

IN THE WASHINGTON STATE COURT OF APPEALS

DIVISION I

The Boeing Company, Marc Birtel,

Respondents,

vs.

Michael A. Leon,

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF KING COUNTY

Cause No. 14-2-34320-5

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

MICHAEL A. LEON
Plaintiff Pro Se

MICHAEL A. LEON
444 W. Orange Grove Road, #1136
Tucson, Arizona 85704
(520) 256-8457
Email: Michael1Lion@yahoo.com
Plaintiff Pro Se

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Table of Contents

Pg

I. INTRODUCTION	1	
II. ARGUMENT		8
A. MICHAEL LEON STATED A CLAIM FOR INTENTIONAL INTERFERENCE WITH A BUSINESS EXPECTANCy		
1. Where Facts Exist Which Justify Recovery Dismissal Pursuant to Civil Rule 12(b)(6) is Improper		
2. MICHAEL LEON's Unequivocal Actions and Statements Regarding His Intent To Secure Supplemental Income encouraged by Social Security Ticket to Work Program for the disabled constitutes business expectancy.		
3 MICHAEL LEON's Complaint Alleges That MARK BIRTEL an agent of The Boeing Company Was Aware of The Business Expectancy And That His Interference Was Intentional..		
4. MARC BIRTEL Used Improper Means To Interfere With MICHAEL LEON's Business Expectancy When He Used Confidential Information Employment Screening Report to defame him to prospective employers		
B. MICHAEL LEON STATED A CLAIM FOR DEFAMATION	10	
In an Effort to Convince This Court That MICHAEL LEON's Defamation Claim Was Unlikely to Succeed, Defendants Ignore Both the Law and the Facts . Manifest Constitutional Error May Be Raised for the First Time on Appeal....		
C. QUALITY OF PERSONS, RES JUDICATA NOT APPLICABLE		14
1. The Causes of Action and Subject Matters Are Not Identical	21	
2. The Quality of Persons is Not Identical...		
3. The Previous Lawsuit Did Not End In a Final Judgment On the Merits		
D. SUMMARY JUDGMENT ERROR SPARSE RECORD	16	
1. The trial court erred in denying disabled pro se litigant MICHAEL LEON's a short continuance to respond to opposition to motion for summary judgment		
2. Summary judgment was not warranted on the sparse record submitted by Defendants ...		

E. NO DISCOVERY ALLOWED STANDARD OF REVIEW DE NOVO SUMMARY JUDGMENT ERROR GRANTED NO TRIAL	18
III. CONCLUSION	30

TABLE OF AUTHORITIES ii**Pg****Cases**

Weden v. San Juan County, 135 Wn.2d 678,689,958 P.2d 273 (1998)	11
Folsom v. Burger King, 135 Wn.2d 658,663,958 P.2d 301 (1998).	
Mountain Park	11
Homeowners Association v. Tydings, 125 Wn.2d 337,341,883 P.2d 1383	11
Home Loans, Inc. v. Blair (In re Blair), 324 B.R. 725, 731 (Bankr. W.D. Ark. 2005)	5
Jennen v. Hunter (In re Hunter), 52 B.R. 912, 915 (D.N.D. 1984)	5
Wedley v. San Juan County, 135 Wn.2d 678,689,958 P.2d 273 (1998)	6
Folsom v. Burger King, 135 Wn.2d 658,663,958 P.2d 301 (1998)	6
Mountain Park Homeowners Association v. Tydings, 125 Wn.2d 337,341,883 P.2d 1383 (1994).	6
American Family Life Assur. Co. of Columbus v. Biles, 714 F.3d 887 (5th Cir. 2013).	10
C.B. Trucking, Inc. v. Waste Management, Inc., 137 F.3d 41, 39 Fed. R. Serv. 3d (LCP)	10
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 303 (1980)	11
Reid-Walen v. Hansen, 933 F.2d 1390, 1395 (8th Cir. 1991).	12
Franklin v. Murphy, 745 F.2d 1221, 1231 (9th Cir.1984	12
Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1524 (9th Cir.1983),	12
Moy v. United States, 906 F.2d 467, 469 (9th Cir.1990	12
Delew v. Wagner, 143 F.3d 1219, 1222 (9th Cir.1998	36
BE & K Const. Co. v. NLRB, 536 U.S. 516, 524–25, 122 S.Ct. Christopher v. Harbury, 536 U.S. 403	13
Foman v. Davis, 371 US 178 – 1962	15
Lopez v. Smith, 203 F. 3d 1122 – 2000 15	
Boag v. MacDougall, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982);	34
Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)	34
Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957))	34
Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)	29
McDowell v. Delaware State Police, 88 F.3d 188, 189 (3rd Cir. 1996)	29
United States v. Day, 969 F.2d 39, 42 (3rd Cir. 1992)	37
S.E.C. v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992)	36

United States v. Miller, 197 F.3d 644, 648 (3rd Cir. 1999) 37
Poling v. K.Hovnanian Enterprises, 99 F.Supp.2d 502, 506-07 (D.N.J.
2000).

Statutes

CR 56(c); 11, 15,17,49.
Fed. R. Civ. P. 56(d). 11
CFR 56f
Fed. R. Civ. P. 15

Other Authorities

Restatement (Second) of Torts § 766(b), cmt c (1979).
David K. DeWolf & Keller W. Allen, 6,48
Washington Practice: Tort Law and Practice § 3.1, at 116 18 39

I. INTRODUCTION



November 7, 2006 Securaplane premises battery fire

Michael Leon worked for Securaplane Technologies, a subcontractor for The Boeing Company in connection with battery testing for the Dreamliner airplane. When the planes were grounded worldwide in January 2013 in an effort to run interference and distract the public from safety concerns, Marc Birtel fabricated and ran a character assassination on Michael Leon who was contacted by journalists worldwide concerning his safety allegations and trial in the Securaplane Technologies, Inc./Michael Leon/ Case No. 2008-AIR- 00012 labor trial. To discredit Michael Leon, spokesperson Marc Birtel stated that he was a convicted felon, lied to investigators and multiple other issues defaming Michael Leon. Michael Leon was looking for consulting and supplemental opportunities at this time and this worldwide negative exposure destroyed any opportunities to supplement income through social security Ticket to Work program which is encouraged for the disabled. CP 1-8

In Exhibit N to the Declaration of Michael Leon in support of opposition to motion for summary judgment, the report adopted all suggestions by Michael Leon that he stated were wrong with the design and safety. CP 179-181
<http://www.nts.gov/investigations/AccidentReports/Reports/AIR1401.pdf>

NTSB safety board exonerated Michael Leon. Michael Leon advised his supervisors two weeks prior to the fire exploding battery Securaplane for the Dreamliner 787 that the battery was sparking and a danger. This was confirmed in the Department of Labor trial with witnesses and evidence substantiating that Michael Leon had advised of faulty parts and sparking batteries Securaplane Technologies, Inc./Michael Leon/ Case No. 2008-AIR- 00012. Likewise, this was confirmed in the documentary by multiple securaplane former employees in the documentary Broken Dreams the Dreamliner <https://www.youtube.com/watch?v=rvkEpstd9os> The NTSB's (National Transportation Safety Board) final incident report states that the cause of the aircraft fires lie entirely with the design and manufacture of the Lithium ion battery. They further stated that Boeing failed to adequately test the battery for catastrophic failures. Boeing has been aware of the thermal defects of this battery as long ago as November of 2006 and has failed to lead to appropriate remedial reports to the United States. This failure to disclose is defrauding the Air Force. CP 179-181

The Boeing Company has a pattern of safety violations, concealing defects and governmental judgments. The FAA (Federal Aviation Administration) fined The Boeing Company \$275 safety violations Seattle Times dated July 26, 2013 in connection with the 777.

