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CASE NUMBER 85716-4

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IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

WILLIAM SCHEIDLER
Plaintiff/Appellant

V

SCOTT ELLERBY
Defendant/Respondent

APPELLANT'S REPLY BRIEF
SUPERIOR COURT CASE 09-2-00660-3

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ORIGINAL

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I FATAL DEFFICIENCIES IN RESPONDANT BRIEF

A) *ELLERBY STATES AT PAGE 2, "MR. ELLERBY BELIEVES THE ISSUES ON APPEAL ARE MORE PROPERLY STATED AS FOLLOWS."*

Ellerby lists 7 topics representing his edition of Scheidler's assignment of errors and issues pertaining to these errors.

RAP 10(3)(b) states explicitly.

"The brief of respondent should conform to section (a) and ***answer*** the brief of appellant or petitioner."

Said another way, respondent is not to "edit" Appellant's brief and then answer his own "edition" in an effort to push plaintiff out of court.

"A defendant cannot push a plaintiff out of court by swearing that the plaintiff has no case" *KLOSSNER v. SAN JUAN COUNTY* 21 Wn. App. 689 (1978)

Scheidler has a right to plead his own case. Therefore, Ellerby fails to answer Scheidler's assignment of errors 2-12. App.Br. pages 15-22. Ellerby fails to answer Scheidler's issues pertaining to the assignment of errors 2-19. App.Br. pages 28-71. Therefore, Scheidler's assignment of errors and issues pertaining to the assignment of errors should be accepted as uncontested.

B) *ELLERBY ASSIGNS NO ERROR TO JUDGE HARTMAN'S RULING. RESPONDENT AT PAGE 1.*

Judge Hartman's Feb 8, 2011 ruling finding Ellerby withdrew due to a conflict of interest*, **is an implied finding of Ellerby's perjury.*** Scheidler noted App. Br. 33-34, with ample references to the record, Judge Hartman found as a matter of fact¹ that Ellerby withdrew his representation of Scheidler on the eve of the hearing for which he was hired to attend because he had a '**conflict of interest**'.* CP 1278. Every declaration Ellerby filed in this action he claims **"I voluntarily withdrew from representation at the plaintiff's request."** * Ellerby's declarations conflict with Judge Hartman's factual finding and what he told Scheidler in 1998. App. Br. "Evidence" pgs. 29-30, 40; CP 212 at 2; 295 at 2; 433 at 2; 2518 at 7. Further, Ellerby, in his "Answer, Affirmative Defenses and Counterclaims" at 1.7 denies withdrawing due to a conflict of interest.* CP at 59, App.Br. p. 49. Further, in Ellerby's response to Scheidler's WSBA grievance Ellerby denies withdrawing due to a conflict of interest,* he states Scheidler's finances as the reason for his leaving the case.* CP 451 ¶3, 453 ¶1. Ellerby's counsel, Downer, presents his own version of the 1998 withdrawal as a scheme between Ellerby and Scheidler *-- a contradiction to Judge

¹ "The appellate court does not resolve factual issues but must determine if there exists a genuine issue as to any material fact. In re Estate of Black 153 Wn.2d 152 (2004).

Hartman's factual finding. App Br. Page 35, 49. When Ellerby blames Scheidler for his withdrawal to Mr. Mills in 2008, remarkably, Mills believes and actually confirms Ellerby's contradictory statement.* Mr. Mills' "2008 investigation" of Ellerby's 1998 withdrawal finds as follows,

"Mr. Ellerby never declined to represent you and was never disqualified from representing you because of Kitsap County's suggestion that Mr. Ellerby and our firm may have a conflict of interest" App.Br. pg. 30 at 5, *

Mr. Mills' "investigation" yields facts in contraction to Judge Hartman's finding and what Ellerby told Scheidler in 1998.* [The facts [*] are noted as "**Set A**" for reference below.]

Appellate courts have held,

"Unchallenged findings of fact are verities on appeal."

JOHNSON v. KITTITAS COUNTY 103 Wn. App. 212, (2000)

Because respondent (not Appellant) assigned no error, nor offers rebuttal evidence to Judge Hartman's finding of February 8, 2011, there is no rebuttal argument to Scheidler's claim that Ellerby and Downer and perhaps Mr. Mills are in violation of CR 11, CR 26, RPC's and violations of law - RCW 9.72 and RCW 2.48.210.

This lawsuit was spawned because of these conflicting statements – one or the other statement, made by these attorneys,

Judge Hartman could have found Ellerby lied to Scheidler in 1998 by claiming a conflict

is a lie. Neither Judge Hartman nor Downer explains these conflicting declarations by Ellerby, Mills and Downer.

Scheidler argued in the lower court that lawyers, Downer and Locker, should have been reported to the proper authorities upon their first instance in making false statements to the court. App. Br. pg 33. This first instance was the motion hearing of August 21, 2009, in which Judge Hartman recognized for himself that Downer lied about his "fees"⁺ and lied about a "CR 26(i)"⁺ conference. App.Br page 50.⁺ [These facts [+]⁺ are noted as "**Set B**" for reference below]

The legislature demands lawyers shall employ "such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law".²

If Scheidler suffered 'sanctions' because he is to be "**held to the same standard of law as an attorney**" Resp.Br. page 12; VRP August 21, 2009, pg. 21, 23; and the "standard of law for attorneys" established in this case is unrecognizable, then Scheidler should never be sanction for any violation of Court Rules or statutes as a matter fair dealing. On the strength of the fair

required his withdrawal. Either/Or Ellerby has committed perjury.

dealing augment alone, the lower court's summary judgment and award of sanctions should be reversed. Beyond fair dealing, Scheidler has not engaged in perjury as has Ellerby and Downer and possibly Mills. Sanctions against Scheidler should be reversed under CR 60(b)(4), 'misconduct by the adverse party.'³

II ISSUES RAISED BY RESPONDENT'S REPLY BRIEF

C) RESPONDANT'S BRIEF VIOLATES GR 33

GR 33 requests for Accommodation by Persons with Disabilities states in pertinent part, "(2) An application requesting accommodation may be presented ex parte ... Medical and other health information shall be submitted under a cover sheet created by the Administrative Office of the Courts for use by applicants designated "SEALED MEDICAL AND HEALTH INFORMATION" Appendix A is the entire GR 33 general rule.

