v. Ronald Wastewater District, No. 86401-2. “Baker Declaration, Order of the Washington Supreme Court [hereinafter “Request for Notice, Exhibit 2].....CP1734-1735.

- «46». PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO STRIKE DECLARATION.....CP1737-1748.

- «47». KING COUNTY CAUSE NO.: 08-2-29336-0 SEA, Apostol v. Ronald Wastewater Dist., MINUTE ENTRY.....CP1749.

- «48». ORDER DENYING DEFENDANT RONALD WASTEWATER DISTRICT’S MOTION TO STRIKE DECLARATIONS, Apostol v. Ronald Wastewater Dist., CAUSE NO.: 08-2-29336-0 SEA, FEB. 8, 2013.....CP1750-1753.

- «49». ORDER DENYING PLAINTIFF’S MOTION FOR ORDER TO SHOW CAUSE, Apostol v. Ronald

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- Wastewater Dist., CAUSE NO.: 08-2-29336-0 SEA,
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- «50». NOTICE OF APPEALS TO COURT OF APPEALS,
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- «51». DESIGNATION OF CLERK’S PAPERS, NO.: 08-2-
29336-0 SEA, Apostol v. Ronald Wastewater District,
March 20, 2013,..... CP1768-1769.
- «52». NOTICE OF APPEALS TO COURT OF APPEALS-
ADDENDUM, March 7, 2013. CAUSE NO.: 08-2-
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- «53». NOTICE OF APPEALS TO COURT OF APPEALS-
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TRIAL «54».DEMANDED, , Apostol v. Ronald
Wastewater District.....CP1770-1789.
- «55». BENCH TRIAL SUPERIOR COURT SUMMARY
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ARGUMENT

I. MENTAL ILLNESS NEED NOT RISE TO THE LEVEL OF LEGAL INCOMPETANCE TO WARRANT RELIEF UNDER CR 60.

The Superior Court and Respondent concludes Apostol is not incompetent and therefore “relief is unwarranted” under CR 60(b) (11) as stated by the Trial Judge (CP1765) and argued by the Respondent. CP1578-1595, *supra*.

The Superior Court and Respondent is wrong. Nowhere in CR 60(b)(11) or the Federal counterpart CR 60(b) (6) states incompetence in a litigant (or counsel) as a requirement to warrant relief under the rule. The Superior Court and Respondent is wrong and inapposite as noted in *Randall v. Merrill Lynch* 820 F.2d 1317, 1319, 1321 (D.C. Cir. 1987) and in this court in *Barr v. MacGugan*, 119 Wn. App. 43, 48 (2003). CP1444-1445.

In August, 1984, Laurence Randall suffered an attack of acute, stress-related anxiety disorder and was certified as fully disabled by the State of California. Mr. Randall's doctors directed him not to participate in any cross-country litigation because of serious risk of suffering a heart attack or stroke. Mr. Randall's inability to work coupled with the medical costs necessitated by his illness depleted the Randalls' financial resources. *Randall v. Merrill, Ibid.* In *Randall*, the lower court found Mr. Randall suffered a disabling illness that would have permitted his participation in the litigation only at the risk of even greater disability. The D.C. Circuit Appeals Court stated:

“We find that the district court did not abuse its discretion in determining that this combination of health and financial considerations was sufficient to permit relief under Rule 60(b)(6).”

In *Barr v. MacGugan*, 119 Wn. App. 43, 48 (2003), this court stated:

“Barr's attorney suffered from severe clinical depression-not incompetence or deliberate inattention to his workload. We find no abuse of discretion, because her attorney's mental illness, of which Barr was unaware, constituted extraordinary circumstances warranting relief from the judgment.”

Furthermore, the Ninth Circuit Court of Appeals has held that an attorney's gross negligence may be grounds to set aside a judgment under Fed. R. Civ. Pro. 60(b)(6), the federal “catch-all” counterpart to CR 60(b)(11). *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164 (9th Cir.2002).

Under *Tani*, relief can be granted where the attorney's conduct essentially “vitiat[es] the agency relationship that underlies our general policy of attributing to the client the acts of the attorney.”