II. ARGUMENT

Res Judicata does not apply Marc Birtel not heard previously Judge Jones was deceived and dismissed in the Washington District Court CP 75-76 stating that he may be wrong but he was relying on misrepresentations made by Defendants that Marc Birtel was included in the 226 Boeing matter the cornerstone of their argument to Judge Ramseyer. The Second amended complaint in the -226 matter was never allowed, leave was not granted. Therefore, Marc Birtel has never been a litigant in any proceedings.

Judge Ramseyer abused discretion when she denied a severely disabled pro se litigant a continuance to adequately prepare a respond to motion for summary judgment dismissing trial set for January 2016. Further, the Judge abused discretion by not allowing discovery to proceed to obtain critical documents by Plaintiff to appropriately defend claims in opposition to motion to dismiss. Attorneys are granted extensions constantly. How much more necessary for the disabled? This is a denial of access to court system.

“Rule 15(a) declares that leave to amend ‘shall be freely given when justice so requires’; this mandate is to be heeded. . . . In the absence of any

apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave should, as the rules require, be 'freely given.'" Foman v. Davis, 371 U.S. 178, 182 (1962). 2 Though technically unopposed, defendants' pending motions to dismiss are denied because the Rules of Civil Procedure "encourage an opportunity to amend before dismissal." 2 James Wm. Moore, et al., Moore's Federal Practice § 12.34[5] (3d ed. 2000). A dismissal for failure to state a claim is on the merits. See Johnsrud v. Carter, 620 F.2d 29, 32-33 (3d Cir. 1980). To dismiss plaintiffs' claims on the merits, without first permitting an opportunity to amend, would constitute a forfeiture resulting simply from noncompliance with the Rules of Civil Procedure.

1. No Continuance was granted pro se litigant disabled to prepare and file opposition to motion for summary judgment CFR 56F
2. No Discovery Permitted prior to hearing for motion for summary judgment CFR 56F
3. Dismissal; Summary Judgment granted with without leave to amend no legal reasoning abuse of discretion Foman vs. Davis To the contrary, Michael Leon has never had his day in Court as the Arizona District Court has continually prevented equal access to the Court for handicapped pro se litigant due to abuses of discretion. The Ninth Circuit noted the abuse of discretion by the Arizona District Court. The Ninth Circuit on March 2 2015 found that the Arizona District Court abused discretion in Leon vs. Meggitt No. 13-15696 reversed and remanded to the Arizona District Court. The judge dismissed the action without rhyme or legal reasoning. Citing Foman v. Davis, 371 US 178 – 1962; Lopez v. Smith, 203 F. 3d 1122 - 2000. Likewise in this matter the Court did not allow filing of amended complaint or explain cure deficiencies.
4. Judicial Bias; Abuse of Discretion
5. Misrepresentation to Judge
 - a. Marc Birtel was not privy
 - b. Vexatious Litigant Order too broad, no boundaries not in effect a federal district court in one state cannot interfere with sovereignty of other state courts
6. Implication that Michael Leon was a felon omission that conviction overturned and obtained by confidential source private employment background screening report

I am a pro se litigant not held to the same standards as professional attorneys. I was not allowed to amend the complaint even once. I was not allowed a continuance to prepare a response to the motion for summary judgment. I was not allowed discovery to proceed to facilitate my response to the motion for summary judgment. I am terminally ill and was not afforded a continuance to respond to the Motion for Summary Judgment. I was not allowed discovery to assist in my response to motion for summary judgment. Summary judgment was based on sparse record. The US Supreme Court in The implications of the Supreme Court's decision in Tennessee v. Lane likely extend beyond court access alone, as Title II generally prohibits discrimination against individuals with disabilities with respect to the services and activities of public entities, as well as prohibits public entities from excluding individuals with disabilities from participating in such programs. "Court errs if court dismisses pro se litigant without instructions of how pleadings are deficient and how to repair pleadings." Plaskey v CIA, 953 F .2nd 25. I had to submit the Opening Brief five separate times. This is not liberality for pro se litigant or accommodating the disabled. In Lane, a closely-divided Supreme Court held that states may be sued under Title II of the Americans with Disabilities Act (ADA) for failing to provide court system access to persons with disabilities.

Barriers to the Courthouse

The case involved the claims of George Lane and Beverly Jones that they had been unlawfully denied access to the Tennessee state court system. Both individuals are paraplegic and rely on wheelchairs for mobility.

Required to appear in court on the second floor of a county courthouse with no elevator, George Lane crawled up two flights of stairs to reach the courtroom. When required to return to the courthouse for a hearing, Mr. Lane refused to crawl again or have officers carry him to the courtroom. He was then arrested and jailed for failure to appear in court.

Beverly Jones, a certified court reporter, had repeatedly requested accommodations for wheelchairs. Her requests were denied.

Lane and Jones filed an action against the state of Tennessee and several counties, alleging past and ongoing violations of Title II of the Americans with Disabilities Act of 1990 ("ADA"). The district court denied the state's

motion to dismiss the lawsuit on state immunity grounds, and the U.S. Court of Appeals affirmed.

Justice Stevens delivered the opinion of the Court on May 17, 2004, joined by Justices O'Connor, Souter, Ginsburg and Breyer. Justice Souter filed a concurring opinion in which Justice Ginsburg joined, and Justice Ginsburg filed a concurring opinion in which Justices Souter and Breyer joined. Chief Justice Rehnquist filed a dissenting opinion joined by Justices Kennedy and Thomas, and Justices Scalia and Thomas each filed separate dissenting opinions.

Supreme Court Majority Opinion

The Lane case required the Court to consider issues of legislative intent, constitutional interpretation, Congressional authority, and federalism, among other things (See description of key information and concepts).

Beginning first with a discussion of the consideration and passage of the ADA by Congress, the Court noted that the ADA represented the culmination of decades of investigation and deliberation by Congress with respect to the need for broad legislation to address pervasive discrimination against persons with disabilities.

According to the Court, by its own description, the ADA is intended to provide a comprehensive national mandate to end discrimination against persons with disabilities in three major areas of public life: employment, public services, and public accommodations.

The Court also observed that the enforcement provision in Title II incorporates another statutory provision by reference, § 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a. Section 505 authorizes private citizens to bring suits for money damages. According to the Court, by bringing that provision into Title II, Congress demonstrated its intent to make public entities subject to private suits for violations of Title II.

Finding that the ADA expressly provides for abrogation of state immunity, the Court went on to determine whether or not Congress acted within its authority in passing Title II of the ADA and abrogating state immunity to suits brought under it.

Under section 5 of the Fourteenth Amendment, Congress is provided an enforcement power that enables it to abrogate state immunity from lawsuits. While this enforcement power is very broad, it is not unlimited; moreover, Congressional use of this power must be constitutionally valid.

More specifically, although Congress must be allowed a wide latitude in developing appropriate measures to: (i) remedy past and existing unconstitutional actions (remedial legislation); and (ii) prevent future violations (prophylactic legislation), the measures are not allowed to result in a "substantive change in the governing law" (substantive redefinition).

According to the Court, whether a given piece of legislation is permissible remedial or prophylactic legislation or impermissible unconstitutional substantive redefinition will turn on whether the proposed legislation "fits" the identified constitutional violations both in a qualitative sense--providing logical measures to remedy or prevent the violations, and in a quantitative sense--providing measures that are not overly broad and that are properly tailored to meet the objectives of the legislation.

Applying this analysis to Title II, the Court discussed the fact that Congress enacted Title II in the context of "pervasive unequal treatment of persons with disabilities in the administration of state services and programs, including systematic deprivations of fundamental rights." The Court cited a variety of sources in discussion of the historical record, including a number of court decisions identifying unconstitutional treatment of disabled persons by state agencies.