Ellerby's Brief pages 13-17 and 46-48 discusses the Superior Court's GR 33 practice as applied to Scheidler's disability. In doing so Ellerby publicizes private medical information that is to be sealed under the terms of the GR 33 accommodation language. Ellerby violates GR 33, CR 11, RPC 3.3(a)(1) and 3.4(e), RCW 9.73 .

² RCW 2.48.210 Oath

Ellerby's violations of law, court rules and RPC's must be addressed so as to halt "dishonest, deceitful lawyering".⁴ Sanctions must be sever enough to discourage Judges and lawyers from turning GR 33 requests into a public spectacle by commingling with the litigation and used by an adversary in an uncivilized and malicious legal strategy –as Ellerby has done here.

D) *ELLERBY ARGUES SCHEIDLER VIOLATED RAP 10.*

Ellerby argues Scheidler's brief is: a) "littered with unfounded and scandalous allegations against Mr. Ellerby, Mr. Ellerby's defense counsel (Jeffrey Downer) and Judge Hartman," Ellerby at 22, and b) Scheidler "attempts to incorporate the entire record by reference" and c) Scheidler "flagrantly violates these procedural rules." Ellerby at page 21.

Notwithstanding Ellerby's own violations of GR 33, RAP 10, RAP 9.5(e) – failed to return copies of the VRP as required, RCW 2.48.210, RCW 9.72, RCW 9.73, CR 11, CR 26... Ellerby fails to identify in any specific terms where these 'flagrant violations' occur.

³ **CR 60(b)(4) Relief from Judgment: Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.**

⁴ DISCIPLINE OF DANN 136 Wn.2d 67 Aug. 1998

- a) Re Ellerby's charge that Scheidler makes 'unfounded' and scandalous allegations... The facts noted above as **Set A** and **B** defeat Ellerby's charge.

Furthermore, Downer lies about Scheidler's answer to interrogatory 18, claiming Scheidler's Doctors will be called as witnesses.[#] VRP August 21, 2009, page 10; CP at 341 at 'b'; CP 342 at '3 -6'. Downer lied about the language of the witness statute RCW 5.60.060(9)[#]... CP 338-344; VRP August 21,2009 page 9. And, Downer's baseless motion filed December 11, 2009.[#] [These facts [#] are noted as "**Set C**" for reference below] This court has held in **State v Adams 76 Wn.2d 650**

"Argument of counsel must be confined to the evidence and to ***fair and reasonable deductions to be drawn therefrom***".

Ellerby's charge that Scheidler's allegations are "unfounded" is itself "unfounded" as there are ample facts to support Scheidler's deductions and arguments.

b) Re Ellerby's charge Scheidler tries to incorporate the entire record... Scheidler's case is solely about the conduct of attorneys – the *entire record* is "evidence" of this conduct. While the record encompasses over 3000 pages of evidence, Scheidler's brief is limited by page length and requires self-censuring in presenting limited samples from the universe of events that transpired below.

E.g., Scheidler has not addressed in his appeal Ellerby's 'affirmative defenses at 2.2.' CP 61. Ellerby claims "improper service". This is a false statement of fact and is in violation of Ellerby's oath. Scheidler served Ellerby as evidenced by the "declaration of service" March 27, 2009. CP 23.

To address "every" deceitful statement made by attorneys Ellerby and Downer, Scheidler's brief would be well over the page limit and take 6 months to prepare!

c) Scheidler "flagrantly violates these procedural rules." Ellerby at page 21. Appellate courts have held in **STATE v. KILGORE 107 Wn. App. 160, (2001)**

"an appellate court may consider an issue raised by an appellant despite the appellant's failure to cite to relevant legal authority as required by RAP 10.3(a)(5)."

Scheidler's appeal is a matter of right -- RAP 6.1-- and involves his constitutional right to a jury trial on the merits and a staggering ~\$132,000 penalty. Contrary to the argument of Ellerby, under RAP 1.6, Appellate Courts are to interpret their own rules to "serve the ends of justice." Respondent is encouraging this court to deprive Scheidler of his rights and to escape his own misconduct!⁵

Additionally, this court, will undertake a **de novo** review. That being the case the arguments by Ellerby that Scheidler's brief

⁵ "Deprivation of a Constitutional Right is not a valid sanction for violation of a procedural requirement." STATE v. FLEMING 41 Wn. App. 33

doesn't meet RAP 10, even if true in total, is inconsequential to the function this court is to engage – to review the record below.

Note: This court granted Scheidler a GR 33 extension to file his opening brief 60-days from the date the report of proceedings was filed in the lower court. Reference the Supreme Court's own letter of March 11, 2011, page 2, ¶4. Unexpectedly this Court, via its email of May 13, 2011, reduced the time to file the opening brief to 45-days from the date the report of proceedings was filed in the lower court. This unexpected change imposed upon Scheidler on May 13, 2011 left only 17 days to finish his brief rather than the 32 days the court previously granted in its March 11, 2011 letter and will naturally create a greater chance of unintended errors. That would provide a greater opportunity for Ellerby to make the "technical" argument he has indeed made. To consider Ellerby's argument would be unfair and prejudice Scheidler when Scheidler has complied the best he can under the circumstances.

E) RESPONDENT'S BRIEF IS BASED UPON LOGIC THAT IS AT ODDS WITH COURT RULES.

Assuming Ellerby's claim that Scheidler's case is "frivolous", Respondent at 39, why did he take over two years at a cost of \$132,000 for him to make this argument? Judge Hartman asks this same question. **VRP February 25, 2011.**

(at page 12) "I kept asking myself: Where's the motion for summary judgment?" **(at page 13)** "if you filed for summary judgment at the top of this...he has to demonstrate...some reasonable factual basis... and have a qualifying medical opinion."

Downer's only response was that it was the firms "legal strategy". **(VRP Feb 25, 2011, pg 15).**

CR 11 mandates no pleading is made to simply increase the cost of litigation. What fact is "material to Scheidler's case" that

required 2 years of litigation to refute IAW CR 26? If there were none, then Ellerby engaged in litigation for no reason. If there were material issues of fact, then Scheidler's case isn't frivolous. App. Br pg. 56. Ellerby's conduct implicates him in violations of CR 11 and or 26 and exonerates Scheidler from sanctions.

F) RESPONDENT'S BRIEF IS BASED UPON PREMISES THAT ARE REPUGNANT TO A CIVILIZED SOCIETY. A PUBLIC POLICY ISSUE.

The premise underlying Respondent's brief is – ignore the RPC because the better an attorney's con-job, the higher the accolades.

