

No. 72225-5-1

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

KARL BENZ and CATHERINE RILEY,

Appellants

v.

JOHN RASHLEIGH, an individual,
PETER C. OJALA, an individual,
CARSON LAW GROUP, PS, a Washington corporation,
and DOES I thru V, inclusive,

Respondents

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APPELLANTS' BRIEF

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INTRODUCTION

This case involves Appellants Karl Benz and Catherine Riley's Complaint for Deceptive Acts and Business Practices (Perjury), and for Conspiracy (the 'Complaint') against Respondents John Rashleigh, Peter C. Ojala and Carson Law Group, PS, in violation of RCW 19.86, Washington State's Consumer Protection Act (the 'CPA').

This appeal relates to the dismissal of the Complaint against Respondent John Rashleigh ('Rashleigh'), as noted in the first Notice of Appeal filed on July 16, 2014. This appeal is also related to the dismissal of the Complaint against Respondents Peter C. Ojala ('Ojala') and Carson Law Group, PS, ('Carson') as noted in the second Notice of Appeal filed on August 20, 2014. The appeals were consolidated by this Court on October 6, 2014.

This matter stems from a private dispute where Rashleigh provided professional services to Ojala and Carson that damaged Appellants Karl Benz ('Benz') and Catherine Riley ('Riley'). The acts alleged occurred in the course of Respondents' businesses which are advertised to the general public.

Benz and Riley's claims stem from the documented perjury and considerable evidence of conspiracy committed by and among Rashleigh, Ojala and Carson (collectively 'Respondents') in submitting documents signed under oath in a separate, unrelated lawsuit. As a

result of the perjury and conspiracy committed by Respondents, Benz and Riley suffered monetary and non-monetary injury and seek compensation from Respondents for damages.

The Trial Court improperly granted Rashleigh's Motion for Judgment on the Pleadings Per CR 12(b)(6) (the 'Rashleigh Motion') dismissing Benz and Riley's Complaint, as there is sufficient legal basis for the claims asserted against Respondents.

From its comments, it appears the Trial Court intentionally disregarded the facts and documentary evidence set forth in the Complaint and Benz and Riley's Response to the Rashleigh Motion. The Trial Court abused its discretion and erred by failing to consider the true facts and evidence provided with the Complaint, and further by failing to apply applicable statutes and legal precedent.

The Judge in the Trial Court failed to recuse himself upon motion by Benz and Riley at the hearing on the motion of Ojala and Carson (the 'Ojala/Carson Motion').

The Trial Court further improperly granted summary judgment to Ojala and Carson as their motion failed to present any uncontroverted facts that there was no genuine issue of material fact.

Benz and Riley respectfully request this Court reverse the Trial Court's two orders of dismissal and remand the case so that it may proceed.

ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in granting the Rashleigh Motion for dismissal of the action pursuant to CR 12(b)(6) for failure to state a claim upon which relief could be granted.

2. The trial court erred in abusing its discretion in entering its order of June 17, 2014, granting Rashleigh's motion for dismissal of all claims pursuant CR 12(b)(6) and for judgment in the amount of \$200.00.

3. The judge in the Trial Court at hearing on the Ojala/Carson Motion erred by failing to recuse himself as requested by Benz and Riley based on the appearance of bias and apparent lack of impartiality.

4. The Trial Court erred in granting summary judgment in favor of Ojala and Carson as they failed to provide any uncontroverted facts that there is no genuine issue of material fact.

B. Issues Pertaining to Assignments of Error

1. Does Benz and Riley's Complaint state a claim for Deceptive Acts and Business Practices and for Conspiracy upon which relief can be granted?

2. Did the trial court abuse its discretion in entering its order of June 17, 2014, granting the Rashleigh Motion for dismissal of all claims pursuant CR 12(b)(6) and for judgment in the amount of \$200.00 plus interest against Plaintiffs?

