

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 45255-3-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL B. SMITH as Litigation Guardian Ad Litem for CLARENCE
G. MUNCE,

Appellant,

vs.

KRISTY L. RICKEY and KELLEY R. CAVAR, individually, and as Co-
Executrixes of the Estate of Gerald Lee Munce, Deceased,

Respondents.

APPELLANT'S AMENDED OPENING BRIEF

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ORIGINAL

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A. Identity of Parties

Appellant is the estate of Clarence Munce. Respondents are the estate of Gerald Munce and his adult children, making a loss of parental consortium claim for Gerald being fatally shot by Mr. Munce.

B. Assignments Of Error

1. The Trial Court erred in its discovery Orders preceding its discovery sanction Order by “reserving” and never ruling on Mr. Munce’s motions for protection and Ordering Mr. Munce to deposition when he had been judged incompetent;
2. The Trial Court’s discovery sanction Order was error;
3. The Trial Court’s Default Order was error;
4. The Trial Court erred by not holding a trial (either jury or bench) to determine damages;
5. The Trial Court erred in evidence rulings determining damages;
6. The Trial Court erred in the quantum of damages awarded;
7. The Trial Court erred by not recusing itself;
8. The Judgment is in error.

C. Issues Related To Assignments Of Error

Setting forth issues “related” to assignments of error will be needlessly duplicative and in some respects more confusing than simply setting forth the facts. Error is assigned. “Issues” relating to the assigned error are identified below.

D. Overview

This case is an orphan. It was reassigned four times with three Judges weighing in with orders on the same issue requiring each to read the others' minds. This case suffers from a lack of judicial continuity. Proof of that is demonstrated when, upon the case's fourth assignment back to the original judge, he stated where the case ended up based on his original order was not what he intended.

This case was before this Court on discretionary review on an exceedingly narrow issue. Now there is a final Order and the entire matter is before the Court. The case desperately needs this Court to start from scratch and get its arms around what really happened.

E. Facts

1. Basics Facts Of Case

Mr. Clarence Munce was an 81 year-old disabled man, living alone, diagnosed with Alzheimer's disease and dementia, requiring a walker or a four-point cane to walk. His conditions required medication; including tranquilizers and pain medication to go to bed. CP 878-887, 904-1026, 1840-1877, 1952-2017.

What is known of that night and contextual case facts come solely from (1) Mr. Munce's 911 call immediately after the shooting, (2) testimony of Sheriff's Deputies who arrived 4 minutes after the 911 call

relating what they saw and heard, and (3) Mr. Munce's statement to detectives before he invoked his Miranda rights. There is also physical evidence and testimony from third parties.

Late one night, Mr. Munce's 54 year-old son, known to keep a gun in his car, came banging on Mr. Munce's front door. Mr. Munce had been in bed with the television on. He was medicated. He lived alone and did not expect company let alone his estranged son. CP 904-904 and exhibits attached as CP 908-1026.

In a 911 call Mr. Munce said he was awoken by someone trying to break in. CP 905 and exhibit 3 attached CP 946-950. When he answered wearing his underwear, his 58 year-old son Gerald Munce was at the door. He was drunk, yelling aggressively and then assaulted the elder Munce with a metal hood ornament. CP 904-907, 946-950, CP 1846-48. Gerald Munce's toxicology report indicated a .10 blood level. CP 1850.

To 911, Mr. Munce described Gerald's physical attack. CP 946-950. This is corroborated by physical evidence of blood running down Mr. Munce's arm observed by the responding Deputy and a bloody implement nearby. CP 1952-2017.

Witnesses (friends, family) testified it was well known Mr. Munce's son kept a loaded pistol in his vehicle. CP 1874, CP 904-1026.

According to the responding Deputy and the detective who took

Mr. Munce's statement, after he fended off Gerald with a golf club Gerald moved from the house to his car where the loaded firearm was kept. As he did, Gerald yelled, "You've got it coming, you son of a bitch." Id. CP 904-1026, 1876. Mr. Munce took that as a threat Gerald would get his gun and shoot him. In defense, Mr. Munce took a rifle kept by his door and fired what he intended as a warning shot. CP 904-1026, 1877. Unfortunately, it struck Gerald Munce in the back causing his death.