Scheidler is 'sanctioned' under Court Rules because he is to be "held to the same standard as an attorney." Resp.Br. page 12; VRP August 21, 2009, pg. 21, 23. This court will consider all the evidence to determine Judge Hartman's "standard of law" for attorneys as compared to Judge Hartman's 'standard of law" he demands of Scheidler.

G) ELLERBY CLAIMS SCHEIDLER'S ASSIGNMENT OF ERRORS 2-12 SHOULD BE REVIEWED UNDER THE "ABUSE OF DISCRETION" STANDARD.

This claim by Ellerby is a false statement of law. When the issues to be reviewed are legal issues, or mixed issues of law and fact, the standard is *de novo*.⁶

⁶ We review mixed questions of law and fact de novo. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 329-30, 646 P.2d 113 (1982). We review conclusions of

Scheidler's appeal asks this Court to decide legal questions so as to determine what "standard of law" applies in this case. Refer to CP 357-411; 763-944; App. Br. page 1 et seq.

Furthermore appellate courts have stated.

"If the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous" *MacDONALD v. KORUM FORD* 80 Wn. App. 877, 892 912 P.2d 1052 (1996); and

"Deprivation of a Constitutional Right is not a valid sanction for violation of a procedural requirement." *STATE v. FLEMING* 41 Wn. App. 33

Scheidler has been denied his right to a trial and has been sanctioned an astonishing ~\$132,000 – a deprivation of property. These sanctions have been imposed entirely on the argument by Jeffrey Downer, who is a documented liar from the very beginning of this case! Refer to fact **Set A, B and C** above.

De novo review of the issues Scheidler presents is imperative for these reasons:

- a) The public is "virtually defenseless against the united forces of a corrupt attorney and perjured witness." ***In Re Stroh 97 Wn.2d 289.***
- b) A pro se citizen is not entitled to attorney fees.

law under the same de novo standard. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880-81, 73 P.3d 369 (2003). ***CLAYTON V. WILSON 168 Wn.2d 57 (2010)***

These realities create both “unintended” and “intended” inequities. An attorney vs. a pro se opponent has *no incentive to limit costs, and no incentive to abide by court rules or rules of professional conduct* as there are no attorney fee penalties to worry about. Furthermore, despite the “virtually defenseless public” the Courts have not installed any mechanism to catch corrupt attorneys before damage has occurred. Add to these inequities, in Scheidler’s specific case, is Judge Hartman’s expressed view labeling Scheidler a “fool” who “may not understand the law at all!” VRP December 18, 2010 page 27-29. From the beginning Judge Hartman was skewed in his view of Scheidler and this opened the door far wider to Downer’s deceitful tactics.

The public needs to be protected from deceitful, dishonest lawyering, *Id.*, **DANN** and *de novo* review is the only tool to that end.

**H) RESPONDENT CONTINUES MAKING FALSE STATEMENTS OF FACT.
THESE FALSE STATEMENTS OF FACTS ARE SUMMARIZED BELOW.**

NOTE: The February 25, 2011 VRP transcript, used in pertinent part below, epitomizes all of Scheidler’s other claims of Downer’s professional misconduct – his withholding evidence, false statements of law and fact, and untenable arguments.

1. Ellerby states, reply pg 24, "Mr. Scheidler filed his complaint based on the events in 1998 on March 18, 2009. This is false!

This is a false statement of fact and is material to Ellerby's "statute of limitations" argument accepted by the lower court.

Court: (VRP Feb 25, 2011, pg 13) "obviously barred by the statute of limitations"

Scheidler bases his complaint, filed March 18, 2009, on Ellerby's 2008 denial that he withdrew due to conflict; and based on the information obtained from Mr. Mills, via Mr. Mills' emails of July 30, 2008 and August 12, 2008. [Appellant's Brief page 29-30; CP at 15,16]. Prior to Ellerby's 2008 excuse, and Mr. Mills' emails and what Mills stated in those emails, Scheidler had been under the belief that Cassandra Noble, Kitsap County's attorney, **required** Ellerby to withdraw from Scheidler's case. Ellerby withdrew just as he claimed that he had to withdraw "if the county refuses to waive the conflict" of interest. (CP 17-19; 87-88; CP 86)

Had Mr. Mills confirmed, rather than contradict, Ellerby's conflict of interest excuse then there would only be grounds for a WSBA grievance. But the facts are: Mr. Mills and Ellerby, in 2008, contradict the 1998 excuse given to Scheidler and implicates Ellerby in the misconduct that gives rise to the causes of action

pleaded in Appellant's complaint (CP 1-22 and 64-115) and argued in pages 23 et seq., of his brief.

Downer presents no evidence that Scheidler knew or should have known that Ellerby was lying to him when he claimed that he would be forced to withdraw if the county didn't respond to his letter or waive the conflict. CP 86. If Ellerby claims otherwise it is a question of fact and is for a jury to decide.

"The determination of when a plaintiff discovered or, in the exercise of due diligence, should have discovered the basis for a cause of action is a question of fact."⁷

Scheidler's case, dismissed as barred by the statute of limitations, should be reversed.

2 Page 12, Ellerby states, "Mr. Scheidler refused to appear for his deposition, refused to answer interrogatories, obstructed the deposition of his wife and interposed objections to the deposition of Curtis Holder, M.D., that the superior court had already overruled. And,

3 Ellerby at page 42, states, "Mr. Scheidler willfully violated the discovery order of August 6, 2010 by refusing to appear for his deposition and interfering in the deposition of Mary Scheidler and Dr. Holder.

These are all false assertions just as Downer's previous false assertions that were recognized as such by Judge Hartman – e.g., **Fact Set B**; App. Br. Page 50. Additionally refer to App. Br. 32-36.

⁷ WINBUN v. MOORE 143 Wn.2d 206 (2001)

The verifiable facts are: Dr. Holder was deposed as scheduled per the lower Court's August 6, 2010 order, on Sept 22, 2010 [CP 1712]. Mary Scheidler underwent an 8.3-hour deposition as scheduled, per the August 6, 2010 order, on November 11, 2010 [CP 1251]. Regarding Wm. Scheidler's deposition, Scheidler notified Ellerby, despite Mr. Downer's claims to the alternate, on September 3, 2010 that he was unable to attend his deposition scheduled for November 7, 2010 because of health issues. Had Downer not blocked emails from Scheidler, so he could make the argument "I heard nothing from Mr. Scheidler", that deposition could have been rescheduled, per the August 6, 2010 order, without cost to anyone. CP 1207-1214.

