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COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
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L.S., an individual,

Respondent and Cross-Appellant,

vs.

TITUS-WILL FORD SALES, INC., a Washington Corporation, et. al.,

Cross-Appellants;

RICHIE CARTER,

Cross-Appellant;

MICHAEL R. DOLAJAK,

Appellant.

RESPONSE OF CROSS-APPELLANT TITUS-WILL FORD, et. al.,

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I. OVERVIEW

Plaintiff does not deny her actions violated CR 55. Instead, she asks this court to ignore she asked for a default order 17 times in the trial court and that the trial court indicated 3 times it was granting a default order. Even if only by the concept of judicial estoppel, this court should not condone such a clear attempt by plaintiff to rewrite the record.

What happened below was clearly not a trial. On the motion to set aside the default order, not even the court could bring itself to call what happened a trial, instead calling it a “motion on the merits.” There is no such thing as a “motion on the merits” to resolve lawsuits. Our Civil Procedure provides only two ways to resolve lawsuits: trial or a default motion. If even the court could not characterize what happened as a trial (as clearly it was not) it could only have been a default motion.

By the briefing filed, one might think this is a complicated question. It is not. This can and probably should be decided without oral argument, against plaintiff. That plaintiff was successful in convincing the trial court to preserve one of the default orders is of no import. The arguments she made below and here are nothing short of asking the courts to nullify the Civil Rules. It violated CR 11 for her to do so below, and it violates RAP 18.9 for her to do so here. Defendants ask for remand on their motion for CR 11 costs with a determination of costs by the trial

court and for leave to file additional material for their costs on appeal pursuant to RAP 18.9.

II. REPLY TO PLAINTIFF'S ARGUMENTS

A. The Arguments Raised By These Defendants Are Not "Frivolous"

1. PLAINTIFF CITES NO PROPER AUTHORITY AND MAKES NO PROPER ARGUMENT

Plaintiff did not argue below that defendants' authority and argument was "frivolous." If it plaintiff's intent to ask this court to find such, that issue may not be raised here for the first time. See RAP 2.5(a).

If it is plaintiff's intent to argue that defendants' arguments are frivolous on appeal, that would raise RAP 18.9, which is neither cited or briefed by plaintiff as required by RAP 12.1(a) which would appear to preclude her from even making the argument. But placing that aside, Streater v. White, 26 Wn.App. 430 (1980) explained the standard:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
- (3) the record should be considered as a whole;
- (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous;
- (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Id. at 434 – 435. Plaintiff's argument, asking this court to ignore the

record, appears to fulfill the standard. Defendants' arguments do not.

2. Plaintiff's Argument That Defendants Did Not Seek CR 11 Costs And Fees Below Is In Error

At page 2 of her brief, as her first foot forward, plaintiff argues against these defendants' request for relief that, "to begin, the CR 11 issues was not properly raised before the trial court... (issues raised for first time of (*sic*) appeal not considered)." (See plaintiff's reply brief, page 2).

That attribution to the record is on par with plaintiff's argument that she did not request a default judgment. CR 11 costs were clearly requested. See CP 26 – 27.

3. These Defendants Have Standing

While loath to make a procedural argument, it will be observed that plaintiff's argument over a lack of standing is not properly before this court. These defendants filed substantial material and made a motion for CR 11 costs below, without objection or a motion to strike that material for lack of standing in the trial court.

As such, Jacob's Meadow Owner's Association v. Plateau 44 II, LLC, 139 Wn.App. 743 (2007) indicates plaintiff may not now argue that such matters were not properly before the court then, nor are improperly before this court now. Id. at 755.

Where a party believes that proffered evidence is not properly before the trial court, it must move the trial court to strike such evidence from the record. Upon obtaining an unfavorable ruling from the trial court, error may be assigned thereto on appeal.

* * *

Where the trial court does not strike evidence based on its untimely submittal, we will not strike such evidence on our own initiative. It is our duty to review evidentiary rulings made by the trial court; we do not ourselves make evidentiary rulings. Similarly, it is our duty to review a trial court's ruling on summary judgment on the record actually before the trial court. Thus, because the evidence... was considered by the trial court, and because the trial court made no ruling on the admissibility of this evidence to which any error has been assigned, the evidence constitutes part of the record before the trial court in ruling on the motion and is, consequently, properly before this court as well.