With respect to barriers that prevent access to the courts and court services, the Court described specific information available to Congress on this issue. This information included reports that many individuals, in many states, are or had been excluded from courthouses and court proceedings by reason of their disabilities. One report before Congress found that 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by disabled persons.

According to the Court, the Congressional finding of pervasive discrimination against persons with disabilities in access to public services, combined with the extensive evidentiary record, made clear beyond doubt "that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation."

Turning finally to the question of whether Title II was an appropriate response to the historical pattern of discrimination against persons with disabilities, the Court took a narrowly focused approach to Title II, directly addressing only the issue of access to the court system, rather than the full range of public services, programs, and activities to which persons with disabilities are guaranteed access.

Given the long history of unequal treatment in the court system that individuals with disabilities have experienced, and the persistence of such treatment in spite of numerous state and federal legislative efforts to remedy the problem, the Court found that Congress was justified in concluding that "the difficult and intractable problem" of discrimination against persons with disabilities required additional preventive action.

Moreover, the remedy chosen by Congress was sufficiently specific and limited; and not overly burdensome. Under these circumstances, and in light of past and present injury to the due process rights of disabled persons, the Court concluded that Title II's affirmative obligation to accommodate disabled persons is a reasonable prophylactic measure, and that it is "reasonably targeted to a legitimate end."

Dissenting Opinions

Chief Justice Rehnquist's dissenting opinion (joined by Justices Kennedy and Thomas) stated that Title II was overbroad and that failed the congruence and proportionality test. The dissent stated that the majority failed to find sufficient evidence before Congress in order to demonstrate that states have engaged in unconstitutional actions with regard to dis

Liberality in construing the briefs of pro se lay litigants. State lacks general roving jurisdiction. Only the King has general roving jurisdiction. You give the a court jurisdiction by filing legal papers with them. In criminal cases they get jurisdiction by the complaint of a victim.

WHEN GOD RELINQUISHES, CONCEDES

This is not implying that God holds up a white surrender flag. This is saying that God reaches a point where his patience is exhausted.

We are all given a conscience. Continual evil acts erodes the conscience. The conscience is the warning danger light God has instilled in us all that we are to take heed to in order to keep us in check. We all came into the

world the same way. However, some have elected to choose a depraved path. God is merciful for a time...and then judgment is executed. There reaches a threshold where his patience has ran out and he destroys. God is a God of Mercy and equally of Wrath....

Psalm 81:12

So I gave them over to their stubborn hearts to follow their own devices.

A. MICHAEL LEON STATED A CLAIM FOR INTENTIONAL INTERFERENCE WITH A BUSINESS EXPECTANCY

Where Facts Exist Which Justify Recovery Dismissal Pursuant to Civil Rule 12(b)(6) is Improper. In Washington, the test enunciated by the U.S. Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), applies to whether a Civil Rule 12(b)(6) motion to dismiss should be granted. To prevail on a Civil Rule 12(b)(6) motion, the defendant has the burden of establishing "beyond doubt that the plaintiff can prove no set of facts, consistent with the Complaint, which would entitle the plaintiff to relief." *Fondren v. Klickitat County*, 79 Wn.App. 850, 854, 905 P.2d 928 (1995); *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). A complaint survives a Civil Rule 12(b)(6) motion if any set of facts could exist that would justify recovery. *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988), *affd in part on recon.*, 113 Wn.2d 148, 776 P.2d 963 (1989); See e.g., *In re Coday*, 156 Wn.2d 485, 497, 130 P.3d 809 (2006). Civil Rule 12(b)(6) motions should be granted sparingly and with caution in order to make certain that plaintiff is not improperly denied a right to have his claim adjudicated on the merits. *Fondren*, 79 Wn.App. at 854. -2- B. MICHAEL LEON's Unequivocal Actions and Statements Regarding His Intent To Secure Supplemental Income encouraged by Social Security Ticket to Work Program for the disabled constitutes business expectancy. Michael Leon's complaint alleges that Marc Birtel used confidential information improperly obtained from Securaplane confidential prescreening background report employment. Had Mr. Leon been allowed to file an amended complaint the Ticket to Work program business expectancy would have been addressed. The use of confidential information is a sufficient allegation of improper means. Since MICHAEL LEON's complaint alleged that MARC BIRTEL Boeing spokesperson used confidential information, his interference was through unlawful means. Thus, there is no requirement that MICHAEL LEON also allege an improper business purpose. Congress Passes The Ticket To Work And Work Incentives Improvement Act Of 1999. Ticket To Work And Self-Sufficiency Program. This is

encouraged by the federal government. Fourth amendment right to privacy.

Michael Leon never received the opportunity to amend even once. Michael Leon's family member was never allowed to read cases for visually impaired pro se litigant in defense.

1. Where Facts Exist Which Justify Recovery Dismissal Pursuant to Civil Rule 12(b)(6) is Improper

The judge dismissed the action without rhyme or legal reasoning. Citing *Foman v. Davis*, 371 US 178 – 1962; *Lopez v. Smith*, 203 F. 3d 1122 - 2000. Judge gave no legal reasoning for dismissal granting summary judgment cite ninth circuit *forman v. davis*, etc. The judge refused continuances of disabled.

Where Facts Exist Which Justify Recovery Dismissal Pursuant to Civil Rule 12(b)(6) is Improper. In Washington, the test enunciated by the U.S. Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), applies to whether a Civil Rule 12(b)(6) motion to dismiss should be granted. To prevail on a Civil Rule 12(b)(6) motion, the defendant has the burden of establishing "beyond doubt that the plaintiff can prove no set of facts, consistent with the Complaint, which would entitle the plaintiff to relief." *Fondren v. Klickitat County*, 79 Wn.App. 850, 854, 905 P.2d 928 (1995); *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

2. MICHAEL LEON's Unequivocal Actions and Statements Regarding His Intent To Secure Supplemental Income encouraged by Social Security Ticket to Work Program for the disabled constitutes business expectancy.

Social Security's Ticket to Work Program is a free and voluntary program available to people ages 18 through 64 who are blind or have a disability and who receive Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits. Offer beneficiaries with disabilities expanded choices when seeking service and supports to enter, re-enter, and/or maintain employment; Increase the financial independence and self-sufficiency of beneficiaries with disabilities; and Reduce and, whenever possible, eliminate reliance on disability benefits.

3 MICHAEL LEON's Complaint Alleges That MARK BIRTEL an agent of The Boeing Company Was Aware of The Business Expectancy And That His Interference Was Intentional

Michael Leon interviews were published in multiple newspapers, websites as well as television news interviews discussing this fact and his condition. Damage control and spin doctor Marc Birtel engaged in character assassination to deflect from Boeing safety violations in an effort to silence Michael Leon. Michael Leon has always been concerned for the innocent consumers that would be boarding the planes including the judiciary. Unsuspecting public that were jeopardized by shortcuts in safety and deadlines sped up profits over protection for the public.

4. MARC BIRTEL Used Improper Means To Interfere With MICHAEL LEON's Business Expectancy When He Used Confidential Information Employment Screening Report to defame him to prospective employers

This is still contained to this date on the internet. This is Exhibit A to the Complaint in this matter. This publication then and now has far reaching effects. The defamation on a global forum level. The private screening employment report was private information with confidential stamped all over it.

<http://cdn.nextgov.com/nextgov/interstitial.html?v=2.1.1&rf=http%3A%2F%2Fwww.nextgov.com%2Femerging-tech%2F2013%2F01%2F2006-battery-fire-destroyed-boeing-787-suppliers-facility%2F60809%2F>

B. MICHAEL LEON STATED A CLAIM FOR DEFAMATION In an Effort to Convince This Court That MICHAEL LEON's Defamation Claim Was Unlikely to Succeed, Defendants Ignore Both the Law and the Facts . Manifest Constitutional Error May Be Raised for the First Time on Appeal

But in fact, it is the law. In fact, an Article can be defamatory, and actionable as such, even though no statement in the Article is expressly false. Although Swart may not like it, six justices in Mohr held that Washington does recognize the tort of defamation by implication that is proved when the author makes material omissions from an article that contains no expressly false statements.