Regarding Scheidler's answers to interrogatories ...The lower Court **NEVER** found that Scheidler failed to answer any interrogatory. CP 1643-1645. Respondent's charge is false.

Sanctions are based on the lower Courts August 6, 2010 order – an order that may be a nullity as it conflicts with statute RCW 5.60.060(9). App. Br. 44-48. Notwithstanding the legality of Judge Hartman's August 6th order there is no language in that order [CP at 977-980], or in any other Court Order, that would make the

above facts proof of Scheidler's "violations." Let alone a 'willful violation'. Let alone a violation that would in any way prevent Ellerby's preparation for trial. Nor was there a violation that should merit sanctions -- let alone a ~\$132,000 sanction.

The facts are, from August 2009, Ellerby ignored all 'objections' made by Scheidler that challenged his subpoena duce tecum for mental healthcare records, which are "privileged"⁸, and Ellerby conducted depositions, without waiver, of Scheidler's privileged mental health providers whether Scheidler was present or not.

Dr. Holder was initially deposed by Ellerby, for mental health-care records, over an objection without seeking a court order, ex parte, on September 15, 2009 (CP 349-350). So too, the Front Street Clinic was deposed by Ellerby for mental health-care records, over an objection without seeking a court order, ex parte, on September 8, 2009 (CP 349-350). (Dec of Locker: CP 2212-2224) These acts by Ellerby are violations of Court Rules and law. Nothing stood in the way of Ellerby's rampage against Scheidler – no objection, no law, no court rule, and no code of ethics! How has Ellerby been prevented from anything given his conduct? These allegations were argued in the lower court at CP 763-790.

⁸ RCW 5.60.060(9) see Appendix B.

Under any standard of review the only sanctions truly supported by the evidence would be sanctions levied upon Downer and based upon his violations of RCW 5.60.060(9), CR 11, CR 26, CR 34, RCW 9.73, RCW 9A.50, RCW 9.72, RPC Title 3 and Title 8, ¶4!

What “standard” has the lower court applied when it said, “Scheidler will be held to the same standard of law as an attorney?”
Base on the conduct of Downer there is NO STANDARD OF LAW!

- 4 Ellerby’s legal argument regarding “defamation and false light invasion of privacy” intermixes cases based upon unrelated core issues – one false light claim is based in **defamation**, the other is based in **privacy**.

The most appropriate case germane to Scheidler’s defamation and false light invasion claim is **EASTWOOD v. CASCADE BROADCASTING 106 Wn.2d 466 (1986)**. Ellerby at page 37-38. This case recognizes “while all false light cases need not be defamation cases, **all defamation cases are potentially false light cases.**” Emphasis.

While a defamation claim and a false light invasion of privacy claim both involve a false communication, fault on the part of the publisher, and injury to the claimant, a defamation action is primarily concerned with compensating damage to reputation, while the false light action is primarily concerned with compensating injured feelings or mental suffering.

Because Scheidler's case is a "defamation" case, the elements for defamation apply – "false and defamatory statement concerning another, an unprivileged communication to a *third party*, fault amounting at least to negligence on the publisher's part, and either actionability of the statement or special harm caused by the publication." Scheidler presents these elements in his complaint, CP 10-11, and in his rebuttal to counterclaims, CP 66-69 and in other pleadings CP 1022 et passim.

The crux of Scheidler's defamation cause is as follows. In response to Scheidler's letter sent "To the Executives at MMS" Ellerby told Mr. Mills, who was given the task of responding on behalf of the "Executives", that Scheidler was the one who asked Mr. Ellerby to withdraw his representation – which is a lie. Mr. Ellerby said to Mr. Mills that he was never required to withdraw due to a conflict of interest – another lie. In truth Cassandra Noble asked Ellerby to withdraw, and Ellerby in fact withdrew. Scheidler never asked Ellerby to withdraw. But Mr. Mills believed Ellerby and not Scheidler. Mr. Mills called Scheidler's claims false and called Scheidler's request for a refund of fees "unfounded". Scheidler's reputation for honesty was destroyed by Ellerby's false characterization of Scheidler's factual account of the 1998 events –

and thereby prevented Mr. Mills from dealing with Scheidler on the issue of a refund (i.e. damages). All the elements for a defamation/false light cause are present. "false and defamatory statement, knowledge that it's false, and damages. Exhibits: CP at 15, 16, 17-18, 19, 86, 89; Scheidler's Admissions at CP 39-40, Ellerby's admissions at CP 123, 127-128, 133; emails CP 385-392

Ellerby's other citation **Fisher v Dept of Health, 125 Wn.App 869** is not a defamation case and is completely irrelevant.

Ellerby's claim of conditional privilege, even if true, is lost if the defamatory statements are false. Since Scheidler did not ask Ellerby to resign, Ellerby's statement to Mr. Mills blaming Scheidler is false. Any privilege claimed has been lost. CP at 67.

5 Ellerby claims pages 44, "After finding that sanctions were warranted, the superior court reviewed the amounts billed in Mr. Ellerby's defense fully CP 1787."

This is a substantially false statement of the facts as will be shown. Defendant previously tried to defraud the lower court in seeking attorney fees. Ref fact **Set B**. Id., App.Br. page 50.

Proof: Referring to the Verbatim Report of Proceedings, February 25, 2011, and Downer's declaration at CP 2801-2954.

That declaration is completely devoid of any explanation for the fees noted - just dates beginning in 2009, initials, and amount.

The Court, page 4: "I have some concerns about reasonable hours expended. I want to have a chat about that today and see what --- what you thought about some of the court's concerns."

The Court page 6: "I'm pretty uncomfortable with granting relief when she's not a named party and never has been."

The Court page 6: "there is in the case law a statement about what the court should do in order to address the issue of the reasonable hours that apply. And it says, "The court must limit the lodestar to hours reasonably expended and should, therefore, discount hours spent on unsuccessful claims, duplicated effort, or otherwise *unproductive time*." ... I look at the declarations, is there's no explanation of what was actually -- there's no description of the time... **(at page 7)** "it's really difficult for me when addressing the issue of reasonableness to evaluate the case, because the declaration has no description of the work performed...**(at page 13)** if you filed for summary judgment at the top of this...he has to demonstrate...some reasonable factual basis... and have a qualifying medical opinion."

Mr. Downer, page 9: "We deliberately omitted that in this case because Mr. Scheidler, more than our average opponent, will seize upon any piece of information he's provide with." ... **(at page 15)** "we're taking about a matter of litigation strategy ... fight about privilege."