According to the responding Deputy, Mr. Munce was distraught and pleaded with the Deputies to help his son. He told the Deputy, while in the excitement of the moment, it was only after Gerald attacked, threatened, and went for his pistol that he obtained his own gun. According to the Deputy, Mr. Munce said, "I took a shot to scare the shit out of him. I didn't aim. I didn't mean to hit him." CP 1952-2017. Clarence Munce was soon charged with First Degree Murder in Pierce County Superior Court.

The Court ordered Mr. Munce to submit to a competency evaluation. CP 1325-1337. He was evaluated by several psychologists, all agreeing he suffered from Alzheimer's and progressive Dementia and could not assist in his defense. Mr. Munce's lack of competency was profound. The undisputed medical testimony was he was not oriented to self, place, or time and would uncontrollably confabulate when asked the

most basic of questions. He could not tell reality from fiction, truth from untruth. CP 1325-1359.

Pierce County Superior Court entered an Order finding Mr. Munce incompetent. CP 1328.

Mr. Munce was ordered to remain at Western State Hospital for 90 days to restore competency for trial on the criminal charges. CP 1351-1352. That failed. The charges were dismissed without prejudice to be refiled if he became competent. CP 1354-1357.

Respondents sued Mr. Munce within 3 weeks of charges being filed. CP 1-7. The civil court stayed discovery to him but allowed all other forms. App. 3-11. On respondents' motion arguing Mr. Munce was not competent, the civil court ordered a GAL be appointed. CP 189-191

The discovery stay was lifted on March 6, 2009; plaintiffs propounded written discovery on Mr. Munce. App. 14-15. In response, counsel and the GAL provided substantial answers, documents, and identified witnesses where able based on documents, what was said by Mr. Munce in the 911 call, and what he said to the Deputies. CP 36-191. On matters requiring direct input from Mr. Munce, and in reliance on the incompetency Order, objection was made that Mr. Munce did not have testimonial competence. CP 36-191. On questions the answers to could create criminal peril, both competency and Fifth Amendment objections

were made. CP 36-191.

Mr. Munce timely moved for a protective order asking for a ruling on his discovery objections. CP 19-32. The Trial Court refused to rule, indicating it was “reserving” but frankly not articulating why. CP 464.

Respondents sent Mr. Munce a deposition notice. CP 194-195. Once the stay was lifted Mr. Munce timely moved for protection given his lack of testimonial competency. CP 19-195, 448-464. The Trial Court again would not address Mr. Munce’s lack of competency instead it denied Mr. Munce’s motion to quash ordering Mr. Munce to deposition the next day ordering his criminal counsel present to make Fifth Amendment objections if need be and “reserving” on the motion for protection for written discovery. CP 464.

At deposition, because of his lack of competency, Mr. Munce did not affirm the oath. He could not even identify his correct name. When asked, he provided three names, none his. Plaintiff’s counsel asked Mr. Munce questions. CP 505-538. Not in “blanket” form but individually on individual questions, Mr. Munce’s criminal defense attorney lodged Fifth Amendment objections. Not every question was objected to although many were. CP 505-538.

The parties disagreed on the objections. CP 510-514. Ultimately, they agreed they should return to the Court for guidance and adjourned the

deposition. CP 521-536.

However, instead of simply moving for rulings on objections, respondents moved for sanctions and issue preclusion based on both the deposition objections and Mr. Munce's written discovery objections – the same discovery Mr. Munce had objected to formally specifically asserting the need for a protective order and which the court refused to rule on as the issue was being “reserved.” CP 464.

Without first ruling on the propriety of objections at deposition and without ruling on defendant's motion for protective order in response to written discovery the Trial Court ordered the penultimate sanction of issue preclusion striking Mr. Munce's affirmative defenses and counter-claims. CP 467-1407, 1418-1442.

The Trial Court articulated no lesser sanction it considered, much less why one would not suffice. The Trial Court identified no Order that had been violated – none had, the Trial Court never entered or addressed the written discovery which was brought to the court's attention at every motion on the issue subsequent to Mr. Munce's original request. CP 464, 735-757, 876-903, 1132-1145, 1146-1286. The Trial Court identified no prejudice by ordering answers compelled. It did not identify why alternate sources of information were inadequate in light of Mr. Munce's incapacity. CP 1376-1391.

