

TABLE OF CONTENTS

I.	NATURE OF THE CASE.....	1
II.	RESTATEMENT OF THE ISSUE	1
III.	STATEMENT OF FACTS.....	2
	A. Defendants’ Summary Judgment Motion	2
	B. Allen’s Appeal Of The Summary Judgment was Dismissed When He Failed To File A Brief.....	5
	C. Allen’s Motion To Vacate The Summary Judgment	5
	D. The Trial Court Denies Allen’s Motion To Vacate	7
IV.	LAW AND ARGUMENT.....	7
	A. Standard Of Review	7
	B. Allen’s Motion To Vacate Was Properly Denied	8
	1. Allen’s Motion To Vacate The Summary Judgment Based Upon Newly Discovered Evidence Was Properly Denied Under CR 60(b)(3)	8
	2. Allen Failed To Present Any Newly Discovered Evidence	9
	3. Even If Allen’s Evidence Were “New Evidence”, Allen Failed To Show That The Evidence Could Not Have Been Discovered Before Summary Judgment By The Exercise Of Due Diligence.....	11
	4. Allen’s “New Evidence” Would Not Probably Change The Result If A New Trial Were Granted And Is Merely Cumulative	13
	5. Allen’s Motion To Vacate The Summary Judgment Was Properly Denied Under CR 60(b)(11)	14

TABLE OF AUTHORITIES

Cases

<i>Allen v. Allen</i> , 12 Wn. App. 795, 532 P. 2d 623 (1975).....	16
<i>Betterbox Commc'n Ltd. v. BB Tech., Inc.</i> , 300 F.3d 325 (3 rd Cir. 2002)	10
<i>Burlingame v. Consol. Mine & Smelting Co., Ltd.</i> , 106 Wn.2d 328, 772 P.2d 67 (1986).....	8
<i>Davis v. Globe Mach. Mfg. Co., Inc.</i> , 102 Wn.2d 68, 684 P.2d 692, 698 (1984).....	8
<i>General Universal Systems, Inc. v. Lee</i> , 379 F.3d 131 (5 th Cir. 2004)	10
<i>Go2Net, Inc. v. C I Host, Inc.</i> , 115 Wn. App. 73, 60 P.3d 1245 ((2003).....	11
<i>Griggs v. Averbeck Realty, Inc.</i> , 92 Wn.2d 576, 599 P.2d 1289 (1979).....	7, 9
<i>Gustafson v. Gustafson</i> , 54 Wn. App. 66, 772 P.2d 1031 (1989).....	14
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 753 P.2d 1302 (1978).....	12, 16
<i>In re Flannagan</i> , 42 Wn. App. 214, 709 P.2d 1247 (1985).....	14, 15
<i>In re Marriage of Burkey</i> , 36 Wn. App. 487, 675 P.2d 619 (1984).....	11
<i>In re Marriage of Jennings</i> , 91 Wn. App. 543, 958 P.2d 358 (1998).....	14
<i>Lane v. Brown & Haley</i> , 81 Wn. App. 102, 912 P.2d 1040 (1996).....	7, 12

<i>Mission Ins. Co. v. Guarantee Ins. Co.</i> , 37 Wn. App. 695, 683 P.2d 215 (1984).....	8
<i>Nelson v. Mueller</i> , 85 Wn.2d 234, 533 P.2d 383 (1975).....	9
<i>Patrick v. Vrablic</i> , 2005 WL 3088346 (E.D. Mich. 2005).....	15
<i>Peoples v. City of Puyallup</i> , 142 Wash. 247, 252 P. 685 (1927)	11
<i>Smith v. Shannon</i> , 100 Wn. 2d 26, 666 P.2d 351 (1983)	15
<i>State v. Santos</i> , 104 Wn.2d 142, 702 P.2d 1170 (1985).....	7
<i>Stoulil v. Epstein Operating Co.</i> , 101 Wn. App. 294, 3 P.3d 764 (2000).....	16
<i>Vance v. Offices of Thurston Cy. Comm 'rs</i> , 117 Wn. App. 660, 71 P.3d 680 (2003).....	11
<i>White v. Holm</i> , 73 Wn. 2d 348, 438 P.2d 581 (1968).....	9