3. Should the Judge in the Trial Court have recused himself at the hearing on Ojala/Carson Motion?

4. Did the Ojala/Carson Motion present uncontroverted evidence that there were no genuine issues of material fact in order to support a summary judgment dismissal?

STATEMENT OF THE CASE

Overview

Benz and Riley filed this action as a result of the deceptive acts and business practices (perjury) and conspiracy of Respondents, resulting in monetary and non-monetary damages to Benz and Riley. Benz and Riley's Complaint stated sufficient grounds upon which relief can be granted. (CP Vol. I, 32-48).

Rashleigh filed his motion for dismissal pursuant to CR 12(b)(6) which was granted by the Trial Court. (CP Vol. I, 21-27). It appears Rashleigh and the Trial Court failed to consider the relevant facts and case law supporting Benz and Riley's Complaint.

Ojala and Carson filed their special motion to strike pursuant to RCW 4.24.525 (the anti-SLAPP statute), and for dismissal pursuant to CR 12(b)(6), introducing materials outside of the pleadings, converting the motion to a motion for summary judgment, which was granted in part (for failure to state a claim and summary dismissal) and denied in part (the anti-SLAPP, which denial is not included in this appeal) by the Trial Court (CP Vol. II, 280-300). Once again, it appears that Ojala and Carson, along with the Trial Court failed to consider the relevant facts and case law supporting Benz and Riley's Complaint. Further the Ojala/Carson Motion failed to present any uncontroverted evidence, as is required, showing no genuine issues of material facts to support a motion for summary judgment.

A. Factual Background:

Benz and Riley are the subjects of supplemental proceedings in a separate and unrelated lawsuit (Town of Skykomish v. Investors Property Services, et al., 12-2-06975-1 SEA, King County Superior Court); however they are not named defendants in that lawsuit. Ojala and Carson represent the opposing party in that lawsuit (the 'unrelated lawsuit').

Ojala and Carson had obtained orders (the 'Orders') in the unrelated lawsuit in January 2014, for Benz and Riley to appear for

debtor's examinations in March of 2014, which orders required personal service.

Ojala and Carson, knowing that Benz and Riley were traveling outside of the State of Washington, were desirous of obtaining an order to serve them via electronic mail in order to bypass the statutory requirements of personal service of such orders, with the additional goal of obtaining bench warrants for the arrest of Benz and Riley without their prior knowledge or ability to prevent such an occurrence. These arrests would have resulted in restraint of the trade and commerce of Benz and Riley.

Ojala and Carson have a history of shady attempted service. They had previously attempted service of the Summons and Complaint in the unrelated lawsuit, knowing that no one would be at the location of attempted service (despite knowing where and how to actually serve the defendants therein) for the purpose of placing their client in a position to acquire Mr. Benz' valuable historic property through a default judgment before those defendants were even aware that they had been sued.

These incidents of attempted service were specifically designed to deny Benz and Riley due process as guaranteed by Washington State Constitution and United States Constitution and threatened the loss of Mr.

Benz' substantial asset and more seriously, Benz and Riley's very freedom and liberty.

In late January 2014, Rashleigh was hired allegedly to attempt service of the Orders on Benz and Riley at their residence in Tacoma, Washington, despite Ojala and Carson knowing they were traveling outside of the State of Washington and could not be served there.

Rashleigh purportedly attempted service and executed an Affidavit of Attempted Service (CP Vol. I, 32-48, exhibit A) (the 'Affidavit') which contained clear evidence of perjury on his part. Rashleigh also failed to include his process server's registration information on the Affidavit, a violation of RCW 18.180.030. The later actions of Ojala and Carson in obtaining the order for electronic service based on the perjured Affidavit and the perjured Motion and Declaration of Ojala in the unrelated lawsuit demonstrate there was a conspiracy among Respondents.

Subsequently, Ojala and Carson did in fact use the perjured Affidavit to obtain the order to serve the Orders on Benz and Riley via electronic mail, which Orders otherwise require personal service.