Id. at 755 – 756. Jacobs Meadow was decided in the context of a summary judgment motion however, the court spoke more generally in the context of CR 59 as well. The underling thrust of the opinion is that a party may not acquiesce to the trial court considering material and then raise for the first time on appeal, that the material should not have been filed in the first instance.

However, on the merits the argument is not worthy of weight. Plaintiff's only citation is Tinker v. Kentucky Fried Chicken, 95 Wn.App. 761 (1999), which she characterize as a “dismissed/settled party has no standing.” (See plaintiff's memo, page 3). Such a characterization is at

best a stretch, and at worse a misattribution of the case.

In Tinker a party sought appellate review of a potential cross-claim that was never even made, arguing that “if” a dismissed claim against a co-defendant was reversed, it would then have a cross-claim against that defendant. Id. at 764. The issue of “standing” was that party’s ability to argue the propriety of a potential cross-claim after the King County LR confirmation of joinder had been filed, certifying no other claims were to be joined. Id. The Court of Appeals framed the question as: “whether KFC can appeal the dismissal of Kent Gypsum from the plaintiffs' original claim without itself being a party-plaintiff to those claims.” Id. Thus, the holding of Tinker would appear to have no bearing on this case particularly as these defendants made a CR 11 fee request below that was not granted, upon which appeal is sought.

Having said that, Tinker in some respect did address foundational rules for standing on appeal, citing RAP 3.1 the court articulated:

Only an aggrieved party may seek review by the appellate court. An aggrieved party is one who has a present, substantial interest, as distinguished from a mere expectancy, or contingent interest in the subject matter.

Id. The court also indicated, generally, that when a defendant settles its claims, “the only contest in which they were involved” is complete. Id. at 766.

These defendants do not dispute that as a general statement but its application is not ripe in correct of the procedural posture of this case.

First, unlike in Tinker, the defendants here made a motion after settlement was decided by the trial court and which is the subject of review here. Thus, these defendants have appellate standing.

Second, unlike in Tinker, the issue of standing on appeal is not properly before this court. Defendants filed a request for their attorney's fees. Plaintiff did not object to that request, move to strike those materials, nor argue the defendants had no standing to make the request. It would appear that by any measure of RAP 2.5(a), plaintiff may not now complain of a lack of standing having failed to object or brief it below.

Third, although not properly before this court it will be observed that defendants had standing below as well. These defendants filed substantial material to which Mrrs. Carter and Dolajack simply had no knowledge of, but which bore directly on the merits of the propriety of the default orders that were entered. The trial court clearly considered those matters below.

It is clear the plaintiff's tactic was, to be charitable, paint only one side of a clearly two sided coin to the trial court. Indeed, plaintiff's desire to slant the facts before the court by depriving the court of the information only within the knowledge of these defendants was so great that plaintiff's

attorney threatened to sue the undersigned if he (undersigned) made the trial court aware of plaintiff's actions and conduct. CP 17 and 22. The email from plaintiff's counsel should be read by the court. CP 22.

Defendants argued, without objection from plaintiff, that they were entitled to request costs because the very actions of the plaintiff demanded a reply from them. Plaintiff did not object below and did not assign as error the court hearing it. Plaintiff engaged in a scheme to create the very situation that now lays at the bar. For her to not anticipate a brief to be filed by the defendants is itself a fanciful notion. Plaintiff's argument of standing is apparently based on the notion that the only party (these defendants and the undersigned) with knowledge that what the plaintiff was telling the trial court was not correct should have stood by and said nothing, even while plaintiff blamed these defendants and the undersigned for the situation to begin with. That is novel.

In summary, plaintiff did not object as to a lack of standing in the trial court. Defendants filed a motion for costs that was not granted. There is a justiciable issue in controversy on appeal as relief requested by the defendants below was denied. If standing was to have been raised, it should have been raised below. The defendants, having made their request below without objection, and the trial court having considered the material so filed, the plaintiff may not now object that material or the

motion should not have been considered.

B. PLAINTIFF'S REPLY ARGUMENTS ARE WITHOUT MERIT

1. Plaintiff's Argument Regarding In Re Daley Is Without Merit

Plaintiff argues between pages 2 and 3 that “each and every argument presented by L.S. to the trial court was grounded in the record and current law. L.S. relied upon *In Re Daley*... as factual and legal precedent...”