Statutes

42 U.S.C. § 1983.....	2
-----------------------	---

Rules

CR 59	9, 11
CR 60	9, 16
CR 60(b)(3).....	8, 10
CR 60(b).....	1, 8, 10
CR 60(b)(1).....	13

CR 60(b)(11).....	12, 14, 15, 16
CR 60(e).....	16
<i>Federal Civil Rules Handbook,</i> p. 968 (2006).....	10
FRAP 10.4(h).....	15
FRAP 32.1.....	15

Other Authorities

4 Karl B. Tegland, <i>Rules Practice --- Washington Practice Series,</i> 553 (5 TH Ed. 2006).....	9
Appendix A	5

I. NATURE OF THE CASE

Patrick Allen filed a civil rights action against the Washington State Patrol (WSP) and a trooper in which he claimed excessive force was used when he was handcuffed during an arrest. After the trial court dismissed his complaint on summary judgment, Allen appealed. This court dismissed Allen's appeal when he failed to file an appellant's brief. Allen then filed a motion to vacate the summary judgment under CR 60(b) claiming his attorney was incompetent, and he had newly discovered evidence. The trial court denied Allen's motion and he again appeals.

II. RESTATEMENT OF THE ISSUES

A. Whether the trial court abused its discretion in denying Allen's motion to vacate summary judgment when Allen's "new evidence" was either not in existence at the time summary judgment was entered, or was evidence of which Allen had prior knowledge at the time judgment was entered?

B. Whether the trial court abused its discretion in refusing to allow Allen to present oral argument regarding new case law, when Allen failed to cite the new case law as part of his written motion, and the new case law was an unpublished federal decision establishing no new legal principles?

III. STATEMENT OF FACTS

On June 11, 2003, WSP Trooper Brian George arrested Patrick Allen for Driving Under the Influence near Poulsbo, Washington.¹ George placed handcuffs on Allen. CP at 27.

Allen sued the WSP and Trooper George under 42 U.S.C. § 1983. Allen asserted George violated his Fourth and Fourteenth Amendment rights by the use of excessive force in handcuffing him. CP at 87.

A. Defendants' Summary Judgment Motion

Defendants moved for summary judgment on the grounds that Allen's § 1983 claim against the WSP was barred by the Eleventh Amendment, and that Allen's claims against George, as an individual, should be dismissed on qualified immunity grounds. CP at 1-12. George argued Allen had failed to prove any significant injury resulting from the handcuffing upon which to base an excessive force claim. CP at 8-9.

In their motion, defendants relied upon the deposition transcripts of Allen's treating physicians, Dr. Kent Smith and Dr. John Sack. On June 12, 2004, the day after he was handcuffed, Allen went to see Dr. Smith, an emergency room physician, concerning his wrists and hands. Dr. Smith believed Allen's injuries "weren't very severe injuries and should "get well quickly without any long term impairments...." CP at 35.

¹ Throughout his brief, Allen erroneously refers to Brian George as a "cadet". George is not a cadet, but is a trooper for the WSP. CP at 27.

The doctor found that Allen had “fairly mild bruising to the wrist with some swelling and a little numbness that should get better”. CP at 33. Dr. Smith believed Allen’s injury should have resolved itself within a few days. CP at 34.

On June 25, 2003, Allen was examined by Dr. Sack, an orthopedic surgeon specializing in problems with the hands. CP at 39. Dr. Sack found Allen had full range of motion in his wrist and fingers, that the muscles in his wrist and hands were working normally, and that he had a normal sweating pattern on his hand. CP at 41-42. These findings were indications that Allen was not seriously injured. CP at 44-45.