In an Effort to Convince This Court That MICHAEL LEON's Defamation Claim Was Unlikely to Succeed, Defendants Ignore Both the Law and the Facts . Manifest Constitutional Error May Be Raised for the First Time on Appeal....Marc Birtel failed to state that felony conviction was overturned that Michael Leon was not a felon creating the impression that Michael Leon was a vile person sending this message to potential employers. This will be proven at trial.

In an Effort to Convince This Court That Rule's Defamation Claim Was Unlikely to Succeed, Defendants Ignores\ Both Law and The Facts. In an Effort to Convince This Court That Rule's Defamation Claim Was Unlikely to Succeed,Defendants Ignores Both Law and The Facts.

If a plaintiff establishes a probability of prevailing on the merits by clear and convincing evidence then the defendant's motion to strike must be denied. RCW 4.24.525. Rule contends that she made this showing; Swart argues she did not. Swart contends that she failed to show that she would be able to prove the element of falsity required to show defamation. Swart repeatedly insists that a defamation claim cannot be predicated upon the failure to state some omitted fact. He begins his flawed analysis by erroneously relying on a concurring opinion that expressed the views of only three justices, and by ignoring the fact that the other six justices expressed the opposite view. There were three opinions in *Mohr v. Grant*, 153 Wn.2d 812, 108 P.3d 768 (2005). Swart relies on a passage from Chief Justice Alexander's opinion, in which he concurred in the result reached by the lead opinion, even though six justices expressly disagreed with the Chief Justice. Swart argues to this Court: Rule does not point to any false statement or any true statement that leaves a false impression. Instead, she is asserting that Swart defamed her by omission.

"There is no Washington authority that supports the recognition of defamation by omission." [*Mohr v. Grant*, 153 Wn.2d] at 830 (Alexander, C.J. concurring). The absence of a statement cannot be defamatory because, in addition to falsity, defamation requires publication, and an unspoken thought by definition cannot be published. Defamation as a cause of action simply cannot be predicated on the omission of certain statements.

Response, at 35 (emphasis added).

But Chief Justice Alexander's view did not carry the day and thus it is not the law in this State. Although the Chief Justice concurred in the result that the Court reached in *Mohr*, he wrote a separate opinion to

express his disagreement with the Court's holding that defamation can be predicated on the omission of material facts:

I write separately in order to disassociate myself from the majority's apparent recognition of a tort of defamation by implication "caused by certain material omissions." Majority at 828. There is no Washington authority that supports the recognition of defamation by omission and we should not recognize such a cause of action now.

Mohr, 153 Wn.2d at 830 (Alexander, C.J., concurring) (emphasis added). Endorsing the Chief Justice's failed argument for what the law of defamation should be, Swart argues that Rule's suit was properly dismissed because her defamation claim is based solely on the omission of facts:

Rule contends that by omitting statements about Swart's relationship with Northon, the Article contains the false implication that the article is accurate. e]. Rule does not cite to any actual statements in the Article that are allegedly inaccurate, but points only to the omitted statement as the sole inaccuracy. If no statement contained in the article is false, then the Article cannot be defamatory. . . . She is asking the Court to read the Article as false without pointing to any false statements. This is not the law.

Response at 36 (emphasis added).

Justice Fairhurst's opinion for three justices clearly states: Defamation by implication occurs where "the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts." [Citations]. Although the Court of Appeals stated that "[n]o Washington case directly addresses the problem of material

Mohr, 153 Wn.2d at 823 (emphasis added).

At page 827 (emphasis added) that opinion further states: In a defamation by omission case, the plaintiff must show with respect to the element of falsity that the communication left a false impression that would be contradicted by the inclusion of omitted facts.

Mohr, 153 Wn.2d at 827 (emphasis added). Applying this rule of law to the facts of the case, Justice Fairhurst concluded that Mohr "has not made a prima facie showing that the communication left a false impression that would be contradicted by the inclusion of omitted facts." Id. at 830. So

Mohr lost, and the Chief Justice concurred in that result.

In Justice Chambers' opinion, three more justices unambiguously joined in the holding in Justice Fairhurst's opinion that defamation by omission exists and can be actionable. His only disagreement with the lead opinion was that he believed that the news broadcast at issue did leave a false impression which would have been contradicted had omitted facts been included:

I agree with my colleagues that falsity may be established by implication and that the omission of facts may result in defamation by implication. See Majority at 823,826-27.

Mohr v. Grant, 153 Wn.2d at 833 (Chambers, J., concurring in part and dissenting in part) (emphasis added).

Three plus three is six, and six is a majority. In Mohr a solid majority of six justices held that an article can be false and defamatory and actionable, even if every statement in the article is literally true. Swart may dislike this holding, but that does not change the fact that defamation by omission is recognized as actionable in this State.³ As noted below, it is uncontested that Swart omitted the fact that he had a romantic relationship with Northon and that he was engaged to marry her. Swart simply ignores the impact of that omission on the entire article.

Manifest Constitutional Error May Be Raised for the First Time on Appeal.

Swart argues that Rule's arguments regarding the unconstitutionality of RCW 4.24.525 should not be addressed by this Court because Rule did not raise them in the Superior Court. Citing *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 81, 322 P.3d 6 (2014) and *Lindblad v. Boeing Co.*, 108 Wn. App. 198,207,31 P.3d 1 (2001), Swart argues that because "[t]hese arguments are raised for the first time on appeal it is improper to consider them now." He asserts that "The agreements [sic] presented in pages 43-47 and 48-49 of Rule's appellate brief were not presented at either the initial briefing or on her motion for reconsideration and must not be considered now." Response at 34. Swart overlooks RAP 2.5(a) and the case law implementing it.

The rule provides:

"The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right."

This rule makes no distinction between civil and criminal cases.

The plain language of subsection three states a party may challenge

for the first time on appeal a manifest error that affects a constitutional right. We have recognized that civil parties may raise constitutional issues on appeal if they satisfy the criteria listed in RAP 2.5(a)(3). See *Richmond v. Thompson*, 130 Wn.2d 368, 385, 922 P.2d 1343 (1996) (citing *Haueter v. Cowles Publ'g Co.*, 61 Wash.App. 572,577 n.4, 811 P.2d 231 (1991)). *State v. WWJ Corp.*, 138 Wn.2d 595, 601, 980 P.2d 1257 (1999). It is well-settled that manifest constitutional error which violates First Amendment freedoms may be raised for the first time on appeal pursuant to RAP 2.5(a). In *re Dependency of TL.G.*, 139 Wn. App. 1, 19, 156 P.3d 222 (2007); *State v. Ballew*, 167 Wn. App. 359,370-71,272 P.3d 925 (2012). So long as the record is sufficiently developed to permit judicial review, excessive fines claims and due process claims may be raised for the first time on appeal. *WWJ Corp.*, 138 Wn.2d at 603-607. Asserted violations of the right to jury trial may be raised for the first time on appeal. *State v. Lamar*, 180 Wn.2d 576, 589, 327 P.3d 46 (2014) ("The affirmative instruction given to the reconstituted jury constitutes manifest error affecting the constitutional right to a unanimous jury verdict under article I, section 21 of the Washington Constitution. Accordingly, the defendant could raise the asserted error for the first time on appeal."). If this Court finds it necessary to reach these constitutional issues, there is no procedural bar to this Court's consideration of them. Rule respectfully submits that **RCW 4.24.525 is unconstitutional, both on its face, and as applied to this case, because it violates the First Amendment, the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, and the state constitutional rights to access to courts, separation of powers, and jury trial.**

C. QUALITY OF PERSONS, RES JUDICATA NOT APPLICABLE

1. The parties are not identical

The res judicata argument does not apply in this matter. All elements have not been met required for defense of res judicata doctrine as follows:

First element, the parties are not the same. Defendants mention the Washington District Court matter which was once again like the Chicago matter dismissed as Defendants stated that the matter was duplicative and being argued in Arizona the 226 matter darkening the waters. Judge Richard Jones the Judge for the Western District of Washington Court, in the very Order attached as Exhibit C to Declaration of Steve Koh motion for summary judgment the Court itself states that it may be wrong pg. 1 line 22 *Leon v. Exponent Leon v. The Boeing Company* 2:14 ccv00095

RAJ. Plaintiff is handicapped medicated and at times difficult to write the court stated was incomprehensible but did not provide leave to amend.