Procedurally, that is a difficult if not impossible statement to square with the record as plaintiff did not cite even once, In Re Daley to the trial court in support of her request for a judgment. Instead, as amply briefed with no meaningful reply by plaintiff other than to say she did not really mean what she said to the trial court when she cited to CR 55, *17 times via oral argument and the orders she presented*, the only authority cited by plaintiff to obtain her default order and judgment was CR 55 pertaining to default orders and judgments.

On the merits however, plaintiff's argument that she complied with In Re Daley, 77 Wn.App. 29 (1994) is not well taken. A trial is a trial. And when a trial has been noted as a jury trial, it “shall” be a jury trial. See CR 39. The trial court had no discretion to convert a properly noted jury trial into a bench trial as a time saving measure, even if the

defendants did not appear.

Daley explicitly held that asking for a judgment without “proceeding with her case,” but instead presenting orders of judgment and asking that they be signed because the defendant did not appear for trial (precisely as the plaintiff did in the case at bar), is not a trial. Id. at 32. It is the requesting of a default judgment. Id.

Plaintiff thus grossly errs in her argument at page 2 of her brief that “according to Daley, the presentation of evidence on the record for review by the appellate court to support to (*sic*) the corresponding judgment constitutes a “hearing on the merits,” i.e. in the words of L.S., a mini trial.” (internal quotation marks in plaintiff’s brief).

The import of what plaintiff argues is that provided the evidence offered below was sufficient to determine on appeal there was a substantial basis for the ruling, that what occurred below was (in plaintiff’s words a “mini-trial”). That is an utter miscasting of the ruling in Daley which in fact held precisely the opposite.

First, Daley simply fails to state that as its rule. Anywhere. For plaintiff proclaim that Daley held such is to create a rule from whole cloth.

Second, the import of Daley is entirely opposite of what plaintiff argues the case held.

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The “findings, conclusion” and judgment referred to in Daley which the Court of Appeals indicates might have been appropriately entered if the plaintiff had given the defendant notice, were clearly and without question identified by the Court of Appeals as an order of default under CR 55. Id. 32. If the trial court had properly taken evidence and the plaintiff properly given the defendant notice of her intent to take a default, then what the Court of Appeals indicates is that the trial court could have properly entered a default order. The Court of Appeals did not indicate that if what the plaintiff provided was sufficient to uphold the judgment, that is all she needed to do to conduct a “mini-trial.”

Third, the phrase “mini-trial” is entirely and completely a creation of the plaintiff, as a means to exaggerate what she did below. Our case law is utterly silent as to the concept of a “mini-trial.” Daley does not acknowledge one. This court should resist the plaintiff’s plea that the Court of Appeals erode what a trial is.

At the risk of being circular: A trial is a trial.

A motion is a motion.

Neither the Civil Rules or common law recognize a so-called “mini-trial.” There may be trials that are “mini” in their length, and certainly if plaintiff had proceeded to trial on the day in question in the absence of the defendants it could have been a very short trial, dare the

defendants say even a “mini” trial. But, it still would have had to conform to the requisites of a trial. Anything else, our rules make clear is a motion and here, as explained by Daley, absent going forward with a trial the “only applicable rule was CR 55” (providing for default order) for plaintiff to go forward with which even plaintiff does not deny was not followed. Id.

This dovetails into plaintiff’s argument at page 4 of her brief that this court should ignore that this was noted to be a jury trial because the issue of a jury trial was not raised below. That argument is devoid of weight.

First, the issue was raised repeatedly throughout the argument below as the full body of argument in the trial court is that what occurred below was not a “trial,” but instead was a motion. Thus, on the merits plaintiff’s argument is incorrect.

Second, the right to jury trial in Civil matters is guaranteed by Washington’s Constitution, Art. 1, sec. 21. Deprivation of a jury trial is an issue of Constitutional magnitude that may be raised as a matter of right for the first time on appeal. See RAP 2.5(a)(3). Thus, even if newly raised – which is not conceded – RAP 2.5(a)(3) indicates it is permissible.

On the merits of the jury trial issue, assuming for the sake of argument that what occurred below can in anyway be called a “trial,”

plaintiff's response is silent to the authority cited by defendants in their first brief that it had to be a jury trial. (See Mallon Defendants' memo, page 21 – 24). Plaintiff has no response to defendants' analysis of CR 39(a)(1), Graves v. P.J. Taggares Co., 94 Wn.2d 298 (1980), inter alia. that once the jury demand was filed, all parties in the litigation had the right to rely on it and that the trial court had no discretion to disregard it. See Graves, 94 Wn.2d at 305.