Dr. Sack found Allen had, to a minor degree, decreased sensitivity in his radial nerve of his right hand. CP at 43. Dr. Sack considered this to have been a relatively minor injury that would not be permanent. CP at 40-41. Dr. Sack also observed some scraped skin on the top of Allen’s hand. CP at 45.

Allen saw Dr. Sack again on September 4, 2003. This time, Allen claimed he was suffering symptoms in his right hand that differed from the symptoms he claimed in his prior visit. Allen claimed he was having pain stretching from his right middle finger over the top of his right hand up to his elbow. Dr. Sack could not find anything that supported Allen’s

claimed symptoms. CP at 46. Dr. Sack did not believe these symptoms were related to the handcuffing. CP at 47.

At the time of his deposition on July 21, 2005, Dr. Sack had reviewed a report of a nerve conduction study (EMG) from Dr. Jennifer Carl, dated June 22, 2005. CP at 47. This report indicated Allen had abnormalities which would support a diagnosis of past median nerve injury. CP at 47. However, Dr. Sack did not believe the injuries identified in Dr. Carl's report were related to the handcuffing. When asked about Dr. Carl's report at his deposition, Dr. Sack responded:

23 Q Based upon this report does that
24 change your opinions that
25 you testified to today?
A No.
1 Q Why not?
2 A Because the most logical injury from
3 a handcuff is a radial
4 nerve injury and she's not noticing
5 any.
6 Q So you're saying that based upon the
7 injury to the nerves
8 that she noted in her examination we
9 are talking about some
10 other kind of injury that occurred
another time?
A She's saying there is an injury that
occurred at some point
in time, she can't put it down to
when it occurred and she's
only finding it in the nerve, or I
mean in the muscle
component. The conduction of the
nerves are all normal and

11 it's just signifying that something
 happened in the past and
12 it's mainly in the median nerve and
 some in the ulnar nerve
13 in the right side, not on the left.

CP at 164-65.

On November 18, 2005, the trial court granted defendants' summary judgment motion. CP at 80.

B. Allen's Appeal Of The Summary Judgment Was Dismissed When He Failed To File A Brief

On December 22, 2005, Allen filed an appeal of the summary judgment dismissing his complaint. This Court subsequently dismissed the appeal when Allen failed to file an appellant's brief.² *See, Patrick Allen v. Brian George et. al.*, Court of Appeals Cause No. 34213-8-II.

C. Allen's Motion To Vacate The Summary Judgment

On November 17, 2006, Allen filed a motion to vacate the summary judgment claiming his attorney negligently handled his case, and that he had discovered new evidence to support his claims. CP at 91.

Allen's claim of new evidence was primarily based upon the declarations of Dr. Lynn Staker and Dr. Carl, and medical records related to their treatment of Allen. *See* CP at 431; 137, 323-30; 338-39. These

² A copy of the Conditional Ruling of Dismissal and the Ruling Dismissing Appeal are attached as Appendix A.

physicians treated Allen both before and after his lawsuit was dismissed in November 2005.

Dr. Carl started treating Allen more than two years after he was handcuffed. In her declaration, Dr. Carl does not render an opinion as to whether the handcuffing caused Allen's hand injuries; however, she does state Allen's nerve injuries to his right and left hands will be permanent. CP at 137. In rendering this opinion, Dr. Carl relied upon EMGs she performed upon Allen on June 22, 2005, and January 19, 2006. CP at 137. Dr. Carl noted that the abnormalities in the January 2006 EMG, "were present on [the] EMG examination of 6-22-05." CP at 283. She indicates that the nerve injury occurred no later than March 2005. CP at 283.

Dr. Staker first examined Allen for his hand injury in September 2005, two months before the summary judgment was entered. CP at 323. In her report of that examination, she noted that Allen "[s]tates he had nerve tests and was told there was nerve damage". CP at 323. She next examined Allen on December 27, 2005. As part of her examination, she reviewed the June 2005 EMG study performed by Dr. Carl. Dr. Staker informed Allen that "the nerve injuries to his hands, as demonstrated by Dr. Carl's EMG study were not minor, but significant and possibly permanent". CP at 432.