2. The Causes of Action and Subject Matters Are Not Identical

There remain genuine issues of material fact regarding whether the Defendants' actions fall under defamation and interference with business expectancy motion for summary judgment is denied. The Defendants argue that the same nucleus of operative fact—the Defendants defamation and infliction of emotional distress against Michael Leon 2013 Dreamlier —is the basis for all the actions, and because Michael Leon did not allege tortious interference against agent Marc R. Birtel of The Boeing Company third parties in the post employment retaliation against Meggit former employer or the FALSE CLAIMS Act concerning The Boeing Company K-46 Pegasus , res judicata now precludes Mihcael Leon from doing so in the current action

There remain genuine issues of material fact regarding whether the Defendants' Third Party Marc R. Birtel of The Boeing Company qualified defamation privileges may be overcome only by a showing of "excessive publication" actual malice—that is, "the defendant's knowledge or reckless disregard as to the falsity of the statement." and A valid business expectancy for purposes of a tortious interference claim involves a prospective business relationship that would be of pecuniary value to the plaintiff, including "the prospect of obtaining employment." Restatement (Second) of Torts § 766(b), cmt c (1979).

3. The Quality of Persons is Not Identical...

Marc Birtel has not been a party to lawsuits previously the individual that engaged in defamation of Michael Leon. There is not the same identity in persons and parties. Marc Birtel has only been brought in recently as individual and as an agent for The Boeing Company. Marc Birtel was not named in the 226 matter or any others. The Boeing Company misrepresented to the Judge in the Washington District Court matter that Marc Birtel named in 226 litigation and that duplicative convincing Judge to dismiss.

4. The Previous Lawsuit Did Not End In a Final Judgment On the Merits

The foundation is flawed on which they base their argument. The four elements of res judicata are not met in this case. No final judgment applied.

Judge Richard Jones the Judge for the Western District of Washington Court, in the very Order attached as Exhibit C to Declaration of Steve Koh motion for summary judgment the Court itself states that it may be wrong pg. 1 line 22 Leon v. Exponent Leon v. The Boeing Company 2:14 ccv00095 RAJ. Plaintiff is handicapped medicated and at times difficult to write the court stated was incomprehensible but did not provide leave to amend. CP 75-76. The judge even expressed reservation but indicated was basing on misrepresentation.

D. SUMMARY JUDGMENT ERROR SPARSE RECORD

1. The trial court erred in denying disabled pro se litigant MICHAEL LEON's a short continuance to respond to opposition to motion for summary judgment. The only thing raised in this court was a vexatious litigant order and a Washington Federal District Court Western Division Order dismissing matter based on the fact that the Boeing attorneys stated it would be litigated in Arizona District Court 226 matter Marc Birtel was a party to however Marc Birtel had not been added to the case yet so this was misleading and misrepresentation. The Judge in the Arizona matter David Bury denied filing of the Second Amended complaint therefore Marc Birtel never a part of any matters adjudicated. Marc Birtel the individual that engaged in libel, slander and defamation of Michael Leon.

This is not equal access to the court denial of severely handicapped pro se additional time to prepare opposition to motion to dismiss. Order denying extension of deadline. CP 159-160

2. Summary judgment was not warranted on the sparse record submitted by Defendants ...

The Defendants' arguments that Plaintiff is simply recasting claims and that Washington law does not provide for these causes of action is

incorrect. These statements have not been retracted by the Boeing Company and exist to this very date reopening liability and ongoing statute of limitations. The existence of material disputes of fact preclude summary judgment on these claims.

The right to sue first amendment right to petition. Due process fifth and fourteenth amendments right to defend against accusations. Marc Birtel personal liability as well as The Boeing Company vicarious liability.

The only thing I wanted to do was to insure the safety of passengers and consumers on flights as a result The Boeing Company continues to attempt to destroy me for bringing to the attention safety issues.

- A. The trial court erred in denying the Berrys a short continuance to obtain new counsel who could oppose CBIC's motion following the death of Mr. Berry's mother
- B. Summary judgment was not warranted on the sparse record submitted by CBIC ...

B. Summary judgment was not warranted on the sparse record submitted by CBIC. The trial court granted CBIC summary judgment based on nothing more than the assertion of its employee - without any supporting documentation - regarding the amounts it purportedly paid to eleven different subcontractors and the general contractor. The trial court erred in holding the Berrys liable for \$411,241.12 based on this unsupported assertion, which conflicted with the only documentary evidence in the record. CBIC's affidavit fails to meet even the minimal bar it set for itself in the indemnity agreement, which required it to produce "an itemized statement of the aforesaid loss and expense" or "the vouchers or other evidence of disbursement" before it could recover. (CP 34) See also Resp. Br. 18 citing Safeco Ins. Co. of Am. v. Gaubert, 829 S.W.2d 274, 282-83 (Tex. App. 1992), writ denied (Sept. 23, 1992) (involving similar clause). A statement "lumping together" eleven of twelve claims is not an "itemized statement," and it is undisputed CBIC provided no "vouchers" or other documentation to support the payments it purportedly made. CBIC's own surety contract confirms that it was not entitled to summary judgment. McKasson v. Johnson, 178 Wn. App. 422, 429, ~ 15, 315 P.3d 1138 (2013) ("we construe written contracts against their drafters"). Indeed, CBIC's affidavit is little more than the "robo-signed" affidavits Washington courts have previously condemned. See, e.g. Klem v. Washington Mut. Bank, 176 Wn.2d 771, 792 n.14, ~ 41, 295 P.3d 1179 (2013) (criticizing "assembly-line signing and notarizing of affidavits for foreclosure cases, mortgage assignments, note allonges and related documents"). Moreover, CBIC concedes it produced no documentation

supporting the amounts it allegedly paid to eleven subcontractors and the general contractor, and instead relied on the declaration of its employee that "lump[ed] together" all the payments made to subcontractors, failing to specify when payments were made to the subcontractors, how much was paid to each subcontractor, or the basis of any of the payments to subcontractors. (Resp. Br. 7) CBIC fails to cite any evidence supporting its assertion that these payments were made on "disclosed dates." (Resp. Br. 7) Nor does CBIC provide any documentation to explain the discrepancy between the \$3,150 in "corrections" demanded by the general contractor directly to CCS in a June 2011 letter and the over \$162,000 CBIC alleges it paid to the general contractor, again relying solely on the declaration of its employee that CBIC paid the general contractor to complete unspecified "work" and "provide as built drawings and warranties." (Resp. Br. 17 (citing CP 29); see also App. Br. 13-14; CP 59,69) Far from establishing that there are no genuine issues of material fact, CBIC's sole piece of "evidence" - its self-serving employee affidavit - raises far more questions than it answers. (App. Br. 13-16) In order to recover damages, a plaintiff must prove them. That is why the Berrys cited *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn. App. 86, 95, 615 P.2d 1332 (holding that plaintiff could not recover extra costs because it "presented no documentation of such extra costs" and thus "failed to present sufficient evidence to prove these costs"), rev. denied, 94 Wn.2d 1023 (1980) (see Resp. Br. 18). The trial court erred in holding to the contrary and allowing CBIC to recover six-figure payments it allegedly made on its bond without any supporting documentation required by the indemnification agreement on which it sued. III. CONCLUSION This Court should reverse the trial court's summary judgment order and remand with instructions to allow the Berrys sufficient time to obtain local trial counsel and conduct discovery before ruling on any summary judgment motion.