RAP 1.2(b) is clear that the use of the word “shall” in CR 39(a)(1) created a non-discretionary requirement that the court conduct a jury trial if any trial was conducted. See CR 39(a)(1) (“When a jury trial has been demanded... the trial of all issues so demanded shall be by jury.”). It is manifest that a jury trial did not occur. In the words of Daley, the only rule or procedure left to the plaintiff to have proceeded under was CR 55, which plaintiff clearly violated.

At page 3 of her memo, plaintiff cites from the report of proceedings where the trial court stated, “... while there may be a mistake by Counsel in citing the incorrect rule, CR 40 over CR 55, there was a hearing on the merits.”¹ This citation is of no assistance to plaintiff.

¹ The defendants simply cannot let pass without comment plaintiff's novel characterization in her briefing of the Verbatim Reports of Proceedings as “Trial Transcripts.” See plaintiff's memo, page 3, footnotes for illustration citing the court's ruling as “Trial Transcript.” In her frantic, post hoc attempt to characterize what happened below as a “trial,” she has apparently lost track that what she cites as

First, and as noted in defendants' original brief, this citation by the plaintiff demonstrates that not even the trial court could bring itself to characterize what occurred on the first day of trial as a "trial" as the plaintiff tries to convince this court occurred. At best, even the trial court could only call it a hearing. A more clear illustration of how Daley was violated is not possible. A "hearing" is not a "trial." And if it was not a "trial," then Daley is clear that the only rule available to the plaintiff to proceed under was CR 55 providing for a default hearing. However, as now said too many times, plaintiff failed to provide the mandated notice to the defendants to avail herself of that rule.

Second, as a statement of the obvious, if what occurred was not a trial, it was a hearing – even the trial court acknowledges that. And if it was a hearing, then it could clearly only be a default hearing under CR 55. A trial court may hold a trial, or it may rule on a hearing brought under an appropriate rule. There is simply no provision of the Civil Rules to allow for resolution of lawsuits by "hearings on the merits" as the court attempted to characterize what it did.

a "Trial Transcript" is the transcript from the June 8 hearing to vacate the default judgments. Apparently, now, even that motion was a "trial." Defendants will not commit the same error of plaintiff and ask this court to decide these issues on anything other than the merits as plaintiff did in her opening brief. However, at some point it is submitted this court must take note of the lengths to which plaintiff is recharacterizing and thus mischaracterizing what occurred below in order to preserve the orders of the trial court.

Third, not even CR 40 as cited by the court (as argued by plaintiff in opposition to the motions to vacate) is the correct rule or procedure. CR 40 simply speaks to notes of issue for trial. The correct rule and procedure, assuming a trial took place – which not even the trial court said is what occurred – would be CR 52 requiring findings of fact and conclusions of law following a bench trial. Which this was not.

Fourth, it could not have been a bench trial due to CR 39, requiring the matter to have been tried to a jury as a jury demand had been filed, as discussed above.

Thus, this citation by the plaintiff of the court's ruling actually demonstrates the error of the trial court.

At page 5 of her memo, plaintiff argues she was candid with the trial court because she told the court she had not received a "formal answer." The record is what it is. This court will need to review it and reach its own conclusions. However, as previously argued, when the trial court told plaintiff's counsel squarely that it considered the Answer of Mr. Gordon an Answer, for plaintiff's counsel to say anything other than he received the same form of Answer from Mr. Carter instead of the sharp response that he had not received a "formal answer," was not as candid as the undersigned believes an attorney should be.

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At page 5 plaintiff again argues outside of the record, asserting that the undersigned was not candid to the trial court because he (the undersigned) “had told them (Carter and Dolajak) not to attend trial.” As previously noted, two wrongs do not make a right and that plaintiff’s counsel desires to argue outside of the record at every turn would not make it correct for the undersigned to do so. Suffice it to say, (1) the undersigned disagrees with all of plaintiff’s counsel’s personal impressions outside of the record – this court may safely assume the undersigned disagrees with this assertion as well, and (2) even if accurate it has no bearing whatsoever on the procedural questions before this court which are whether plaintiff complied with CR 55 and whether what occurred below may be called a “trial.” That plaintiff’s counsel sees fit, time and time again, to turn the issues personally against the undersigned speaks better to the lack of merit to plaintiff’s position than anything defendants can say.