The Trial Court clearly stated it would not enter a default or direct liability against Mr. Munce. CP 1418-1442. See 1428. VRP Hearing 12/18/09 and Hearing 6/14/13 10, 12-14.

Respondents presented a proposed Order, 34 pages long, longer than the entire discovery hearing, engaging in analysis and consideration the Trial Court never did for itself. Mr. Munce timely filed objections. The proposed order contained several contradictions. Despite that, the Trial Court signed the Order. CP 1363-1370, 1376-1412, 1418-1442.

Based on the context discussed below, Mr. Munce is reluctantly compelled to suggest the Trial Court either did not read the Order carefully or did not read it (or Mr. Munce's) objections to it at all. It contained a core contradiction the Trial Court later commented it never intended and was utterly contrary what it Ordered.

2. Subsequent Judicial Assignments And Actions

The case was reassigned in January 2010 to Judge Stoltz. App. 16. Upon reassignment a trial date was issued for March 2, 2010. Due to trial conflict of counsel combined with Judge Stolz' trial calendar a new trial date was given setting trial to September 21, 2010.¹ App. 17-18.

On July 13, 2010, respondents' counsel moved for a trial

¹ This is notable because not only should Judge Larkin have, if he deemed the objections without merit, ordered answers and extended time for discovery if need be, doing so would have resulted in no prejudice as the Court itself put the trial date out 8 months.

continuance due to his scheduling conflict with a King County case. App 19-21. The trial was continued to February 28, 2011.² App 22-23.

On January 20, 2011, respondents' counsel again moved for a trial continuance due to another scheduling conflict of his. App 24-26. The Trial Court continued the matter to July 11, 2011,³ ordering no more continuances. App 27-28. Clearly this case was on track for trial on damages.

After all dispositive deadlines passed, respondents moved on April 7, 2011, for an order of partial summary judgment on negligence and proximate cause followed by a motion for default filed May 11, 2011.⁴ CP 1443-1928, 1932-2017, 2053-2062, 2104-2112, 2240-2248. Over Mr. Munce's objection due to timeliness, the Trial Court heard the motion. CP 1929-1931.

On May 20, 2011, the Trial Court denied respondent's motion for default, taking summary judgment under advisement. CP 2018-2052, 2113-2123, 2143-2239, 2249-2265, 2268-2270. On May 23, 2011 the Court issued a letter granting summary judgment. CP 2271. Having the

² Here is another 5 months, this time at respondents' urging, that discovery could have taken place in.

³ And here is yet another 5 months of delay, again at respondents' request. That is a total of 18 months the trial date was delayed with no prejudice to respondents.

⁴ Plainly, respondents had no problem with taking action after a Case Schedule deadline. As it suited them, they moved for relief after a deadline. They cannot be head to complain if given more time after a discovery deadline to conduct discovery.

procedural history put at issue by the default motion, Judge Stolz *sua sponte* amended the discovery sanction restoring Mr. Munce's comparative negligence defense as an issue for trial. CP 2271, 2450-2451.

Respondents moved for reconsideration which was denied. App 29-31. This Court accepted discretionary review of one narrow issue, the amendment of the sanction Order by Judge Stolz. Although this Court discussed the merits of the original sanction Order for context, its propriety was not before this Court.

This Court found Judge Stoltz had authority to amend the Order but disagreed there was a contradiction in it. There is a clear contradiction in the Order different than what Judge Stoltz identified that is more central to the instant appeal discussed below.

The case was remanded April 24, 2013. App 32-41. Plaintiff noted the matter for trial. App 42-43. It was initially assigned to Judge Hogan. Without notice Plaintiff filed an affidavit of prejudice and the case was reassigned to Judge Garold Johnson. App 45-46.

On May 23, 2013, plaintiff moved for default scheduled for June 14. CP 2491-2697. On May 28 defense counsel filed a notice of unavailability for June 17 through July 8, 2013. App. 48-49.

On June 10, 2013 Judge Johnson *sua sponte* reassigned the hearing on plaintiff's motion for default to Judge Larkin. App. 50.