Dr. Staker next saw Allen on May 9, 2006, at which time she reviewed the January 2006 EMG study performed by Dr. Carl. Dr. Staker diagnosed Allen as having “contusion and nerve damage to [his] hands bilaterally, with some weakness, loss of dexterity, and pain from over activity”. CP at 432.

D. The Trial Court Denies Allen’s Motion To Vacate

On December 8, 2006, the trial court denied Allen’s motion to vacate the summary judgment. CP at 433. Allen now appeals the order denying this motion. On appeal, he asserts the trial court erred in denying his motion because he had newly discovered evidence to support his claims. He also claims, for the first time on appeal, it was error for the court not to allow him to orally argue the relevance of new case law, which was not cited in his written material submitted to the trial court.³

IV. LAW AND ARGUMENT

A. Standard Of Review

A trial court's decision on whether to vacate a judgment or order under CR 60(b) is reviewed for abuse of discretion. *See, Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979); *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1170 (1985); *Lane v. Brown & Haley*, 81 Wn. App. 102, 105, 912 P.2d 1040 (1996).

³ Allen has not appealed his claim that the summary judgment should have been vacated due to his attorney’s incompetence. Br. of Appellant at 1-2.

“Discretion is abused when it is exercised on untenable grounds or for untenable reasons.” *Davis v. Globe Machine Mfg. Co., Inc.*, 102 Wn.2d 68, 77, 684 P.2d 692, 698 (1984). A CR 60(b) motion may not be used to correct errors of law in the trial court’s decision as that is a function of appeal. *Burlingame v. Consol. Mine & Smelting Co., Ltd.*, 106 Wn.2d 328, 336, 772 P.2d 67, 72 (1986).

B. Allen’s Motion To Vacate Was Properly Denied

The trial court did not abuse its discretion in denying the motion to vacate because Allen presented no newly discovered evidence. Allen’s “new evidence” was either not in existence at the time summary judgment was entered, or was evidence of which Allen had prior knowledge at the time judgment was entered.

Moreover, even if Allen had properly raised the issue of new case law in his motion, which he did not, the trial court did not abuse its discretion in denying the motion to vacate, as the cases Allen wished to bring to the Court’s attention did not establish any new principles of law.

1. Allen’s Motion To Vacate The Summary Judgment Based Upon Newly Discovered Evidence Was Properly Denied Under CR 60(b)(3)

Under CR 60(b)(3), a motion to vacate may be based upon newly discovered evidence which, by due diligence, could not have been discovered in time to move for a new trial. *See e.g., Mission Ins. Co. v.*

Guarantee Ins. Co., 37 Wn. App. 695, 683 P.2d 215 (1984). The test for newly discovered evidence under CR 60 is the same as the test for newly discovered evidence for a new trial under CR 59. 4 Karl B. Tegland, *Rules Practice - Washington Practice Series* 553 (5d 2006).

The requirements necessary to justify the granting of a new trial on the ground of newly discovered evidence are: (1) that the new evidence will probably change the result if a new trial is granted; (2) that the evidence must have been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching. *Nelson v. Mueller*, 85 Wn.2d 234, 533 P.2d 383 (1975).⁴

Pursuant to this standard, the trial court did not abuse its discretion in denying Allen's motion to vacate.

2. Allen Failed To Present Any Newly Discovered Evidence

Much of Allen's "new evidence" consists of medical records and doctors' opinions that did not exist at the time summary judgment was granted. See *e.g.*, CP at 329-344 (medical reports of Dr. Staker). Dr. Staker's and Dr. Carl's opinions are based, in part, upon medical tests

4. Allen cites *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d at 582, 599 P.2d 1289 (1979), and *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), for the proposition that a more liberal standard applies. Br. of Appellant at 22. However, these cases concern motions to vacate default judgments, which are subject to a less stringent standard than motions to set aside other types of judgments.