E. NO DISCOVERY ALLOWED STANDARD OF REVIEW DE NOVO SUMMARY JUDGMENT ERROR GRANTED NO TRIAL

This is in violation of CFR 56(f) no discovery allowed to prepare opposition to motion for summary judgment. This is abuse of discretion to not allow aid for disabled persons reading in court hearing. This is abuse of discretion to not allow continuances for handicapped people.

As a general rule, motions to dismiss and motions for summary judgment are not granted without leave to amend. In this proceeding, Mr. Leon had asserted that discovery was necessary to fully prepare objection to summary judgment and therefore needed a continuance which was denied.

The trial court committed further reversible error in denying continuances for a disabled, handicapped Plaintiff from out of state. Based upon erroneous factual and legal contentions, the Court granted Defendants motion for summary judgment. The trial court erroneously concluded that there were no material facts at issue disputed. Washington State claims that is favorable to disabled and grants equal access to the Courts.

1. No Continuances were granted discriminating against handicapped out of state Plaintiff

Plaintiff has not had ample time since the filing of the lawsuit to conduct discovery the motion for summary judgment premature. This matter is in its infancy. Parties have only recently been served and filed answer. Motions for continuance of summary judgment to conduct additional discovery are broadly favored and should be liberally granted to safeguard non-moving parties from summary judgment motions that they cannot adequately oppose. Fed. R. Civ. P. 56(d). American Family Life Assur. Co. of Columbus v. Biles, 714 F.3d 887 (5th Cir. 2013).

In Plaintiff's request for continuance Plaintiff stated: Plaintiff requests this court to refrain from acting on summary judgment request and postpone opposition deadline until discovery can be conducted; Plaintiff in the process of drafting discovery prior to receipt in mail of motion for summary judgment

Plaintiff is terminally ill, handicapped non attorney and requires additional time

Plaintiff has several actions courts requiring diligence

Plaintiff believes through discovery facts and evidence gathered will influence outcome of pending summary judgment motion. C.B. Trucking, Inc. v. Waste Management, Inc., 137 F.3d 41, 39 Fed. R. Serv. 3d (LCP) 1117 (1st Cir. 1998).

Plaintiff seeks clarification when opposition is due.

Plaintiff seeks vacating of June 26 2015 hearing for reason premature.

A defendant may move for summary judgment in one of two ways: (1) by setting out the defendant's version of the facts and alleging that there is no genuine issue of material fact, or (2) by pointing out to the trial court that the plaintiff lacks sufficient evidence to support its case. Seybold v. Neu, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).

A defendant moving for summary judgment in this second way may do so "by 'showing - that is, pointing out to the [trial] court - that there is an absence of evidence to support the nonmoving party's case.'" Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91

L. Ed. 2d 265 (1986)). **The failure of proof as to an essential element of the plaintiffs case “necessarily renders all other facts immaterial.” Id. at 225 (quoting Celotex, 477 U.S. at 322-23).**

Plaintiff has not had any opportunity at all to present this case. Discovery is underway by Plaintiff and to be mailed out. Discovery conducted is critical to the adjudication process and for Plaintiff to prepare opposition demonstrating justifiable controversy exists.

The US Court of Appeals Ninth Circuit Court matter pending 14-17009 Leon v. Meggitt has not determined I am vexatious litigant. The US Court of Appeals Ninth Circuit reversed and remanded false claims against Boeing in 13-15696 US relator, Leon v. Meggitt, Boeing. The 13-71450 Leon v. Securaplane matter has not had final mandate issued. Defendants attempt to darken poison waters.

.CR 56(f) ‘protects a party opposing a summary judgment motion who for valid reasons cannot by affidavit-or presumably by any other means authorized under Rule 56(e)-present ‘facts essential to justify his opposition’ to the motion.’...

In such a case, the trial court may then refuse summary judgment, order a continuance to give the party opposing summary judgment an opportunity to gather and present the evidentiary facts, or ‘make such other order as is just.’... Moore v. Pay’N Save 581 P.2d 159, 161, Wash.App. Div. ; Potter v. Van Waters & Rogers, Inc. 578 P.2d 859, 864+, Wash.App. Div. 1; Garbell v. Tall’s Travel Shop, Inc. 563 P.2d 211, 211, Wash.App. Div. 1 Court was hesitant to cut plaintiffs in automobile products liability suit off from their right to trial by means of summary judgment when they had neither opportunity nor occasion to take advantage of rule permitting party opposing summary judgment motion to obtain continuance so as to gather and present evidentiary facts. CR 56(f).

Discovery was not allowed prior to motion for summary judgment which prejudiced appellant abuse of discretion.

The judge dismissed the action without rhyme or legal reasoning. Citing Foman v. Davis, 371 US 178 – 1962; Lopez v. Smith, 203 F. 3d 1122 - 2000. Judge gave no legal reasoning for dismissal granting summary judgment cite ninth circuit forman v. davis, etc. The judge refused continuances of disabled. ¹

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<http://www.courts.wa.gov/content/Briefs/A01/670301%20appellant's.pdf>

The National Transportation Safety Board (NTSB) said a failure in the plane's GE90 engine was not contained by the engine's casing and that it

Plaintiff pleaded with Judge Ramseyer in pleadings:

- **Plaintiff pro se litigant Michael Leon hereby requests extension of time to file opposition to motion for summary judgment and requests postponement of ruling until after discovery completed.**

- **No discovery had been conducted**

The cases are not on point because there, the first action made the second one necessary. Again, although res judicata does not apply here, the same is arguably true. When this Court decided that Concrete Science, a dissolved company, had no choses and no rights, and held that Berschauer Phillips, lacking any choses or rights of Concrete Science, lacked standing to assert Concrete Science's claims in the previous lawsuit, those decisions made this lawsuit necessary. Here, Berschauer Phillips is suing on its own claims, not Concrete Science's. (Likewise, MOE made this present lawsuit necessary by concealing the insurance policy).

c. The Quality of Persons is Not Identical

Berschauer Phillips sued on the choses of action of Concrete Science in the previous lawsuit. Now it is making its own direct claims. The quality of persons is not identical.

d. The Previous Lawsuit Did Not End In a Final Judgment On the Merits

The previous lawsuit did not end in a final judgment on the merits.

This Court reversed and remanded for dismissal for lack of subject matter

had found several pieces of the high pressure compressor spool on the runway.

If a blade at the front of the engine fails, the casing is designed to retain it. The NTSB's findings therefore suggest that the failure was within the internal part of the engine.

"Initial examination of the left engine revealed multiple breaches of the engine case in the area around the high pressure compressor," the NTSB said in a statement.

<http://www.thedailybeast.com/articles/2015/09/14/exclusive-boeing-and-ge-warned-about-airplane-engine-that-exploded.html?ref=yfp>

<http://gizmodo.com/the-faa-warned-boeing-about-the-flaw-that-caused-a-777->

[1730504726?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+gizmodo%2Ffull+%28Gizmodo%29&ref=yfp](http://gizmodo.com/the-faa-warned-boeing-about-the-flaw-that-caused-a-777-1730504726?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+gizmodo%2Ffull+%28Gizmodo%29&ref=yfp)

jurisdiction. The case was never heard! And though Berschauer Phillips agreed to stipulate to dismissal at the Trial Court, given this Court's decision and holding, that was in order to save time, effort, and attorney fees given the foregone conclusion. Moreover, the parties stipulated to dismissal being careful to notate "in this lawsuit" and "in this matter," when this present lawsuit was already pending! Berschauer Phillips certainly did not intend the dismissal to have res judicata effect, whatever MOE may have hoped.

e. MOE Waived Res Judicata

As argued above, MOE waived res judicata. It was aware of this present lawsuit before the dismissal of the earlier lawsuit. *Karlberg*, No. 64595-1-1, slip op. at 5.