Finally at page 6, plaintiff again raises the novel argument that the undersigned was acting as Carter’s and Dolajak’s attorney and that he owed (and breached) a “fiduciary duty” to them. This has been amply addressed in the defendants’ first memo. (1) There is simply no support for such a claim. (2) This is clearly nothing more than plaintiff’s counsel’s attempt to feather his bed to twist Carter’s and Dolajak’s arms

for an assignment of a possible claim against the undersigned. (3) Even if true it has no bearing on the issues before this court: whether plaintiff complied with CR 55 and whether what occurred below can be called a “trial.” Let us assume, as fanciful as it is but for the sake of argument, plaintiff’s counsel is right and the undersigned was a quasi-attorney of Carter and Dolajak. That makes no proposition on this appeal more or less true, it does not create 10 days of notice of intent to take a default where none was given. Again, plaintiff’s falling back on ad hominem argumentation reveals the lack of support of her arguments.

2. **Plaintiff’s Argument Constitutes A Request That The Court Ignore The Rules To Make A Nice Result For Her Which Must Be Rejected**

The fundamental crux of plaintiff’s error, and is submitted the error of the trial court, is the misconception that the fact this was the first day of trial and the defendants did not appear had anything to do with the plaintiff’s adherence to the Civil Rules.

It takes no reading at all between the lines, as the plaintiff made the argument explicitly both below and to this court, that plaintiff’s primary argument is that the courts should ignore her violation of the notice required by CR 55, and her decision not to proceed to trial, because she wants “finality” and does not desire to be put to the processes again. Indeed, this is close to how the trial court framed the issue itself on oral

argument below.

At oral argument the trial court framed the issue, contrary to Daley, in a question posed to Mr. Dolajak's attorney. The following colloquy, with proper respect due to the trial court, reveals the trial court placed aside CR 55 and CR 39 in favor of some unrecognized concept of "the whole philosophy of resolution":

Court: Reconcile that (the required notice under CR 55) with the fact that it was (the) trial date. It's a separate situation for making a motion not on (the) trial date. But now we are on (the) trial date. That's the posture that we had.

Mr. Olbertz: But the motion was made pursuant to Rule 55.

Court: I understand that.

Mr. Olbertz: And that's the order that is entered, so ---

Court: So you are reading strict compliance with CR 55, regardless of the fact that it's the first day of trial?

Mr. Olbertz: But that's what they requested.

Court: I am just asking you to reconcile that argument.

Mr. Olbertz: Well, I don't think it matters whether it was the day of trial. For the purposes of their motion, and the purposes of your order, I don't think that it matters whether it was the day of trial or some other day.

Court: All right. So reconcile that with the whole philosophy of resolution. Just bring me there then....

RP 12 – 13.

Again, and with the greatest respect to the trial court, several things must be observed.

First, the court erred in its framing the issue as being “a separate situation for making a motion” for default “not on (the) trial date” as opposed to “on (the) trial date.” Daley is clear that CR 55 is applied no differently on the first day of trial.

Second, the trial court erred in characterizing the argument to set aside the default as arguing for “strict compliance with CR 55.” CR 55 by its clear and unambiguous terms indicates the trial court “shall not sign an order of default or enter judgment” unless 10 days have elapsed since notice to the adverse party if sought more than 1 year after original service of the summons and complaint. Mr. Olbertz was not arguing for strict compliance in asking the court to apply the rule. He was simply asking the trial court to apply the plain and unequivocal requirement of the rule. The court’s apparent allowance of substantial conformance with the rule, and minimization of the arguments to set aside the default as an unfair “strict compliance” argument, were not well taken.

Third, and ultimately the gestalt of what occurred below, is illustrated by the question of the court to counsel regarding a so-called “philosophy of resolution.” The court clearly stuck Mr. Olbertz between the rock of the first day of trial, and the hard place of the defendants not

showing for the first day of trial.

While that quandary may have a certain visceral resonance, it was of no import to the procedural question then before the court. The court was bound to apply CR 55 and CR 39 as written. It is respectfully submitted it could not minimize their requirements, stated in the clear terms of “shall,” under a “philosophy of resolution.” Decision by “philosophy” (however well intended) changes our courts from courts of laws and rules, to courts of “man,” or “woman” as the case may be. With the greatest respect to needed and necessary judicial discretion, “philosophy” does not enter the equation.