Tani, 282 F.3d at 1171. This decision is in accord with the majority of federal courts, including those that have considered an attorney's mental illness or other disability as grounds for granting relief to an unaware client. See, e.g., *United States v. Cirami*, 563 F.2d 26 (2d Cir.1977) (vacating default judgment resulting from attorney's mental illness),(CP1444); *L.P. Steuart, Inc. v. Matthews*, 329 F.2d 234 (D.C.Cir.1964) (holding that relief justified where personal problems of counsel caused him to grossly neglect a diligent client's case and mislead the client).

In *Roland v. Rivera*, No. 9:07-CV-00230, 2007 U.S. Dist. LEXIS 41522, at p. *4 (N.D.N.Y. June 6, 2007), relief was granted based on

plaintiff's pro se status and asserted mental disability. In Davenport v. Tribley, No. 2:07-CV-14248, 2011 WL 669240, at p. *3 (E.D. Mich. Feb. 17, 2011, relief was granted based on petitioner's learning disability and reliance on other prisoners for assistance).

Here, it is undisputed Apostol appeared pro se throughout the litigation process. As a non-attorney, Apostol wrote his own briefs and learned the law online. Apostol appeared pro se in oral arguments in Superior Court and the Court of Appeals, despite suffering severe mental illnesses and medical disabilities. «4», «7», «11», «12», «14», «15», «18», «23», «26», «29», «39», «41», «42».

Furthermore, Apostol was unemployed and had no monies which he relied on his family for support. «8».

In July 2011, the Social Security Administration found Mr. Apostol had become permanently disabled by mental illness no later than September 21, 2005 and awarded him benefits. Baker Declaration, Exhibit 1, pp. 10-11; Request for Notice, Exhibit 3, pp. 1, 5, Exhibit 4, pp. 1-2. CP1459-1467, CP1470-1475. «9», «22», «21».

Using these monies, after review was denied in January 2012, Mr. Apostol retained counsel that same month to explore the possibility of proceeding further with his lawsuit. Baker Declaration, Exhibit 1, pp. 12-13. CP1497-1498. «10».

Applying these same parameters from Randall and Barr, Apostol's severe mental illness and disability and financial hardship, constitutes the "extraordinary circumstances" application under rule CR60(b)(11) and warranting relief from the judgment.

II. MOREOVER, THE SUPERIOR COURT ABUSED ITS DISCRETION BY ENTIRELY DISREGARDING THE OTHER GROUND FOR RELIEF RAISED IN APOSTOL'S MOTION.

Other Grounds For Relief Under CR 60(b) (11) "extraordinary-circumstances".

1. Apostol's Failure to Secure Representation Due to His Severe Mental Illness. «6», «7», «8», «10», «12», «23», «1», «25».
2. Apostol's Severe Financial Hardship. «8».
3. Judicial Notice Request Under Section IV. Evidence Relied Upon. «4», «18», «29».
4. Judicial Notice Request Under Section V. Authority. Baker's Declaration, Exhibits 1-9. «18», «36».
5. The Trial Court Abused Its Discretion By Entirely Disregarding a Social Security Administrative Law Judge (ALJ) Finding Apostol Totally Disabled on September 21, 2005. «9», «21», «22».

Apostol's Motion - Section IV. EVIDENCE RELIED UPON (CP1442).

Apostol relies on the declarations of Attorney Randy Baker, Attorney Susan Mindenbergs, Forensic Psychologist David Dixon, Ph.D., Clinical Psychologist Hanan Berman, Ph.D., Kenneth Mayeda, M.D., Stephen Paulis, Maintenance Manager

and Safety Manager Ronald Wastewater District, Appellant-Plaintiff Rodolfo Apostol. Opinions by the Washington Court of Appeals and the Order of the Washington Supreme Court, respectively in Apostol v. Ronald Wastewater District, No. 65434-9-1 and Apostol v. Ronald Wastewater District, No. 86401-2, the June 22, 2011 findings of the Social Security Administration in the case of Rodolfo Apostol, and the July 1, 2011 letter from the Social Security Administration awarding benefits to Mr. Apostol, as well as the papers and pleadings already on file in this case and on any reply, supplemental matter and/or oral argument and/or testimony this Court deems appropriate. CP1442-1443.

Apostol's Motion- Section V. AUTHORITY (CP1443).