The Trial Court concluded that collateral estoppel does not apply here. MOE did not cross-appeal that determination, but rather asks this Court to reverse the Trial Court on the grounds that "This court may affirm on any ground supported by the record." *Washington Federal Sav. & Loan Ass'n v. Alsager*, 165 Wn. App. 10, 14,266 P.3d 905 (2011). However, this goes beyond asking this Court to affirm; MOE asks this Court to reverse the Trial Court. Contentions on cross-appeal will not be considered in absence of any assignment of error in cross-appellant's brief. *Hafer v. Marsh*, 16 Wn.2d 175, 181, 132 P.2d 1024 (1943). The assignments of error in MOE's brief are inadequate, failing to point out errors for which reversal is sought. Even if the assignments were adequate, this Court should affirm the Trial Court on the issue of collateral estoppel, because the doctrine does not apply. There is not identity of issues. The basis on which this Court decided that Berschauer Phillips lacked standing was that it did not possess Concrete Science's choses. This is an entirely different basis for standing, arising out of the insurance policy. Further, the earlier proceeding ended with this Court's determination that the Trial Court lacked subject matter jurisdiction. The matter was never decided. There is no "final judgment" for collateral estoppel. *In re Cogswell's Estate*, 189 Wash. 433, 436, 65 P.2d 1082 (1937). Finally, application of the doctrine will work an injustice. MOE prevented Berschauer Phillips from discovering the insurance policy. MOE should not be rewarded.

MOE prevented Berschauer Phillips from discovering the insurance policy and its cause of action. The elements of res judicata and collateral estoppel do not apply. This Court should reverse and remand.

- **Plaintiff has not had any opportunity at all to present this case. Discovery is underway by Plaintiff and to be mailed out. Discovery**

conducted is critical to the adjudication process and for Plaintiff to prepare opposition demonstrating justifiable controversy exists. ...In such a case, the trial court may then refuse summary judgment, order a continuance to give the party opposing summary judgment an opportunity to gather and present the evidentiary facts, or ‘make such other order as is just.’... Moore v. Pay’N Save 581 P.2d 159, 161, Wash.App. Div. ; Potter v. Van Waters & Rogers, Inc. 578 P.2d 859, 864+, Wash.App. Div. 1; Garbell v. Tall's Travel Shop, Inc. 563 P.2d 211, 211, Wash.App. Div. 1. Plaintiff has not had any opportunity at all to present this case. Discovery is underway by Plaintiff and to be mailed out. Discovery conducted is critical to the adjudication process and for Plaintiff to prepare opposition demonstrating justifiable controversy exists.

Court was hesitant to cut plaintiffs in automobile products liability suit off from their right to trial by means of summary judgment when they had neither opportunity nor occasion to take advantage of rule permitting party opposing summary judgment motion to obtain continuance so as to gather and present evidentiary facts. CR 56(f).

The bulk of Defendants’ motion for summary judgment argues that res judicata doctrine bars this particular action from litigation and rehashes the facts and argument underlying Defendants’ initial Motion to Dismiss in the closed United States District Court Arizona Case No. Leon v. Meggitt 4:12-cv-00226-DCB (hereinafter referred to as the “226” matter) for Title VII Post Employment Retaliation against Meggitt, Inc. before the United States Court of Appeals for the Ninth Circuit Case No. 14-17009. Defendants’ fail to mention to this Court the procedural history associated with the Leon v. Meggitt 4:12-cv-00226-DCB in an attempt to muddy the waters concerning this separate set of claims. Likewise, Defendants attempt to merge the 4:13-cv-00111-CKJ False Claims Act (hereinafter referred to as the “111” matter) arising from 2006 and the USDOJ FAA Leon v. Securaplane US Labor Board 2008 AIR 00012 (hereinafter referred to as the “DOJ FAA” matter) concerning Plaintiff’s former employer Securaplane and Parent Company Meggitt actions arising from 2007.

Defendants admit that there is no enforcement of Order a stay as it is pending in Ninth Circuit Court of Appeals. RT 11 (Mtn Summary Judgment Transcript 6 26 2015 Pg. 11 lines 13-15.) Judge Jorgenson in Order dated May 6 2015 DKT 19-1 4:13-cv-00111-CKJ states that no such Order exists in case pg. 3 lines 25-27. A Vexatious Litigant Order was attempted in Leon v. Meggitt 4:12-cv-00226-DCB action, however,

the Leon v. Meggitt 4:12-cv-00226-DCB is closed and subject of an appeal before the United States Court of Appeals for the Ninth Circuit Case No. 14-17009. The dismissal will in all probability be reversed and remanded as the 4:13-cv-00111-CKJ for the reasons that the Order is overly broad attempting to encroach individual state sovereignty and attempting to bar any future Title VII, the ADA, or the FCA. The United States Court of Appeals for the Ninth Circuit has already reversed and remanded a False Claims Act matter for Plaintiff to pursue 4:13-cv-00111-CKJ. Further pending Judicial Misconduct Complaints pending against Judges Collins and Bury. (Michael A. Leon Decl., Ex. C-M.).

The existence of factual disputes as to whether these claims against Marc Birtel and the Boeing Company interference with business expectancy defamation have been litigated previously similarly preclude the grant of summary judgment on these claims. Plaintiff Michael Leon respectfully requests that the Court deny the Defendants' Motion for Summary Judgment.

Defendants argument fails concerning vex litigant because the 111 false claims matter reinstated not dismissed upon which subsequent actions filed at the misguidance of judge jorgenson stating state and federal. The court found this judge abused discretion remanded for false claims matter going forward which has nothing to do with events January 2013 as defendants claim.

The Court erred in issuing Vexatious litigant Order applicable to all states with no boundaries in the 4:12-cv-00226-DCB matter. Vexatious Litigant Order raising litigations prior to this set of cause of action in 2013 Dreamliner different cases through the years, issues merging to darken waters preventing state and federal filings no legal remedies for this action or any further causes of action retaliatory. Securaplane, employer defendant in prior to 2013 actions unrelated to 2013 worldwide grounding Dreamliner aircraft defamatory statements issued by The Boeing Company. In addition, this judge refusal to allow efileing despite the fact that Plaintiff has efiled for years in that Court and Appellate Courts, Plaintiff submitted several motions to efile as he is disabled, impoverished demonstrates Section 1983 and abuse of discretion. This same judicial officer which owns litigant Boeing stock.

This matter was transferred from Chicago Illinois. Plaintiff a pro se

being financed the legal defense in the United States Department of Labor proceedings prior to the unveiling of the Dreamliner July 8 2007 and financed Exponent Consultant analysis of battery explosion in 2006 at Securapalme premises which Michael Leon injured. Vex litigant erroneous and biased judicial analysis.

Durley v. Mayo, 351 U.S. 277 (1956)

Res judicata is not a rigid doctrine in Florida. The Supreme Court recently refused to apply it where to do so would "defeat the ends of justice." Universal Const. Co. v. City of Ft. Lauderdale, 68 So.2d 366, 369. [Footnote 2/4] Once the facts alleged by petitioner are conceded, as they must be on the present record, it defeats the ends of justice to deny relief here.