Despite that, plaintiff makes no attempt to hide her base appeal to the “philosophy of resolution” in her argument. From top to bottom she has asked both the trial court and this court to ignore the plain language of “shall” in CR 55 and to ignore her invocation of CR 55, 17 times when requesting her relief, as being something other than it was. That is not “splitting hairs” as her straw man argument protests at page 2 of her brief. That is simply the mandated result of the clear and unequivocal language of CR 55 and the argument and authority she relied upon to request her judgment.

Her further argument at page 2, invoking RAP 1.2(a) (although she fails to cite the rule she relies upon) that the rules “should be applied in

such a way that substance will prevail over form,” must thus be seen for what it is: the rhetorical unfolding of the umbrella employed by all those who ignore clear procedural requirements: do not apply the rules to me, it would be an unfair result.

The very rule relied upon by plaintiff (RAP 1.2) for this argument forecloses it. RAP 1.2(b) discusses “words of command” and clearly addresses the word “shall,” as used in both CR 55 and CR 39:

The word “shall” is used when referring to an act that is to be done by an entity other than the appellate court, a party, or counsel for a party.

In other words, when the Rules speak in terms of “shall,” it is a direction of what the trial court “shall” and “shall not” do. No discretion is present.

When CR 55 says the court “shall not” enter a default order without proper advance notice, it “shall not” do so.

When CR 39 says that “when trial by jury has been demanded... the trial of all issues so demanded shall be by jury,” then any trial “shall” be by jury. There is no exception in CR 39 to do away with a jury trial once demand has been made, if one of the parties do not show up for the first day of trial.

Plaintiff argues at page 4 of her brief that it “defies common sense that a plaintiff is required to seat a jury and to hold a jury trial when the defendants do not show up to defend themselves...”

Not to make an ad hominem argument, but it might be said that it “defies common sense” for a plaintiff to demand a jury trial as plaintiff did here, and to show up for the first day of trial and not be prepared to present a trial to a jury. She clearly had no intention on going forward with a trial. It is undisputed she was not even in the courthouse. She asked for a default against all parties. When the court told plaintiff it would not enter a default against the defendant it could find and answer for (Gordon), a decision the plaintiff assigns no error to, plaintiff asked for defaults against Carter and Dolajak. It “defies common sense” that the parties even have to have this discussion: Clearly the orders below were default orders. Clearly that is what the plaintiff requested and what the court gave.

If it was not, then judgment should have been entered against Gordon as well because he was not present on the first day of trial either and the plaintiff should have assigned as error the court’s refusal to do so. But, the court knew it could not enter a default against an answering party and appreciated that what it was doing was entering default orders and thus refused to enter an order against Gordon. And despite the plaintiff’s protestations to the contrary, even she acknowledges that is what the orders were. If not, she would have assigned error to the trial court’s not entering judgment against Gordon. Her failure to assign error to that

decision by the court estoppes her from arguing the other orders were anything other than default orders because by her failure to assign as error the court's refusal to enter judgment against Gordon who also did not appear on the first day of trial, she accepts that as a correct decision of the trial court.

It further "defies common sense" that if the plaintiff wanted a default judgment against those defendants for her to have slept on her rights for over two years and not ask for it until the day of trial – or at the very least before the expiration of one year after service of process so she would not have to give any notice.

It "defies common sense" for a plaintiff to invoke the authority of CR 55 for default judgments 17 times in the trial court but to apparently not read it, or at the very least to not follow it, by failing to provide notice to the parties she was seeking defaults against in this case.

It "defies common sense" when a party invokes the authority of CR 55 for default judgments 17 times in the trial court and for the court to indicate 3 times it was granting a default order and judgment, for the plaintiff to come to the Court of Appeals and argue that what occurred below was not a default order and judgment.

And finally, it "defies common sense" for the plaintiff to express shock or confusion over the plain import of these fundamental Civil Rules.

The plaintiff demanded the jury trial. Once she did that, under CR 39 the court was without discretion to strike it. She could not withdraw it. If what occurred below as a motion, then clearly it violated CR 55 and all orders should have been vacated. But what occurred below was also clearly not a “trial” as would be required to excuse plaintiff’s failure to comply with the notice requirements of CR 55. Not even the trial court could bring itself to call it that. It was clearly not a jury trial and there is no such thing as a “motion on the merits” to resolve a lawsuit.

It “defies” commons sense, violated CR 11 and violates RAP 18.9, for plaintiff to not simply admit anything else.