The Court, page 12: "I kept asking myself: Where's the motion for summary judgment?" **at page 17,** "But the total hours expended ... but, man, 950 hours. ... Okay."

Mr. Downer, page 20: "And I guess it's now Divisions II's problem."

The lower in no way carefully sorted out the wheat from the chaff in the ~\$132,000 sanction. Mr. Downer says “We deliberately omitted” the information the court needed to comply with the law -- a fraud upon the court.

RPC 3.3(4)(a-f) and 3.4(a) re withholding/concealing evidence. “The failure to make a duty-required disclosure in effect is a representation of the nonexistence of the matter which is not disclosed. Restatement of Torts §§ 550, 551 (1938). Boonstra v. Stevens-Norton, Inc., 64 Wn.2d 621, 393 P.2d 287 (1964); Ikeda v. Curtis, 43 Wn.2d 449, 261 P.2d 684 **JOHNSTON v. BENEFICIAL MANAGEMENT 85 Wn.2d 637, 538 P.2d 510 [July 1975]**

[6] SAME - DECEPTION CONSTITUTING - DECEPTIVE STATEMENTS - HALFTRUTHS. Fraudulent misrepresentations may be effected by half- truths calculated to deceive; and a representation literally true is actionable if used to create an impression substantially false. **IKEDA v. CURTIS 43 Wn.2d 449 450**

RCW 2.48.210 “Oath on admission I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;”

Furthermore, Downer admits a lot of time was expended in arguing issues of “privilege.” VRP page 9, Issues of “privilege” are not germane to CR 37 discovery issues, which deal only with “non privileged issues”. Then there are the fees attributable to “legal strategy” instituted as a matter of the “legal tradition” employed by Downer’s firm, Lee Smart, P.S., Inc. VRP pages 13 et.seq. The

legal strategy Lee Smart employs as a matter of tradition is at odds with itself. See **Sec. E** above and App. Br. at page 56. Then there was Ellerby's December 18, 2009 motion that Judge Hartman deemed "meritless." VRP December 18, 2009 pages 29-30. The fees associated with GSL were unverified. By law, all of these fees should have been backed out. Mr. Downer's declaration is clearly an attempt to defraud Scheidler by including fees not otherwise proper and 'deliberately omitting' crucial information Judge Hartman needed to perform his judicial obligation that he himself recognized. Sanctions should be reversed and Downer should be disciplined if not disbarred.

6 Ellerby's claims Scheidler's emotional distress claims were defective as a matter of law, that there exists no medical evidence of harm. Respondent's reply pages 32-34

Downer withheld the medical info the court was needing. Ref: ex parte hearing VRP February 25, 2011

Court: (pg 13 In. 17-21) "he would have had to have had a qualifying medical opinion... he's never had any of that..." **(pg 14, In 17)** "he wouldn't have been able to produce that" **(In. 25)** "he would have had to produce the declaration from Dr. Holder or somebody." [Comment: did Judge Hartman read Scheidler's filing? CP pg. 1572-1573 beginning at In. 12]

Downer: (page 14 In. 19) "Well, we don't know that until we get to the medical records, and the medical testimony of Dr. Holder, in particular".

Downer lied to the court by withholding material facts. Dr. Holder was deposed and offered testimony of the kind the court wanted - September 22, 2010, CP 1716-1778.

Scheidler: “Dr. Holder, inter alia, could Ellerby’s conduct exacerbate the symptoms that are part of the disorder?”

Dr. Holder: “I can say for certainty that it would magnify the symptoms. CP 1766

Scheidler: “...the magnification of these symptoms due to the overhang of lawsuits and disputes with attorneys affect me to the point where someone else, say, Mary, my wife, would be able to actually see and notice a difference between, say, a baseline behavior and a behavior that’s affected by these stressors?” ... in other words are my symptoms or changes in these symptoms observable by other people? CP 1767.

Dr. Holder: “Yes” CP at 1767

Downer withholds the declaration of Mary Scheidler CP 327-330. Mary states in detail her observations of my health and experiences dealing with Mr. Ellerby’s abrupt withdrawal.

Mary at 8, CP 328, “...he (Mr. Scheidler) isn’t one to abuse anything. In fact most any ‘just cause’ he undertakes takes its toll on his health, sometimes to the point of utter despair.

Mary at 10-12, CP 328, “... just 2-days before our hearing my husband called me at work and told me Mr. Ellerby is being asked to withdraw due to a conflict of interest... this is all noted in my daily journals. See E-42 (CP 331). Bill went into a nosedive of depression.”

Downer withholds his own observations as to the affect his

“withdrawal” had on Scheidler and he writes about Scheidler’s difficulties in his Memorandum.

Ellerby, CP 86, “I am sensitive to your anxiety over the County’s attempt to force my withdrawal from the case.”

Ellerby, CP 107, “... a disability such as the neurological imbalance commonly known as “panic disorder” obviously affects the taxpayer’s ability to operate in a complicated world.”

Withheld too, Ellerby, in his declaration in support of summary judgment, CP 2517-2548, for the first time, admits Cassandra Noble refused to waive the conflict, CP 1010, and produces an email between Ellerby and Scheidler from November 5, 1998, CP 1160-1161, that email on its face is about Scheidler’s health.

- 1) Ellerby was fully aware of Scheidler’s struggle with health issues and how the stress of litigation exacerbates his medical symptoms.
- 2) Ellerby asked Scheidler to essentially “suck it up” and put up with his deteriorating health because the Assessor’s conduct deserves full exposure to the light of day”?

Ellerby’s last minute withdrawal under “any excuse” let alone a false excuse is unconscionable given his particular knowledge.

Downer never discussed this material information in the ex parte hearing. The sad fact is *Ellerby, according to Mr. Mills, [CP at 15,16] never had a conflict of interest. Therefore Ellerby had no valid excuse to withdraw. Had he not withdrawn from Scheidler’s case the emotional equity would not have been wasted and*

destined to compound because of lack of counsel and Kitsap County's continuing unlawful treatment of Scheidler! CP 100-109.

7 Ellerby claims his conduct is not a type of misconduct that is “egregious” or that his misconduct would be considered “utterly intolerable in a civilized society.” Therefore by law a claim for intentional infliction of emotional distress should be dismissed. Ellerby at page 33.