- A. THE AGGRAVATION OF PLAINTIFF'S MENTAL ILLNESSES BY YEARS OF DISCRIMINATION AND HARASSMENT AT WORK RENDERED HIM UNABLE TO COMPETENTLY TESTIFY ON HIS OWN BEHALF, TO RETAIN COUNSEL OR TO REPRESENT HIMSELF IN THIS LAWSUIT. CP1443-1447.
- B. While Mr. Apostol Was Unable To Testify For Himself Or Effectively Represent Himself When He Brought This Suit, There Is Good Reason To Believe That, With Counsel, Mr. Apostol Can Prevail Now That His Mental Illness Has Somewhat Abated. CP1443-1450.

- C. Defendant is Not Prejudiced by the Duration of Time Between Entry of Judgment and This Motion, and Mr. Apostol Acted Reasonably to Bring this Motion. CP1450-1451.

The Trial Court Abused Its Discretion

The Superior Court disregarded Apostol's showing that his mental illness prevented him from securing counsel on a contingent fee basis, the only basis on which he could afford counsel, and that as the Ninth Circuit observed in *Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301, 1310 (9th Cir. 1981). The Ninth Circuit states:

“The litigating of a civil rights suit is so complex that where a civil rights plaintiff must proceed pro se he in effect does not have the opportunity to litigate his suit.” CP1447.

In *Bradshaw*, appellant Nancy Bradshaw, acting in propria persona, filed sex discrimination action in early 1975, alleging that she was unlawfully denied employment by the Zoological Society in 1969 and again in 1971. She had earlier filed a charge with the Equal Employment Opportunity Commission (EEOC) and the EEOC had found "reasonable cause" to believe that the Zoological Society discriminated against Bradshaw in denying her application for the position of education director at the Zoo. *Ibid.*

In April of 1975, the district court granted summary judgment to the Zoological Society, finding Bradshaw's claims under both Title VII and section 1983 to be time-barred. Bradshaw

appealed. Nearly three years later, a panel of the Ninth Circuit court reversed both determinations, and remanded the case for further proceedings. *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066 (9th Cir. 1978).

Bradshaw filed a motion for appointment of counsel pursuant to 42 U.S.C. section 2000e-5(f) (1) (B), 3 and for leave to proceed in forma pauperis. Supporting affidavits were filed detailing her unsuccessful efforts to obtain an attorney and her impecunious financial situation. The district court granted Bradshaw leave to proceed in forma pauperis and denied her motion for appointment of counsel.

On her appeal for appointment of counsel, the Ninth Circuit court further states:

“The decision to deny the assistance of an appointed attorney to a layman unschooled in the law in an area as complicated as the civil rights field is truly too important to be deferred until a resolution on the merits can be had. Such an individual likely has little hope of successfully prosecuting his case to a final resolution on the merits.”
Ibid., 662 F.2d 1301, 1310 (9th Cir. 1981).

Here, the Superior Court abused its discretion by entirely disregarding the ground for relief raised in Apostol’s motion.

CP1440-1451. In Apostol’s Motion, he states:

“Prior to filing the suit Apostol approached several dozen attorneys to represent him. Each of them, including Attorney Susan Mindenbergs, who had represented Apostol in 2005 in negotiations with Defendant to end the workplace harassment, declined without reference to the

merits of his case. Declaration of Randy Baker (hereinafter “Baker Declaration”), Exhibit 1, p.11, Exhibit 2, pp. 1-2.

Mindenbergs has explained that, although she believed Apostol likely had a meritorious case, she declined, because he seemed too psychologically frail to withstand the stress of a discrimination suit. Baker Declaration, Exhibit 2, p. 2. In 2008, Apostol found one attorney who would represent him for a non-contingent fee, but still unemployed, he could not afford the fee. Baker Declaration, Exhibit 1, p. 11.

It is undisputed that Apostol was in extreme financial hardship. He had no monies, unemployed, no Medical Health Insurance or no money for his medications, homeless and had to move in with his parents for support and had to borrow money from his bank.

The “extraordinary circumstances” Apostol presents in his case mirrors both cases found in Randall and Barr. As in Randall and Barr, under CR 60 (b) (11), the courts grants power to vacate a judgment for any “other reason justifying relief from the operation of the judgment.” *Suburban Janitorial Servs. V. Clarke Am.*, 72 Wn. App. 302, 311, 863 P.3d 1377 (1993). CP1443.

As appropriate, in Apostol the Court of Appeals should do the same “to accomplish justice”. *Klapprott v. United States*, 335 U.S. 601, 614-615, 695 S. Ct., 384, 93 L.Ed.2d 266 (1949). CP1443.

Social Security Administration Documents.