conducted during the year after the summary judgment was entered. CP at 137; 431-32. This is not “new evidence” under the rule. Implicit in the elements necessary to vacate a judgment under CR 60(b)(3), is the recognition that the newly discovered evidence be of facts that were in existence at the time of trial. *See Federal Civil Rules Handbook*, p. 968 (2006); *see also, Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131 (5th Cir. 2004); *Betterbox Commc’ns Ltd. v. BB Technologies, Inc.* 300 F.3d 325 (3rd Cir. 2002). Subsequent medical records and physicians’ opinions based upon Allen’s medical treatment occurring after dismissal of his complaint does not constitute new evidence because the evidence did not exist at the time summary judgment was granted.

The other “new evidence” Allen claims he has discovered since the summary judgment hearing is the June 2005 EMG report by Dr. Carl, which indicated Allen had abnormalities supporting a diagnosis of past median nerve injury. CP at 47. This report existed prior to entry of the summary judgment order - it is *not* newly discovered evidence. Allen obtained a copy of the report in late June 2005. CP at 107. This report was also discussed by Dr. Sack and included as an exhibit at his deposition on July 21, 2005, months before the summary judgment motion was granted. CP at 142; 163-64. Civil Rule 60(b) requires the evidence to truly be newly discovered and not simply evidence that was available but

not presented at trial. *Vance v. Offices of Thurston Cy. Comm'rs*, 117 Wn. App. 660, 71 P.3d 680 (2003). Dr. Carl's June 2005 EMG report was available to and in Allen's possession, but was not presented at the summary judgment hearing. The report is not "newly discovered evidence".

In *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 60 P.3d 1245 (2003), the court of appeals upheld the trial court's determination that e-mails produced on the day before the summary judgment hearing and entry of the court's order were not "discovered since the trial" and thus were not newly discovered evidence requiring the court to set aside summary judgment under CR 59. Likewise, Allen had Dr. Carl's EMG report for nearly five months prior to entry of the summary judgment dismissing his case, so the report is not "newly discovered evidence".

3. Even If Allen's Evidence Were "New Evidence", Allen Failed To Show That The Evidence Could Not Have Been Discovered Before Summary Judgment By The Exercise Of Due Diligence

The moving party must state facts that explain why the evidence was not available for trial, a mere allegation of diligence is not sufficient. *Peoples v. City of Puyallup*, 142 Wash. 247, 248, 252 P. 685 (1927). Allen blames his lawyer for failing to present Dr. Carl's June 2005 EMG report at the summary judgment hearing. CP at 428. However, the

incompetence or neglect of a party's own attorney is generally not sufficient grounds for relief from a judgment in a civil case. *Haller v. Wallis*, 89 Wn.2d 539, 547, 753 P.2d 1302 (1978); *Brown & Haley*, 81 Wn. App. at 107; *In re Marriage of Burkey*, 36 Wn. App. 487, 490-91, 675 P.2d 619 (1984) (inadequate representation did not constitute "manifest injustice" or "unusual circumstances" warranting relief under CR 60(b)(11)). Other than blaming his attorney, Allen does not offer an explanation for failing to present Dr. Carl's report at the summary judgment hearing. CP at 422-430.

Nor did Allen exercise due diligence in obtaining the declarations of Dr. Carl and Dr. Staker, which are based, in part, upon Dr. Carl's June 2005 EMG report. CP at 137; 432. Allen offers no explanation as to why he did not submit a declaration from Dr. Carl as part of his response opposing the summary judgment motion. Nor does Allen offer an explanation as to why he did not seek another expert opinion after Dr. Sack, his treating physician, failed to support his claim that he had suffered a significant injury due to the handcuffing.

Allen admits his attorney informed him a short time after Dr. Sack was deposed in July 2005, that "Dr. Sack's testimony was not going to be helpful" to his case. CP at 426. Yet, Allen failed to submit the opinion of another physician regarding his hand injury until 16 months later, when he

filed his motion to vacate in November 2006. In essence, Allen is claiming the trial court erred in refusing to vacate the summary judgment because he subsequently found a physician who would render an expert opinion to support his claim.