Notwithstanding the factual and medical evidence cited above substantiating emotional distress, this court has already determined that an attorney “lying to clients is an **assault** upon the most fundamental tenets of attorney-client relations.” [**Id.**, **Dann**] But Mr. Ellerby’s conduct goes far beyond just lying to Scheidler. Ellerby lied to Scheidler so he could withdraw, after asking Scheidler, just a couple weeks earlier, to ‘suck it up and **we** will fight the assessor’. CP at 1160-61. Ellerby lied so he could withdraw from Scheidler’s case under a false excuse thus leaving Scheidler without counsel at the most critical time in that case -- on the eve of the hearing to address unlawful conduct perpetrated upon Scheidler by the Kitsap County Assessor. [This is argued in CP 1-22, 64-115 ; RP August 21, 2009, pages 5-6 and App.Br.] Then Mr. Ellerby lied to Mr. Mills about the reason for his last minute withdrawal, pinning his withdrawal as a request made by Mr. Scheidler so Mr. Mills would

not deal with Scheidler on the issue of a refund of fees paid. [Id., App.Br. and CP and RP plus CP at 59-60, 212, 295, 433]. Then Ellerby lies to the WSBA (CP 72-76) to avoid the embarrassment of an ethics violation when he provides services to the WA Bar – he is a member of the professional conduct committee! CP 1010-1011 et seq. Then Ellerby lies in his pleadings and declarations made in this case. CP 58-60, 1010 et seq., emphasis at CP 1054 #1.7. Ellerby's conduct is nothing but a string of lies. Such conduct is not only violations of law, CR 11 and rules of professional conduct, but Ellerby, an attorney, as "guardian of the law" demonstrates conduct utterly reprehensible in a civilized society.

8 Ellerby's version of Scheidler's "fraud, breach, conspiracy" claim is a distortion of the facts.

Scheidler incorporates all the preceding arguments as if set forth in full.

The November 5, email, CP1160-61, discussed above clearly establishes a "duty" Ellerby owes to Scheidler, if a duty isn't already implied by the 'attorney-client' relationship. That email also addresses 1) the conduct of Kitsap County's assessor and 2) Scheidler's struggle with health issues and 3) an obligation

between Ellerby and Scheidler. Downer doesn't address this material email in the ex parte hearing.

Fact is Ellerby 'sabotaged' Scheidler's legal standing when he withdrew from Scheidler's case leaving Scheidler without counsel and in dyer medical condition. CP page 7 #6, page 9 #15, page 11 – Claim Three. The point being, Scheidler is in a worse position – financially, legally, medically, than if Ellerby had never taken Scheidler's case in the first place.

There is more than enough documented evidence to support Scheidler's Claim 3 allegations.

Dr.Holder's testimony [CP beginning at 1716-1778], Mary Scheidler's personal observations CP 98, and documents from Ellerby himself, including his Feb 5 email discussed above, all validate emotional distress levied upon Scheidler by Ellerby's withdrawal using a trumped-up excuse – conflict of interest. Mr. Mills says Ellerby never had a conflict of interest and therefore should not have withdrawn using that excuse!

Scheidler **believed** Mr. Ellerby when he was told, "if the County does not respond to my letter [letter at CP at 87-88] or refuses to waive their conflict I will be forced to withdraw." [CP at 86] Scheidler believed Ellerby when he said to Scheidler, "you have put

too much work into this and the Assessor's conduct deserves full exposure to the light of day." CP 1161.

"Fraudulent misrepresentations may be effected by half-truths calculated to deceive; and a representation literally true is actionable if used to create an impression substantially false." **43 Wn.2d 449 IKEDA v. CURTIS 450 RCW 2.48.210** "Oath on admission I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;" **RPC 3.3(a)(4)** A lawyer shall not knowingly offer evidence that the lawyer knows to be false."

The lower court's dismissal of Scheidler's Claim Three Causes of Action, was improper.

9 Ellerby's 'version of the case' is immaterial.

The standard this court will apply is de novo review⁹ and must find for itself if there are any genuine issues of material fact. As a matter of law, Ellerby's version of Scheidler's case is not relevant, as it requires a court make factual determinations to find in favor of Ellerby's version of the case.

This court has held: "An appellate court reviews a summary judgment de novo. Review is conducted by engaging in the same inquiry as the trial court under CR 56(c).¹⁰ "The appellate court does not resolve factual issues but must determine if there exists a genuine issue as to any material fact. Summary judgment should not be granted if reasonable people

⁹ Id., CLAYTON V. WILSON 168 Wn.2d 57 (2010)

¹⁰ DePHILLIPS v. ZOLT CONSTR. CO. 136 Wn.2d 26 (1998)

could reach more than one conclusion from all of the factual submissions in the record.” ¹¹

Further “argument of counsel is not evidence”¹² and only “evidence” must be considered in a de novo appeal from Summary Judgment.

III CONCLUSION

Attorneys Ellerby, Downer, Locker, and Mills “standard of conduct” falls well below “truth and honor”.

In contrast, Scheidler has not made any false statement of fact nor based his claims against Ellerby that cannot be supported by the evidence. For this reason Scheidler’s claim is not frivolous.

Scheidler has not violated any court order, nor refused to provide discovery of any “non privileged” material. Scheidler’s conduct in this case is supported by the “plain reading” of RCW 5.60.060(9), CR 11, CR 26, CR 68, Article 1 Section 5.

Judge Hartman’s ~ \$132,000 sanction levied on Scheidler is prejudicial and should be reversed. Scheidler’s conduct far exceeds the “standard of conduct” Judge Hartman applies to attorneys Ellerby, Downer, Locker, and Mills.

¹¹ *Id.*, In re Estate of Black 153 Wn.2d 152 (2004)

¹² STATE v. PERKINS 97 Wn. App. 453 460 Sept. 1999

Judge Hartman's dismissal of Scheidler's case against Ellerby should be reversed because there are issues of material fact. Furthermore, to the extent Scheidler's causes of action are based in common law, common law is an evolutionary process and for this reason Scheidler's claims have common law merit.¹³ To uphold the lower court's dismissal is to insulate this state's "guardians of the law" from the responsibilities citizens' have a right to demand from their institutions. Article 1, Section 1 and 4.