Washington's Supreme Court stated that in order to be admissible under RCW 5.44.040, a public document must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion. The subject matter must relate to facts which are of a public nature, it must be retained for the benefit of the public and there must be express statutory authority to compile the report. *State v. Monson*, 113 Wn.2d 833, 839, 784 P.2d 485 (1989) (quoting *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941)).

A trial court's admission or refusal of evidence lies within the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion. *Norris v. State*, 46 Wn. App. 822, 826, 733 P.2d 231 (1987). RCW 5.44.040 provides:

“Copies of all records and documents on record or on file in the offices of the various departments of the United States . . . shall be admitted in evidence in the courts of this state.”

And, although there is no Washington law addressing the admissibility of Social Security decisions, Ninth Circuit case law holds administrative decisions admissible even if they contain conclusions so long as the conclusions are factually based and trustworthy under Federal Rule of Evidence (FRE) 803. *Baldwin v. Rice*, 144 F.R.D. 102, 104 n.3 (E.D. Cal. 1992) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 102 L. Ed. 2d 445, 109 S. Ct. 439 (1988)).

Citing GOODMAN v. BOEING COMPAN , 75 Wn. App. 60, July 1994: In Monson, the Goodman court stated that Monson was unclear as to the persuasiveness of federal cases. Exercising its discretion, the court carefully reviewed the administrative law judge's decision and determined that it was trustworthy under FRE 803, suggested redaction of certain statements, and permitted Boeing to redact still others. We find no error here. <1>

<1> We note that the facts the document relied on are already part of the trial record. Pages 1-3 of the Social Security decision contained Goodman's medical records and a description of her functional limitations and depression, all of which is in the record. Page 4 set forth a vocational expert's opinion on the absence of jobs Goodman could do in the regional or national economy. At trial, vocational counselor Kent Shaffer testified to the same effect.

In Goodman, a former employee sought damages for handicap discrimination, negligent infliction of emotional distress, intentional infliction of emotional distress, and deliberate injury under RCW 51.24.020.

The Superior Court for King County, No. 90-2-24670-1, George A. Finkle, J., on September 25, 1992, entered a judgment on a verdict in favor of the plaintiff on the handicap discrimination and negligent infliction of emotional distress claims. Court of Appeals held:

“That the Industrial Insurance Act (IIA) did not bar the Plaintiff's handicap discrimination claim, ...that the admission of a Social Security decision was proper, that a nurse was competent to testify concerning the plaintiff's future medical condition, that the damage award for the

expenses of a future caretaker was proper, that the employer was not prejudiced by the testimony of an occupational therapist, ... the court affirms the judgment.” *Ibid.*

In Goodman, the case was tried to a jury. The jury awarded Goodman (a) lost past earnings and earnings capacity, (b) lost future earnings and earnings capacity, (c) for pain, suffering, emotional distress and loss of enjoyment, (d) for disfigurement, and (e) for future medical expenses, household help and other nonmedical expenses. Plus, the court awarded Goodman attorneys' fees and costs.

Here, Apostol's Motion for Relief to the Superior Court, Apostol submitted duplicate copies of his Social Security documents he receive from the Social Security Commissioner and the Social Security Administrative Law Judge. Apostol request judicial notice to these documents. CP1454.

As in Goodman, here in Apostol, we can note the facts the Social Security documents are already part of the trial record. Pages 1-5 of the Social Security decision (CP1471-1475) contained Apostol's medical records and a description of his functional limitations and depression and Post-Traumatic-Stress-Disorder (PTSD), all of which is in Apostol's record. Page 1 (CP1471) set forth an impartial vocational expert's opinion, Mr. Joseph A. Moisan appeared at the hearing and voiced on the absence of jobs Apostol could do in the regional or national economy.

In Goodman, she suffered a physical injury, right arm tennis elbow, for which she was compensated under the IIA. Here, similarly Apostol

suffered a physical injury, a bone stress fracture in his left wrist, for which Apostol was compensated under the IIA.

In Goodman, Boeing correctly asserts that in instruction 19 the court instructed the jury to consider awarding Goodman damages based on Goodman's mental and physical emotional distress: pain, suffering and emotional distress, both mental and physical, experienced in the past and present and with reasonable probability to be experienced in the future., for which she was compensated under the IIA.