In order for the perjury to have been committed by Respondents to accomplish their goals, they conspired beforehand as to how they would conduct the attempted service and complete the Affidavit and pleadings.

Rashleigh's Affidavit was prepared by Ojala and Carson, using virtually the same verbiage in the perjured Affidavit as was used in their motion for the order for electronic service. Additionally, there is a familial relationship between Rashleigh and Carson. Rashleigh is the father-in-law of, and resides in the home of, another attorney employed by Carson.

B. Procedural History:

Benz and Riley filed this action on May 20, 2014, against Rashleigh, Carson, and Ojala. They asserted causes of action for deceptive acts and business practices (perjury) and for conspiracy in violation of RCW 19.86. (CP Vol. I, 32-48).

On May 27, 2014, Ojala and Carson, representing themselves, filed a Notice of Appearance (CP Vol. I, 30-31).

On June 9, 2014, Rashleigh's counsel filed a Notice of Appearance (CP Vol. I, 28-29) and a motion to dismiss Benz and Riley's Complaint under CR 12(b)(6). (CP Vol. I, 21-27). The motion was set for hearing on June 17, 2014. Benz and Riley filed their opposition to Rashleigh's motion to dismiss on June 13, 2014. (CP Vol. I, 16-20). Rashleigh filed his reply on June 13, 2014. (CP Vol. I, 13-15).

Agreeing that the Complaint failed to state a claim upon which relief could be granted, and despite the case law supporting otherwise, on

June 17, 2014, the Trial Court granted the Rashleigh Motion for dismissal, including a judgment for statutory attorney's fees in the amount of \$200.00 plus interest, pursuant to CR12(b)(6). (CP Vol. I, 9-11) The Court's order granting the motion dismissed Benz and Riley's suit "with prejudice." *Id.*

On July 16, 2014, Benz and Riley filed the first Notice of Appeal on the ruling on the Rashleigh Motion. (CP Vol. I, 2-8).

On June 17, 2014, Ojala and Carson filed a special motion to strike pursuant to RCW 4.24.525 (the anti-SLAPP statute), and motion for an order dismissing the complaint for failure to state a claim, and for an order granting summary judgment dismissal. (CP Vol. II, 280-300).

Their motion included materials unrelated to the case thereby converting it to a motion for summary judgment. . (CP Vol. II, 118-152). The Ojala/Carson Motion was set for hearing on July 22, 2014. Benz and Riley filed their opposition and supporting declaration to that motion on July 18, 2014. (CP Vol. II, 110-117).

At the outset of the oral presentation on the Ojala/Carson Motion, Mr. Benz requested that the Judge recuse himself, stating that in as much as the Court had recently granted the Rashleigh Motion, and that Benz and Riley believed that ruling was in error, it was Appellants' further belief that a conflict of interest existed because of possible bias or personal

interest. Benz and Riley believed the Trial Court was in a quandary. Here it was faced with a second motion for dismissal, already having a Notice of Appeal on the Rashleigh ruling and now having to decide on the Ojala and Carson Motion, especially considering that Ojala and Carson failed to provide uncontroverted facts that there was no genuine issue of material fact to support summary judgment dismissal. This situation presented what Benz and Riley believed to be the appearance of bias and lack of impartiality. The Judge denied Mr. Benz's motion for recusal.

It is particularly curious that no record of the proceeding on either motion was taken. The only notation of the Judge's refusal to recuse himself at the second hearing is made in the Clerk's Minute Entry (CP 61).

This absence of a record of the proceedings amounts to a secret hearing and prevents due process to litigants.

The Trial Court made its ruling on the Ojala/Carson Motion for dismissal stating, because of the materials presented in the unrelated lawsuit, that this lawsuit "amounts to forum shopping. The issues in this case were previously resolved in King County. The Court adopted the findings made by King Judge Spearman on 6/19/14." (CP Vol. II, 61).