August 24, 2011

Respectfully submitted,



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¹³ Over time other classifications at common law also evolved, including the classification of "offenses against morality." State v. Snedden 149 Wn.2d 914 921 Aug. 2003

APPENDIXES

I) APPENDIX A

GR 33

Requests for Accommodation by Persons with Disabilities

(a) Definitions. The following definitions shall apply under this rule:

(1) "Accommodation" means measures to make each court service, program, or activity, when viewed in its entirety, readily accessible to and usable by a person with a disability, and may include but is not limited to:

(A) making reasonable modifications in policies, practices, and procedures;

(B) furnishing, at no charge, auxiliary aids and services, including but not limited to equipment, devices, materials in alternative formats, qualified interpreters, or readers; and

(C) as to otherwise unrepresented parties to the proceedings, representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a person with a disability.

(2) "Person with a disability" means a person with a sensory, mental or physical disability as defined by the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101-12213), the Washington Law Against Discrimination (RCW

49.60 et seq.), or other similar local, state, or federal laws.

(3) "Proceedings Applicant" means any lawyer, party, witness, juror, or any other individual who is participating in any proceeding before any court.

(4) "Public Applicant" means any other person seeking accommodation.

(b) Process for Requesting Accommodation.

(1) Persons seeking accommodation may proceed under this rule. Local procedures not inconsistent with this rule may be adopted by courts to supplement the requirements of this rule. A disputed or denied request for accommodation is automatically subject to review under the procedures set out in subsections (d) and (e) of this rule.

(2) An application requesting accommodation may be presented ex parte in writing, or orally and reduced to writing, on a form approved by the Administrative Office of the Courts, to the presiding judge or officer of the court or his or her designee.

(3) An application for accommodation shall include a description of the accommodation sought, along with a statement of the disability necessitating the accommodation. The court may require the applicant to provide additional information about the qualifying disability to help assess the appropriate accommodation. Medical and other health information shall be submitted under a

cover sheet created by the Administrative Office of the Courts for use by applicants designated "SEALED MEDICAL AND HEALTH INFORMATION" and such information shall be sealed automatically. The court may order that such information be sealed if it has not previously automatically been sealed.

(4) An application for accommodation should be made as far in advance as practical.

(c) Consideration. A request for accommodation shall be considered and acted upon as follows:

(1) In determining whether to grant an accommodation and what accommodation to grant, the court shall:

(A) consider, but not be limited by, the provisions of the Americans with Disabilities Act of 1990 (§ 42 U.S.C. 12101 et seq.), RCW 49.60 et seq., and other similar local, state, and federal laws;

(B) give primary consideration to the accommodation requested by the applicant; and

(C) make its decision on an individual- and case-specific basis with due regard to the nature of the applicant's disability and the feasibility of the requested accommodation.

(2) If an application for accommodation by a proceedings applicant is submitted five (5) or more court days prior to the scheduled date of the proceeding for

which the accommodation is sought, and if the applicant otherwise is entitled under this rule to the accommodation requested, the accommodation shall be provided unless:

(A) it is impossible for the court to provide the requested accommodation on the date of the proceeding; and

(B) the proceeding cannot be continued without prejudice to a party to the proceeding.

(3) If an application for accommodation by a proceedings applicant is submitted fewer than five (5) court days prior to the scheduled date of the proceeding for which the accommodation is requested, and if the applicant otherwise is entitled under this rule to the accommodation requested, the accommodation shall be provided unless:

(A) it is impractical for the court to provide the requested accommodation on the date of the proceeding; and

(B) the proceeding cannot be continued without prejudice to a party to the proceeding.

(4) If a requested accommodation is not provided by the court under subsection (c)(2) or (c)(3) of this rule, the court must offer the applicant an alternative accommodation.

(d) Denial: Proceedings Applicants. Except as otherwise set forth in subsection (c)(2) or (c)(3) of this rule, an application for accommodation by a

proceedings applicant may be denied only if the court finds that:

- (1) the applicant has failed to satisfy the substantive requirements of this rule;
- (2) the requested accommodation would create an undue financial or administrative burden;
- (3) the requested accommodation would fundamentally alter the nature of the court service, program, or activity; or
- (4) permitting the applicant to participate in the proceeding with the requested accommodation would create a direct threat to the health or safety or well being of the applicant or others.

(e) Decision: Proceedings Applicants. The court shall, in writing or on the record, inform the applicant and the court personnel responsible for implementing accommodations that the request for accommodation has been granted or denied, in whole or in part, and the nature and scope of the accommodation to be provided, if any. The decision shall be entered in the proceedings file, if any, or in the court's administrative files. If the court denies a requested accommodation pursuant to subsection (d) of this rule, the decision shall specify the reasons for the denial. If a requested accommodation is not provided by the court under subsection (c)(2) or (c)(3) of this rule, the court shall state:

(1) the facts and/or circumstances that make the accommodation impossible under subsection (c)(2) or impractical under subsection (c)(3); and

(2) the reasons why the proceeding cannot be continued without prejudicing a party to the proceeding.

(f) Decision: Public Applicants. A public applicant should be accommodated consistent with the Americans with Disabilities Act of 1990 (42 USC §§12101-12213) and the Washington Law Against Discrimination (RCW 49.60 et seq). The applicant shall, orally or in writing, be informed that the request for accommodation has been granted or denied. If requested, a written statement of reasons for denial shall be provided.

Comment

[1] Access to justice for all persons is a fundamental right. It is the policy of the courts of this state to assure that persons with disabilities have equal and meaningful access to the judicial system. Nothing in this rule shall be construed to limit or invalidate the remedies, rights, and procedures accorded to any person with a disability under local, state, or federal law.

[2] Supplemental informal procedures for handling accommodation requests may be less onerous for both applicants and court administration. Courts are strongly encouraged to adopt an informal grievance

process for public applicants whose
requested accommodation is denied.

J) APPENDIX B

RCW 5.60.060

Who are disqualified – Privileged communications.

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

(2) (a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

(b) A parent or guardian of a minor child arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian. This privilege does not extend to communications made prior to the arrest.

(3) A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

(4) Subject to the limitations under RCW 70.96A.140 or 71.05.360 (8) and (9), a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any

information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

(5) A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.

(6) (a) A peer support group counselor shall not, without consent of the law enforcement officer or firefighter making the communication, be compelled to testify about any communication made to the counselor by the officer or firefighter while receiving counseling. The counselor must be designated as such by the sheriff, police chief, fire chief, or chief of the Washington state patrol, prior to the

incident that results in counseling. The privilege only applies when the communication was made to the counselor while acting in his or her capacity as a peer support group counselor. The privilege does not apply if the counselor was an initial responding officer or firefighter, a witness, or a party to the incident which prompted the delivery of peer support group counseling services to the law enforcement officer or firefighter.