Here in Apostol, Court of Appeals upon permitting and Vacation of Judgment, Reverse and Remand similar damages based on Apostol's mental and physical emotional distress: pain, suffering and emotional distress, both mental and physical, experienced in the past and present and with reasonably probability to be experienced in the future.

III. WHILE RESPONDENT URGES THE COURT CONSIDER THE BURDEN ON THE DEFENDANT THAT CONTINUED LITIGATION IMPOSES, IT IS CRUCIAL THE COURT CONSIDER THE BURDEN SUFFERED BY APOSTOL IN BEING UNABLE TO RECOVER DAMAGES FOR THE EXTRAORDINARY INJURY RESPONDENT'S CONDUCT HAS IMPOSED ON HIM-AN INJUSTICE RENDERED ALL THE MORE GROTESQUE BY THE CONSIDERABLE EVIDENCE THAT APOSTOL'S PRIOR INABILITY TO OBTAIN COUNSEL, AND THEREBY TO PROSECUTE HIS

CLAIM WAS CAUSED BY THE UNLAWFUL CONDUCT
FOR WHICH APOSTOL SEEKS REDRESS.

As stated in *Werner v. Carbo*, 731 F.2d 204, 207 (4th
Cir.1984):

“Additional legal costs, however, are the inevitable result
whenever a judgment is vacated.” *Ibid.*

And stated in *Randall v Merrill Lynch*:

“Yet Rule 60(b) certainly contemplates that some
judgments will be vacated. In the circumstances of this
case, particularly given the fact that the previous, abortive
litigation can hardly have imposed significant costs on
Merrill Lynch, we find that the prospect of future litigation
costs does not rise to the level of unfair prejudice.” *Ibid.*

The Court of Appeals can make similar reasoning here in
Apostol’s suit against Ronald Wastewater District. Apostol can
no longer work in his profession as a Professional Engineer
which he was educated and trained for. The damages done by the
Defendant: the mental, emotional and physical scars forever
imbedded in Apostol’s psyche, the many years of pain and
suffering he and his family endured in this ordeal vindicating his
rights as a law abiding American citizen; nowhere rise to the
level of Defendant’s burden upon litigation cost or unfair
prejudice.

CONCLUSION

PRAYER FOR RELIEF

Apostol prays for VACATE JUDGMENT, REVERSE and REMAND FOR NEW TRIAL AND CLAIM FOR ACTUAL DAMAGES.

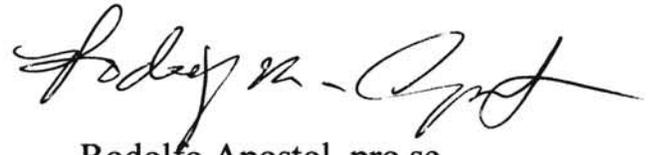
WHEREFORE, the Appellant prays that this Court assume jurisdiction of this cause, the Respondent be cited to appear, and after trial by jury or by default, a judgment be entered against the Respondent for its violations of state and federal law and public policy as follows:

- A. The Appellant's back pay, future lost wages, pain and suffering damages, and other traditional economic and non-economic losses in an amount to be proven at trial, to be assessed against the Respondent.
- B. A declaration that the Respondent is guilty of violating the laws.
- C. Punitive damages, injunctive relief or other relief as may be awarded in law or equity, or by statute.
- D. Reasonable attorneys' fees, cost, and interest as may be provided by contract, statute, or recognized grounds in equity.

- E. Where discrimination is found, damages as may be awarded under federal TITLE VII, as incorporated by reference in RCW 49.60.
- F. Such other and further relief as the court deems just.

September 26, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rodolfo M. Apostol". The signature is fluid and cursive, with a long horizontal stroke at the end.

Rodolfo Apostol, pro se

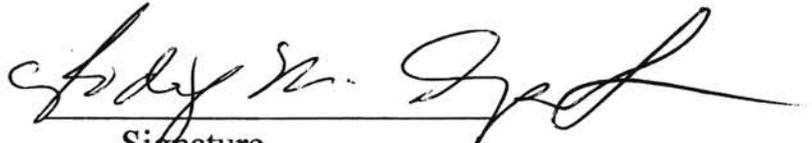
CERTIFICATE OF SERVICE

I, Rodolfo Apostol, hereby certify that on September 26, 2013, I served copies of Appellant's Reply Brief on the following parties by way of U.S. mail.

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September 26, 2013
Date


Signature

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