On July 22, 2014, the Trial Court denied the special motion to strike per the anti-SLAPP statute but, despite the case law supporting otherwise, granted the Ojala/Carson Motion for summary dismissal. (CP

Vol. II, 57-60). The Court's order granting the motion dismissed Benz and Riley's suit "with prejudice." *Id.*

These appeals followed.

ARGUMENT

A. Standard And Scope Of Review

1. Motion for CR 12(b)(6) Failure to State a Claim.

This Court applies a *de novo* standard when reviewing a trial court's decision on a motion brought under CR 12(b)(6) for failure to state a claim upon which relief can be granted. Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

2. Motion for Summary Judgment.

This Court applies a *de novo* standard when reviewing a trial court's decision on a motion for summary judgment, performing the same inquiry as the trial court. Ruvalcaba v. Kwang Ho Baek, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012).

B. Benz and Riley's Complaint Stated A Claim For Relief Against Respondents For Deceptive Acts and Practices (Perjury) and For Conspiracy

1. A Party Seeking Dismissal Pursuant to CR 12(b)(6) Bears The Heavy Burden of Showing Beyond Doubt That There Are No Facts, Even Hypothetical Ones, Which Could Support The Claims Of The Non-Moving Party.

Under CR 12(b)(6), dismissal for failure to state a claim is appropriate only where it appears beyond doubt that the plaintiff cannot prove any set of facts consistent with the complaint which would justify recovery. Burton, 153 Wn.2d at 422. CR 12(b)(6) motions should be granted sparingly and with care in order to make certain that the plaintiff is not improperly denied a right to have his claim adjudicated on the merits. Fondren v. Klickitat County, 79 Wn.App. 850, 854, 905 P.2d 928 (1995).

Further, for purposes of deciding a CR 12(b)(6) motion, *all* of the factual allegations in the complaint will be accepted as true. Dennis v. Heggen, 35 Wn.App. 432, 434, 667 P.2d 131 (1983). The court may *also* consider any hypothetical facts conceivably raised by the complaint. A CR 12(b)(6) motion must be denied if hypothetical facts legally sufficient to support plaintiff's claim exist. Bravo v. Dolsen Companies, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). Indeed, even hypothetical facts alleged for the first time on appeal may be sufficient to defeat a motion under CR 12(b)(6):

We have held that in determining whether such facts exist, a court may consider a hypothetical situation asserted by the complaining party, not part of the formal record, including facts alleged for the first time on appellate review of a dismissal under the rule. [citing Halvorson v. Dahl, 89 Wn.2d 673, 675, 574 P.2d 1190 (1978)] Neither prejudice

nor unfairness is deemed to flow from this rule, because the inquiry on a CR 12(b)(6) motion is whether any facts which would support a valid claim can be conceived.

Bravo, 125 Wn.2d at 750.

Thus, the issue in this case is not whether Benz and Riley have actual "evidence" in their possession to support every single allegation in their complaint. Rather, under CR 12(b)(6) the issue is whether it appears beyond doubt that they can prove no set of facts in support of their claims against Respondents for deceptive acts and practices, and conspiracy. In conducting this analysis, the court must take the factual allegations of the complaint as true and resolve any ambiguities or doubts regarding sufficiency of the claim in favor of Benz and Riley. See, Woodrome v. Benton County, 56 Wn.App. 400, 403, 783 P.2d 1102 (1989), rev. denied, 114 Wn.2d 1013 (1990).

2. Mr. Benz and Ms. Riley's Complaint Alleged Facts Sufficient To State A Claim For Deceptive Acts And Practices (Perjury) and For Conspiracy.

a. Benz and Riley's Complaint Stated Claims Upon Which Relief May Be Granted

Respondents argued incorrectly that Benz and Riley's Complaint failed to identify any unlawful conduct by Respondents. Rashleigh further argued that merely alleging conspiracy does not mean that the facts have been "well pleaded." (CP Vol. I, 21-27).