(b) For purposes of this section, "peer support group counselor" means a:

(i) Law enforcement officer, firefighter, civilian employee of a law enforcement agency, or civilian employee of a fire department, who has received training to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity; or

(ii) Nonemployee counselor who has been designated by the sheriff, police chief, fire chief, or chief of the Washington state patrol to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity.

(7) A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made between the victim and the sexual assault advocate.

(a) For purposes of this section, "sexual assault advocate" means the employee or volunteer from a rape crisis center, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.

(b) A sexual assault advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any sexual assault advocate participating in good faith in the disclosing of records and communications under this section shall have immunity from any liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this section, the good faith of the sexual assault advocate who

disclosed the confidential communication shall be presumed.

(8) A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate.

(a) For purposes of this section, "domestic violence advocate" means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services as defined in RCW 26.44.020.

(b) A domestic violence advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. This section does not relieve a domestic violence advocate from the requirement to report or cause to be reported an incident under RCW 26.44.030(1) or to disclose relevant records relating to a child as required by

RCW 26.44.030(12). Any domestic violence advocate participating in good faith in the disclosing of communications under this subsection is immune from liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this subsection, the good faith of the domestic violence advocate who disclosed the confidential communication shall be presumed.

(9) A mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW may not disclose, or be compelled to testify about, any information acquired from persons consulting the individual in a professional capacity when the information was necessary to enable the individual to render professional services to those persons except:

(a) With the written authorization of that person or, in the case of death or disability, the person's personal representative;

(b) If the person waives the privilege by bringing charges against the mental health counselor licensed under chapter 18.225 RCW;

(c) In response to a subpoena from the secretary of health. The secretary may

subpoena only records related to a complaint or report under RCW 18.130.050;

(d) As required under chapter 26.44 or 74.34 RCW or RCW 71.05.360 (8) and (9); or

(e) To any individual if the mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the individual or any other individual; however, there is no obligation on the part of the provider to so disclose.

RCW 18.225.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Advanced social work" means the application of social work theory and methods including emotional and biopsychosocial assessment, psychotherapy under the supervision of a licensed independent clinical social worker, case management, consultation, advocacy, counseling, and community organization.

(2) "Applicant" means a person who completes the required application, pays the required fee, is at least eighteen

years of age, and meets any background check requirements and uniform disciplinary act requirements.

(3) "Associate" means a prelicensure candidate who has a graduate degree in a mental health field under RCW 18.225.090 and is gaining the supervision and supervised experience necessary to become a licensed independent clinical social worker, a licensed advanced social worker, a licensed mental health counselor, or a licensed marriage and family therapist.

(4) "Committee" means the Washington state mental health counselors, marriage and family therapists, and social workers advisory committee.

(5) "Department" means the department of health.

(6) "Disciplining authority" means the department.

(7) "Independent clinical social work" means the diagnosis and treatment of emotional and mental disorders based on knowledge of human development, the causation and treatment of psychopathology, psychotherapeutic treatment practices, and social work practice as defined in advanced social work. Treatment modalities include but are not limited to diagnosis and treatment of individuals, couples, families, groups, or

organizations.

(8) "Marriage and family therapy" means the diagnosis and treatment of mental and emotional disorders, whether cognitive, affective, or behavioral, within the context of relationships, including marriage and family systems. Marriage and family therapy involves the professional application of psychotherapeutic and family systems theories and techniques in the delivery of services to individuals, couples, and families for the purpose of treating such diagnosed nervous and mental disorders. The practice of marriage and family therapy means the rendering of professional marriage and family therapy services to individuals, couples, and families, singly or in groups, whether such services are offered directly to the general public or through organizations, either public or private, for a fee, monetary or otherwise.

(9) "Mental health counseling" means the application of principles of human development, learning theory, psychotherapy, group dynamics, and etiology of mental illness and dysfunctional behavior to individuals, couples, families, groups, and organizations, for the purpose of treatment of mental disorders and promoting optimal mental health and functionality. Mental health counseling also includes, but is not limited to, the

assessment, diagnosis, and treatment of mental and emotional disorders, as well as the application of a wellness model of mental health.

(10) "Secretary" means the secretary of health or the secretary's designee.

RCW 18.225.030

Limitation of chapter.

Nothing in this chapter shall be construed to prohibit or restrict:

(1) The practice of marriage and family therapy, mental health counseling, or social work by an individual otherwise regulated **under this title** and performing services within the authorized scope of practice;

(2) The practice of marriage and family therapy, mental health counseling, or social work by an individual employed by the government of the United States or state of Washington while engaged in the performance of duties prescribed by the laws of the United States or state of Washington;

(3) The practice of marriage and family therapy, mental health counseling, or social work by a person who is a regular student in an educational program based on recognized national standards and approved by the secretary, and whose performance of services is pursuant to a regular course

of instruction or assignments from an instructor and under the general supervision of the instructor;

(4) The practice of marriage and family therapy, mental health counseling, or social work under the auspices of a religious denomination, church, or religious organization.

Certificate of Service

Supreme Court

Case 85716-4

William Scheidler

V

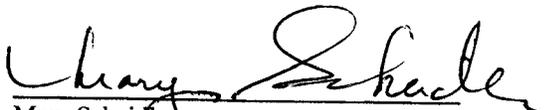
Scott Ellerby, Esq

I hereby certify that I caused the following documents to be served upon the below named individual in the identified manner on this 24 day of August 2011:

Appellant's Reply Brief; Appellant's opposition to respondent's motion on the merits.

Mr. Scott Ellerby,
C/o Mr. Jeffrey Downer, Attorney for Scott Ellerby
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929

Via USPS Priority Delivery Confirmation



Mary Scheidler
1515 Lidstrom Place E.
Port Orchard, WA 98366
360-769-8531

 **ORIGINAL**

Online Label Record (Label 1 of 1)

**Delivery Confirmation™ Number:
9405 5036 9930 0198 2687 48**

Paid Online

Transaction #: 206228357

Print Date: 08/22/2011

Ship Date: 08/22/2011

Weight: 1 lb 0 oz

Priority Mail® Postage: **\$4.75**
Total: **\$4.75**

From: BILL SCHEIDLER
1515 LIDSTROM PL E
PORT ORCHARD WA 98366-4812

To: MR. JEFFREY DOWNER, ESQ.
LEE SMART
701 PIKE ST
1800 ONE CONVENTION PLACE
SEATTLE WA 98101-3924

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