Allen failed to exercise due diligence in obtaining the declarations of Dr. Carl and Dr. Staker. His motion to vacate the summary judgment based upon newly discovered evidence was properly denied.

4. Allen's "New Evidence" Would Not Probably Change The Result If A New Trial Were Granted And Is Merely Cumulative

Even if Allen's evidence were considered "new" it would not probably change the result if a new trial were granted. The "new evidence" simply goes toward showing Allen suffered an injury to his hands, and not to the cause of the injury itself. The post-summary judgment EMG study confirmed the results of the pre-summary judgment EMG study. Allen's "new evidence" was not significantly different than evidence that was available, but not presented, at the summary judgment hearing.

Allen has still failed to present evidence to rebut the testimony of his own treating physician, Dr. Sack that the nerve injury was not caused

by the handcuffing. Neither Dr. Carl nor Dr. Staker address causation in their declarations.⁵

5. Allen’s Motion To Vacate The Summary Judgment Was Properly Denied Under CR 60(b)(11)

Allen also sought to vacate the summary judgment under CR 60(b)(11) which allows an order to be vacated for “[a]ny other reason justifying relief from operation of the judgment.” CR 60(b)(11). The “any other reason” language of CR 60(b)(11) is not a blanket provision authorizing reconsideration for any and all conceivable reasons. The subsection is limited to situations “involving extraordinary circumstances not covered by any other section of the rule”. *Gustafson v. Gustafson*, 54 Wn. App. 66, 75, 772 P.2d 1031 (1989) (quoting *In re Flannagan*, 42 Wn. App. 214 221, 709 P.2d 1247 (1985)). Furthermore, the limited circumstances addressed in CR 60(b)(11) must relate to “irregularities which are extraneous to the action of the court or go to the regularity of its proceedings.” *In re Marriage of Jennings*, 91 Wn. App. 543, 546, 958 P.2d 358 (1998).

Allen asserts that recent case law “establishes a new standard” regarding excessive force claims based upon handcuffing. He claims the trial court abused its discretion in not allowing him to make an oral

⁵ The closest either physician comes to making such a diagnosis is in Dr. Staker’s December 27, 2005, report wherein she states: “Nerve injury from handcuffing that seems to be confirmed by Dr. Carl.” CP at 329

argument based upon this recent case law at the hearing on his motion to vacate.⁶ Br. of Appellant at 10. Allen's assertion fails on numerous grounds.

In rare circumstances, a change in the law may create extraordinary circumstances satisfying CR 60(b)(11). *See, Flannagan*, 42 Wn. App. at 221-22 (holding that a change in federal law pertaining to dividing military retirement pay pursuant to state community property constituted extraordinary circumstances). However, Allen's assertion that a change in the law has occurred affecting his claim is without merit.

Allen bases his argument that there has been a change in the law on *Patrick v. Vrablic*, 2005 WL 3088346 (E.D. Mich. 2005), which is an unpublished decision from a federal district court.⁷ The case is not controlling in Washington, nor does the case set forth any new principles of law. Elsewhere in his appellate brief, Allen cites case law from the Sixth Circuit regarding excessive force. These cases, however, all pre-date the summary judgment dismissal of Allen's complaint. *See* Br. of

⁶ Allen raises this issue for the first time on appeal. He failed cite the new cases in the written materials he submitted to the trial court as part of his motion to vacate. *See*, CP at 91-122. Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wn. 2d 26, 666 P.2d 351 (1983). While George and WSP assert Allen is precluded from raising this issue, they will address the issue on its merits.

⁷ Citation to the unpublished federal district court decision of November 16, 2005, contravenes Fed. R. App. P., Rule 32.1 (allowing only citation as authority to unpublished opinions or orders issued on or after January 1, 2007), and the spirit of RAP 10.4(h) ("A party may not cite as authority an unpublished opinion of the Court of Appeals.").