The Complaint sufficiently identified Respondents' unlawful

conduct. (CP Vol. I, 32-48)

Rashleigh's Affidavit (of attempted service of the Orders) stated unequivocally that he "was unable to effect service as "[T]here was **no furniture present in the house**. (emphasis added) and that "the electricity has been turned off **based on the residence being red tagged for non-payment**." (emphasis added). (CP Vol. I, 32-48, exhibit A).

Ojala and Carson's motion for the order for electronic service in the unrelated lawsuit also stated unequivocally that "[T]he location [Riley's home where Benz also resides] **was vacant, containing no furniture, and was red tagged for non-payment** of the electric bill." (emphasis added). (CP Vol. II, 165-197, Exhibit B).

Later, in Rashleigh's Motion, he changes his wording that Benz and Riley's residence "appeared abandoned". He further states that he "assumed" that the red tag on the electric meter was for non-payment, despite there being no reference to any payment issue whatsoever (CP Vol. I, 21-27). However, again, the Affidavit stated in no uncertain terms that it was for non-payment (CP Vol. I, 32-48, Exhibit A).

Rashleigh could just as easily have *assumed* it was for some other purpose. His goal was clear, to make the Affidavit strong enough to enable Ojala and Carson to obtain their order for electronic service. Long before the dismissal, Respondents' goal of obtaining an order for electronic service was achieved and the damage done to Benz and Riley.

In the process of signing the Affidavit under oath, Rashleigh committed perjury, a criminal act under RCW 9A.72, and acted on the conspiracy among Respondents, a crime under RCW 9A.28.040, both of which must be included under the meaning and intent of unfair and deceptive acts and practices acts under RCW 19.86.020.

b. Washington Consumer Protection Act Declares Unfair or Deceptive Acts or Practices in The Conduct of Any Trade or Commerce Unlawful

The Consumer Protection Act declares unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce". In addition to being crimes against the State of Washington, perjury and conspiracy must both be considered unfair and deceptive acts and practices.

"Unfair [...] or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
RCW 19.86.020.

(1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.
RCW 9A.28.040.

(1) A person is guilty of perjury in the first degree if in any official proceeding he or she makes a materially false statement which he or she knows to be false under an oath required or authorized by law.
RCW 9A.72.

Respondents' actions in committing perjury and conspiracy, in the course of their business practices, had the effect of interfering with the normal activities of Benz and Riley, and threatened their very freedom. This conspiracy is a further violation of the CPA.

Contracts, combinations, conspiracies in restraint of trade declared unlawful.
Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.

RCW 19.86.030

c. A Private Plaintiff Must Prove Five Elements in Order to Prevail on a CPA Claim

In order to prevail on a CPA claim, a private plaintiff must prove five elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.

We hold that to prevail in a private CPA action [...], a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.

Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Here, all five requirements are satisfied: (1) Respondents committed perjury and conspired to do so; (2) these acts were committed in the course of their businesses as a professional process server

(Rashleigh) and attorneys (Ojala and Carson) for which business they advertise to the general public; (3) perjury (a crime against the State of Washington under RCW 9A.72) and conspiracy (a crime against the State of Washington under RCW 9A.28.040) committed by Washington licensed professionals, which are then sanctioned by the Trial Court in granting of motions for dismissal for failure to state a claim or, in the alternative, for summary judgment in the moving party's absence of providing uncontroverted facts that there is no genuine issue of material fact to support summary judgment dismissal, undermines the Rule of Law, the very foundation of civil society, resulting in an extremely negative impact on the public; (4) Benz and Riley were forced to incur expenses and suffered significant non-monetary injury; and (5) the damages were the direct result of the acts of Respondents.

d. The Public Interest Requirement is Broad in The Scope of Its Reach of Offenders From Whom Relief Can Be Sought

The CPA has been expanded over time specifically to deter every bad actor in the conduct of their business practices. It applies to any trade or commerce either directly or indirectly affecting the people of the State of Washington.