3. Dismissal; Summary Judgment granted with No Legal Reasoning
The judge dismissed the action without rhyme or legal reasoning. Citing Foman v. Davis, 371 US 178 – 1962; Lopez v. Smith, 203 F. 3d 1122 - 2000. Judge gave no legal reasoning for dismissal granting summary judgment cite ninth circuit forman v. davis, etc. The judge refused continuances of disabled.

2. Judicial Bias; Abuse of Discretion

Restricting access to the courts is, however, a serious matter. "[T]he right of access to the courts is a fundamental right protected by the

5. Misrepresentation to Judge

- Genuine issues of material fact exist

- Defendants misrepresented to the Judge that Marc Birtel had been named in lawsuit previously and sued.
- Defendants misrepresented the number of lawsuits filed through the years unrelated to this litigation.

- Defamation Interference with Business Expectancy Retaliation.

a. *Marc Birtel was not privity*

In Headley v. Bacon, 828 F. 2d 1272 - Privity does not exist merely because parties happen to be interested in the same question, or in proving or disproving the same state of facts. See Duncan v. Clements, 744 F.2d 48, 52 (8th Cir.1984) (quoting American Polled Hereford Ass'n v. Kansas

City, 626 S.W.2d 237, 241 (Mo.1982)). On the record before us, the facts relevant to the defendants' relationship are not disputed, just their legal significance. The district court said, "I find that the parties are, indeed, in privity." Memorandum and order at 5 (emphasis added). This was a ruling on a motion for summary judgment, however; there appears to have been no factfinding and the court, therefore, merely set forth its conclusion of law. We therefore conclude that the district court erred in its determination that the defendants were in privity with the City in Headley I, at least with respect to the claims against them in their individual capacity. Even for the claims brought against them in their official capacity, privity is not automatic. The district court's order here appealed from was a grant of summary judgment. There have been no findings of fact in this case to allow a determination whether the relationship between all or any of the individual defendants in their official capacity and the City with respect to Headley I rose to the level of "near identity" required to constitute privity.⁹ Under such circumstances, therefore, the district court also erred in granting summary. Central to the holdings in all these cases, however, was that the defendant officials were sued in their official capacities. The actions of their agencies, not their personal actions, were at issue. By contrast, a judgment against a government does not bind its officials sued in their personal capacities. *Beard v. O'Neal*, 728 F.2d 894, 896-97 (7th Cir. 1984) (FBI informant and officials sued in individual capacities not in privity with FBI agent who was defendant in prior unsuccessful *Bivens* -type action), cert. denied, 469 U.S. 825, 105 S.Ct. 104, 83 L.Ed.2d 48 (1984); cf. *Garza v. Henderson*, 779 F.2d 390, 393-94 (7th Cir.1985) (prison discipline committee members sued in official and personal capacities not collaterally estopped by judgment in prior habeas corpus proceeding against warden).

The third factor to consider is whether the original action was judged on the merits of the case and whether that judgment was a final judgment. Final judgment does not occur when the case is settled by the parties on their own, or where the judge decides a motion or makes some other determination that does not resolve the case based on the facts and evidence of the case. This means that the final judgment must concern the actual facts giving rise to the claim. Dismissal of a case because the court does not have subject matter jurisdiction, because the service of process was improper, because the venue was improper or because a necessary party has not been joined, for example, are not judgments on the merits. Grants of these types of motions to dismiss really have nothing to do with the facts, except that the litigation is precluded by a technicality. As such,

subsequent litigation as to whether the defendant is liable would not be barred.

The doctrine of res judicata is not usually raised by motion. Under the federal rules, it must be raised by affirmative defense. In most situations, if a defendant does not raise the defense of res judicata, it is waived. See *Rotec Industries, Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1119 (9th Cir. 2003) (“Claim preclusion is an affirmative defense which may be deemed waived if not raised in the pleadings. Moreover, the failure of the defendant to object to the prosecution of dual proceedings while both proceedings are pending also constitutes waiver.”).

Collateral estoppel arises when the claim (cause of action) at the bar has not been litigated, but the exact issue that is now before the court has been raised and litigated in an earlier action or proceeding. Collateral estoppel is a bit different than res judicata, although the rationale is the same – it is a tool to prevent re-litigation of issues already litigated. See *U.S. v. Wells*, 347 F.3d 280, 285 (8th Cir. 2003) (“The collateral estoppel doctrine provides that ‘when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.’ ”).

Moreover, litigation involving officials in their official capacity does not preclude relitigation in their personal capacity. *Roy v. City of Augusta, Maine*, 712 F.2d 1517, 1521-1522 (1st Cir.1983); cf. *Unimex, Inc. v. HUD*, 594 F.2d 1060, 1061 n. 3 (5th Cir.1979) (per curiam); Restatement (Second) of Judgments Sec. 36(2) and comment e (1982); *Wright, Miller & Cooper* Sec. 4458 at 508-09.judgment even for the defendants in their official capacity.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT ON APPEAL IS DE NOVO. BASED ON THE PLEADINGS, MOTIONS, DECLARATIONS AND DISCOVERY CONTAINED ON THE RECORD, THE TRIAL COURT ERRED IN GRANTING RESPONDENT SMITH'S MOTION FOR SUMMARY JUDGMENT AS GENUINE ISSUES OF MATERIAL FACT EXISTS WARRANTING A TRIAL

STANDARD OF REVIEW FOR SUMMARY JUDGMENT ON APPEAL IS DE NOVO. BASED ON THE PLEADINGS, MOTIONS, DECLARATIONS AND DISCOVERY CONTAINED ON THE RECORD, THE TRIAL COURT ERRED IN GRANTING RESPONDENT SMITH'S MOTION FOR SUMMARY JUDGMENT AS GENUINE ISSUES OF MATERIAL FACT EXISTS WARRANTING A TRIAL.

When reviewing a summary judgment, the Court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853,

860, 93 P.3d 108 (2004) (citing, *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). The standard of review is de novo. *Hisle*, 151 Wn.2d at 860. Summary judgment is appropriate only if "the pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). When considering a motion for summary judgment on review, the Court reviews all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16,26, 109 P.3d 805 (2005) (citing, *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)).

Petitioners' Brief - Page 5 of 11

In the instant case, Respondent noted a Motion for Summary Judgment on June 11, 2012. Based on review of the Snohomish County Superior Court docket, the Respondent's Motion for Summary Judgment, no declaration was filed in conjunction with Respondent Smith's Motion for Summary Judgment, although such Declaration was referenced in the July 12, 2012 court order. See, Appendix J. Nevertheless, in light of the evidence to be relied upon on a CR 56 motion, including discovery, Respondent Smith admission in her Interrogatory Response 18 that she knew of boundary issues back in 2000 provides (See, Appendix B), contrary to her Form 17 Response for the sale of the property (See, Appendix A) clear genuine issues of material facts warranting a trial. Simply put, Respondent Smith did not have authority to sell that parcel of land appurtenant to her property, moreover, she knew there were

issues related to encroachment on other property, although she represented otherwise. Despite this knowledge, Respondent Smith represented otherwise and Petitioners' have not benefitted from what they have bargained for and incurred actual and consequential damages since buying the property. In addition, there are factual disputes as to what other representations were by Respondent Smith. Any doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party. See, *Young v. Key Pharmaceutical Inc.*, 112 Wn.2d 216,225,770 P.2d 182 (1989). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton* at 516. Accordingly, the granting of a Respondent's Motion for Summary Judgment was reversible error.

III. CONCLUSION

For the foregoing reasons, the trial court improperly granted summary judgment in favor of Boeing, Marc Birtel. The ruling should be reversed, and this case remanded.

Dated: July 8, 2016

/s/ _____
Michael A. Leon

Copy of the foregoing mailed this date to:

Steve Koh
Perkins Coie 1201 3rd Ave, Seattle, WA 98101

Thomas D. Ryerson
Perkins Coie 2901 N. Central Avenue
Suite 2000 Phoenix, AZ 85012-2788