Appellant at 24. The cases are not “new law” for purposes of a CR 60(b)(11) motion.

Allen also claims the court erred in not allowing him to present oral argument regarding the “new law” as part of his motion to vacate. However, Allen offers no explanation as to why he did not cite the Sixth Circuit cases as part of his written motion to vacate. Application for relief from a judgment is to be made by written motion setting forth the grounds relied upon. CR 60(e); *Allen v. Allen*, 12 Wn. App. 795, 532 P. 2d 623 (1975) (oral motion ineffective). The trial court did not abuse its discretion in refusing to allow Allen to present oral argument on issues not raised in his written motion. Nor is a court required to allow oral argument at all. *Stoulil v. Edwin A. Epstein, Jr., Operating Co.*, 101 Wn. App. 294, 3 P.3d 764 (2000) (no abuse of discretion in denying CR 60 motion without oral argument).

V. CONCLUSION

The law favors finality. *Haller*, 89 Wn.2d at 544. Allen waited nearly a year before filing his motion to vacate the summary judgment. The trial court did not abuse its discretion in denying the motion. This Court should affirm the trial court’s denial of Allen’s motion to vacate.

RESPECTFULLY SUBMITTED this 15th day of June, 2007.

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Assistant Attorney General
Attorneys for Respondents Washington State
Patrol and Brian George

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COURT OF APPEALS
DIVISION II

MAY 10 06

06 MAY -8 AM 11:46

PATRICK ALLEN,

Appellant,

v.

BRIAN GEORGE, ETAL,

Respondent.

ATTORNEY
FOR
CLERK

No. 34213-8-II

STATE OF WASHINGTON
BY
DEPUTY

CONDITIONAL RULING OF DISMISSAL

THIS MATTER comes before the undersigned upon a motion by the clerk of this court to dismiss the above-entitled appeal for failure to file the Appellants Brief, due since April 28, 2006. It appears that dismissal is warranted, but that a brief grace period is also warranted. Accordingly, it is

ORDERED that the above-entitled appeal will be dismissed without further notice unless the Appellants Brief is on file with the Clerk before the close of business on May 18, 2006.

DATED this 8th day of May, 2006.

Eric B. Schmidt
COURT COMMISSIONER

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Patrick Allen
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MAY 26 06
DIVISION II

COURT OF APPEALS
DIVISION II

06 MAY 24 PM 12:43
STATE OF WASHINGTON
BY SDH
DEPUTY

PATRICK ALLEN,

Appellant,

v.

BRIAN GEORGE,

Respondent.

No. 34213-8-II

RULING DISMISSING APPEAL

THIS MATTER comes before the undersigned to dismiss the above-entitled appeal as it appears to have been abandoned. A review of the file indicates that the Appellant Brief has not been filed as previously ordered in the Conditional Ruling of Dismissal and that dismissal is warranted. Accordingly, it is

ORDERED that the above-entitled appeal is dismissed.

DATED this 24th day of May, 2006.

Eric B. Schmidt
COURT COMMISSIONER

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P.O. Box 923

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FIL. NO. _____
COURT OF APPEALS, DIVISION II
DIVISION II

NO. 35815-8

07 JUN 19 10 14 AM '07

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

STATE OF WASHINGTON
BY _____
DEPUTY CLERK

PATRICK ALLEN,

Appellant,

v.

PROOF OF SERVICE

BRIAN GEORGE, A Washington State
Patrol Trooper, WASHINGTON STATE
PATROL, a Washington State Agency,

Respondents.

I, Marsha Staggs, hereby certify that on June 18, 2007, I caused to be delivered a copy of the following documents:

BRIEF OF APPELLANT

to Patrick Allen, as set forth below:

Patrick Allen
P.O. Box 923
Poulsbo, WA 98374

- United States Mail
- Hand Delivered by Legal Messenger
- UPS Overnight Mail
- Fax

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of June, 2007, at Tumwater, Washington.

Marsha Staggs
MARSHA STAGGS