“ . . . our Consumer Protection Act applies to **"any" trade or commerce** affecting the people of the state of Washington, **directly or indirectly**. RCW 19.86.010(2). It shows "a carefully

drafted attempt to **bring within its reaches every person who conducts unfair or deceptive acts or practices** in any trade or commerce." Short v. Demopolis, 103 Wn.2d at 61." (emphasis added)

Stephens v. Omni Insurance Co., 159 P.3d 10, 138 Wash.App. 151(2007)

- e. **Washington's Consumer Protection Act Is Broad And Was Specifically Amended to Encompass a Private Citizen's Right to Recover for Damages Regardless of Whether There Was a Direct Consumer Relationship.**

Washington's Consumer Protection Act was specifically amended to encourage private citizens to bring action for deceptive acts and practices, regardless of whether or not they had a direct consumer relationship with the offending party.

"The purpose of the Washington CPA was set forth in RCW 19.86.920. That section reveals the Legislature's intent "to protect the public [...]."

[...]

In apparent response to the escalating need for additional enforcement capabilities, the State Legislature in 1971 amended the CPA to provide for a private right of action whereby individual citizens would be encouraged to bring suit to enforce the CPA. RCW 19.86.090, as amended, first in 1971 and again in 1983, provides in relevant part:

Any person who is injured in his business or property by a violation of RCW 19.86.020 . . . may bring a civil action . . . to enjoin further violations, to recover . . . actual damages . . . or both, together with the costs of the suit, including a reasonable attorney's fee, . . ."

Hangman, Id. At 784

The absence of a direct consumer relationship between Benz and

Riley on the one hand, and Respondents on the other hand, does not preclude Benz and Riley from pursuing relief pursuant to the CPA for the damages caused by Respondents.

“Neither the Act nor Hangman Ridge mentions “the consuming public” or the idea of consumption as a limitation on the definition of “trade or commerce”. Indeed, it is well settled that a consumer relationship is not a prerequisite for standing.”

Stephens, Id.

f. Washington is a Notice Pleading State.

The facts in the Complaint are sufficiently pled to the extent necessary to commence the action and the ‘showing of evidence’ is not required in the complaint.

The State of Washington is a notice pleading state. The plaintiff is simply required to state his cause of action in plain language with sufficient facts, as a way to notify parties of general issues in a case. This allows parties drafting pleadings to state their claims in general terms without alleging detailed facts to support each claim and without worrying about hypertechnical details. Bennett v. Schmidt, 153 F.3d 516 (7th Cir. 1998).

Modern civil rules require only that a complaint contain a short and plain statement of the claim, showing that the pleader is entitled to

relief, and a demand for the relief claimed. See, CR 8(a). Pursuant to Washington State's "liberal rules of procedure," a complaint is sufficient so long as it provides notice "of the general nature of the claim asserted." Lightner v. Balow, 59 Wash.2d 856, 858, 370 P.2d 982 (1962); See also State v. Adams, 107 Wn.2d 611, 620, 732 P.2d 149 (1987); Berge v. Gorton, 88 Wash.2d 756, 762, 567 P.2d 187 (1977).

Claims for Relief. A pleading which sets forth a claim for relief, [...] shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief.

CR 8(a).

Pleadings are to be "concise and direct"

Pleading To Be Concise and Direct [...].

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

CR 8(c).

C. The Trial Court Judge Should Have Recused Himself as Requested by Appellants at the Hearing On the Second Motion to Dismiss by Mr. Ojala and Carson Law Group

1. The Appearance of Impartiality on the Part Of a Judge is Required

One of the guiding principles of the American system of jurisprudence is the idea of an independent and neutral judiciary.

Impartiality, as well as the appearance of impartiality, on the part of a judge is required. When it appears that a judge may not be impartial,

or worse, is in a forced position, as here, of having to choose between overriding their prior ruling and find on the evidence before them on the one hand, or utilize a mechanism to allow for a similar ruling despite the facts, he or she must recuse themselves especially at the request of a litigant.