This court may not rewrite the Civil Rules to provide the plaintiff what she believes is a fair result, under the rubric of the “philosophy of resolution” as identified by the trial court.

It is a more unfair result when the rules are not applied as written.

It is a more unfair result when parties may not rely on the rules being applied as written.

While all may have sympathy for the plaintiff’s situation, it is one of her own making. And while not wanting to engage in the same form of ad hominem rhetoric against the plaintiff as plaintiff’s counsel has taken every opportunity to do against the undersigned, it would appear fair to observe that had plaintiff followed the clear requirement of CR 55 and

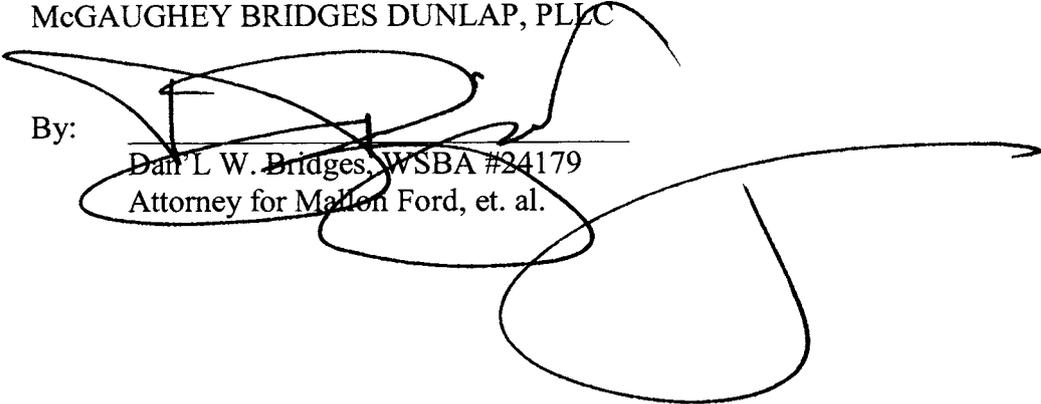
given notice to the defendants of her intent to request a default order which is so clearly what she did, or taken the half day to have an unopposed jury trial as she was put to do, she would not be in her current predicament. It is novel for plaintiff's counsel to so castigate the undersigned while apparently expecting this court to turn a blind eye to plaintiff's own failings.

The rules exist for the protection of all, plaintiffs and defendants, and that plaintiff paid a \$250 filing fee and made salacious claims against all defendants (which were denied), does not entitle her to any greater deference under the rules than any defendant. And yet at times, that appears to be her greatest argument: that she alleged she was sexually assaulted and she should be given closure. It is relied that this court will see such argument for what it is.

DATED this 5th day of January, 2008.

McGAUGHEY BRIDGES DUNLAP, PLLC

By:


Dan L. W. Bridges, WSBA #24179
Attorney for Mallen Ford, et. al.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

L.S., an individual,)	
Respondent/Cross-Appellant,)	
)	NO. 366449-2-II
vs.)	
)	DECLARATION OF
TITUS-WILL FORD SALES, INC., a)	SERVICE
Washington Corporation, et. al.,)	
Cross-Appellants;)	
)	
RICHIE CARTER,)	
Cross-Appellant;)	
)	
MICHAEL DOLAJAK,)	
Appellant.)	
_____)	

I, Christina M. Boland, hereby declare under penalty of perjury under the laws of the state of Washington that on January 10, 2008, I caused to be delivered via legal messenger a copy of the Response of Cross-Appellant Titus-Will Ford, including this declaration of service, to the attorneys of record for all parties.

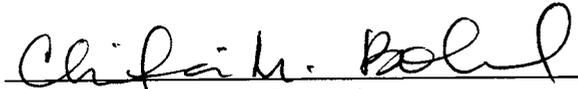
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TO: Mr. John R. Connelly, Jr.
The Law Offices of John R. Connelly, Jr.
2301 North 30th Street
Tacoma, WA 98403

AND TO: Mr. Zenon P. Olbertz
The Law Office of Zenon Peter Olbertz
1008 South Yakima Avenue, Suite 302
Tacoma, WA 98045

AND TO: Mr. Edward Sydney Winskill
Davies Pearson, PC
920 Fawcett Avenue
P.O. Box 1657
Tacoma, WA 98401

Dated this 8th day of January, 2008


Christina M. Boland