Washington's appearance of fairness doctrine not only requires a judge to be impartial, it also requires that the judge appear to be impartial.
State v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999)

Additionally, due process and Washington's Code of Judicial Conduct further mandated that the judge in the Trial Court recuse himself since his impartiality was reasonably questioned in this case.

'Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party *or whose impartiality may be reasonably questioned.*'
Wolfkill, 103 Wn. App. at 841 (citing State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996)). The test to determine whether a judge's impartiality might reasonably be questioned is an objective one that "assumes that a reasonable person knows and understands all the relevant facts." Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995) (quoting In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1313 (2d Cir. 1988)). (Emphasis added).
Smith v. Behr Process Corp., 113 Wash.App. 306, 54 P.3d 665 (2002)

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary,

composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that **judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.** (Emphasis added.)

[2] **Judges should** maintain the dignity of judicial office at all times, and **avoid both impropriety and the appearance of impropriety** in their professional and personal lives. **They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality,** integrity, and competence. (Emphasis added.)

Washington Code of Judicial Conduct, Preamble

[4] Second, the Comments identify aspirational goals for judges. **To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules,** holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office. (Emphasis added.)

Washington Code of Judicial Conduct, Scope

The Trial Court had previously ruled to dismiss against Rashleigh. At the second hearing for dismissal of Ojala and Carson, the Trial Court was in the unfortunate position of either ruling on the evidence as presented and possibly go against his prior ruling, or find a way to still dismiss against Ojala and Carson and protect his prior ruling. The Trial Court found that avenue by incorporating information from the unrelated

lawsuit in King County and granting the Ojala/Carson Motion, stating that Benz and Riley were merely forum shopping.

A reasonable person knowing and understanding all the facts would likewise have questioned the Trial Court's ability to remain impartial under the circumstances.

D. Respondents Peter C. Ojala and Carson Law Group, PC Failed to Provide Uncontroverted Facts That There Is No Genuine Issue of Material Fact To Support Summary Judgment Dismissal

1. A Party Seeking Summary Judgment Dismissal Bears the Initial Burden to Prove by Uncontroverted Facts There is No Genuine Issue of Material Fact

There is a genuine issue as to material facts in this matter as shown in the pleadings. The moving party is required to “**prove by uncontroverted facts** that there is no genuine issue of material fact” or summary judgment should not be granted.

Initially the burden is on the party moving for summary **judgment to prove by uncontroverted facts** that there is no genuine issue of material fact. *LaPlante v. State*, [85 Wn.2d 154, 531 P.2d 299 (1975)] at 158; *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962); 6 J. Moore, *Federal Practice* ¶ 56.07, ¶ 56.15[3] (2d ed. 1948). **If the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials.** *Preston v. Duncan*, [55 Wn.2d 678, 681, 349 P.2d 605 (1960)] at 683, *see also* Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington*, 45 Wash. L. Rev. 1, 15 (1970). (Emphasis added.) *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 235 (1989)

Ojala and Carson, in their motion for dismissal for failure to state a claim, presented voluminous amounts of information relating to the unrelated lawsuit, none of which constituted ‘uncontroverted evidence’ that there was no genuine issue of material fact, thereby failing to overcome their initial burden to support summary judgment dismissal.

It appears their sole purpose for introducing these unrelated materials was to redirect the Trial Court’s attention away from the facts of this case and to provide a mechanism with which it could rule in their favor regardless of its prior erroneous ruling on the Rashleigh Motion.

The Trial Court accepted the unrelated materials, incorporating the ruling in the unrelated matter and further stated, with regard to Benz and Riley’s complaint, that “this lawsuit amounts to forum shopping. The issues in this case were previously resolved in King County. The Court adopted the findings made by King County Judge Spearman on 6/19/14.” (CP Vol. II, 61).

The Trial Court in this matter erred in that ruling.

Forum shopping is defined as “the practice adopted by some litigants to have their legal case heard in the court thought most likely to provide a favorable judgment.” The term has become adopted in a wider context for the activity of repeatedly seeking a venue or willing listener for a concern, complaint or action, until one is found.

Pursuant to RCW 4.12.025, filing the lawsuit in Snohomish County was required in as much as the Respondents reside in that county and Carson, a corporation, transacts business there, and the illegal actions of Respondents that caused damage to Benz and Riley occurred in that county. Benz and Riley never attempted to seek justice for their damages in any other county. Benz and Riley would have preferred, rather than filing in Snohomish County, to have been able to file in King County (their primary legal address) or even Pierce County (where they had a second home) but were not allowed according to statute.

Forum shopping does not apply here. The King County matter related to supplemental proceedings of Benz and Riley, as judgment debtors therein (although not named defendants in that case). This case in Snohomish County is completely unrelated and deals with damages and injury caused to Benz and Riley personally as a result of the illegal acts of Respondents.

The Trial Court in ruling this case was forum shopping had found its escape from the 'Catch 22' quandary in which it found itself. It used forum shopping as the mechanism to be able to grant the Ojala/Carson Motion for summary dismissal while at the same time not being faced with contradicting its prior erroneous dismissal on the Rashleigh Motion for failure to state a claim.

In granting summary judgment dismissal on the Ojala/Carson Motion the Trial Court further demonstrated that it was indeed biased and partial against Benz and Riley. Clearly there is an underlying although unexplained cause for the Trial Court's bias and lack of impartiality in this matter.

Benz and Riley were not forum shopping. Attempting to set aside an order obtained based on perjured testimony in an unrelated matter in another county is a separate issue from obtaining compensation for the damages caused to Benz and Riley personally caused by Respondents' illegal actions. The Trial Court erred in granting summary dismissal of the complaint based on forum shopping.

Summary judgment should only be granted if after considering all the pleadings, affidavits, depositions or admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party, it can be said (1) that there is no genuine issue as to any material fact, (2) that all reasonable persons could reach only one conclusion, and (3) that the moving party is entitled to judgment as a matter of law.

Baker v. Schatz, 80 Wn.App. 775, 782, 912 P.2d 501 (1996). "A genuine issue of material fact exists, where reasonable minds could differ on the facts controlling the outcome of the litigation." Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).
The Bert Kutny Revocable Living Trust v. Mullen, 42811-3-II (2013)

Despite the absence of sufficient discovery taking place as a result of the dismissals by the trial court, evidence was provided with the

Complaint to substantiate that there is a genuine issue of material fact in this matter. (CP Vol I, 32-48)

Further, based on the pleadings, reasonable minds could well 'differ on the facts controlling the outcome of the litigation'.

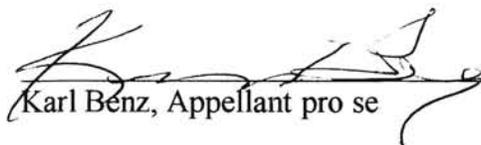
Ojala and Carson had the initial burden of providing uncontroverted facts that there is no genuine issue of material fact. The fact remains that none of the outside materials introduced in the Ojala/Carson Motion, nor any other evidence, constituted such uncontroverted evidence. That failure is fatal to their request for summary dismissal.

Dismissal for failure to state a claim upon which relief could be granted and summary judgment dismissal in this matter were not warranted.

CONCLUSION

Appellants Mr. Benz and Ms. Riley respectfully request that this Court reverse the June 17, 2014 order of dismissal and judgment in favor of Rashleigh, reverse the July 22, 2014 order of dismissal in favor of Ojala and Carson, and remand the case for further proceedings.

Respectfully submitted this 21st day of November, 2014.


Karl Benz, Appellant pro se


Catherine Riley, Appellant pro se