On June 14, 2013 over defendant's objection Judge Larkin heard oral argument on plaintiff's motion for default. VRP Hearing 6/14/13 3, 5-6. As discussed in greater detail below, Judge Larkin clearly stated he never intended to default Mr. Munce on the original sanction order much less direct liability in favor of respondents. VRP Hearing 6/14/13 2, 10, 12-14. Despite that, he did both based on his reading of the original sanction Order. Judge Larkin asked respondents to submit a proposed Order. CP 2698.⁵

On July 2, 2013, ex parte with no notice to Mr. Munce, respondents presented on a Tuesday, not the standard Pierce County Friday motion calendar, an Order of default. CP 2699-2700.⁶

On July 25 respondents moved for Judgment on the default. They captioned it as a "reasonableness hearing" but argued Mr. Munce should be excluded from participation. CP 2701-3271. Mr. Munce objected, arguing even if the default was proper he was entitled to appear and contest damage. CP 3272-3331. The damage hearing was continued to August 5. App. 51-52.

The damage hearing – although it is called a hearing in the loosest sense of the word as Mr. Munce could not participate - was held on

⁵ This letter of June 26, 2013, was received during defense counsel's notice of unavailability. CP 2698 and App. 47-48.

⁶ This order was presented without presentation and/or notice and was presented during counsel's notice of unavailability. App. 47-48.

August 5 by Judge Johnson. CP 3347-3348, App. 53-56, VRP Hearing 8/5/13.

Mr. Munce alerted Judge Johnson to a conflict of interest arising out of his former firm's representing respondents on the same subject matter, but different filing, as this case while Judge Johnson was still with the firm. Judge Johnson refused to recuse himself. CP 3355-3358, App 53-56, VRP 8/5/13.

On the issue of damages only, and over vehement objection Judge Johnson struck the trial. Respondents moved and Judge Johnson also struck the declarations submitted by Mr. Munce on damages. CP 3272-3331, App. 53-56 and VRP 8/5/13.

While depriving Mr. Munce all opportunity to participate on substance, Judge Johnson allowed Mr. Munce to speak on several legal issues. With no opposition and what was essentially an ex parte proceeding, Judge Johnson awarded \$750,000 in loss of parental consortium damages to each of Gerald Munce's adult children totaling 1.5, \$400,000 for pre-death pain and suffering and an additional \$132,267 for economic loss based on only plaintiff's economic expert. With funeral expenses and costs the judgment entered was \$2,048,975.94. CP 3359-3366, App. 53-56, VRP 8/5/13.

F. Argument

1. Standards of Review

Questions of law are reviewed de novo and include the interpretation and application of a statute or other rule of law. State v. Greenwood, 120 Wn.2d 585 (1993). An appellate court applies all rules and statutes that bear on issues; they are properly raised even if not argued to the lower court. Smukalla v. Barth, 73 Wn. App. 240 (1994).

Law of the case. To an appellate Court, law of the case is discretionary; an appellate court may review the propriety of its earlier decision in the same case. RAP 2.5(c)(2). The question is whether the prior ruling was clearly erroneous and resulted in a manifest injustice. Folsom v. County of Spokane, 111 Wn.2d 256 (1998); Eserhut v. Heister, 62 Wn. App. 10 (1991) (The Court held its earlier decision could “lead to pernicious results in the workplaces of this state.”)

Findings of fact will not be disturbed if supported by substantial evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570 (1959). The damages awarded is normally a factual issue, Hoglund v. Raymark Industries, Inc., 50 Wn. App. 360 (1987), but will be reversed if findings of fact are not sufficiently specific to support the award. Shinn v. Thrust IV, Inc., 56 Wn. App. 827 (1990).

Cumulative Error. When a Trial Court makes several otherwise minor nonreversible errors, the cumulative effect may require reversal. State v. Perrett, 86 Wn. App. 312 (1997).

2. The Original Sanction Order Was Error

a. AUTHORITY

Competency and Fifth Amendment objections are appropriate.

Only those of sound mind may be called as a witness. RCW 5.60.020. Those of unsound mind, may not. RCW 5.60.050. The ability to parrot the oath is not the test. Competency requires:

(1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which [she] is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words [her] memory of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Przybylski, 48 Wn. App. 661, 664 (1987) (competency of children).

The Order of Pierce County Superior Court judging Mr. Munce incompetent constituted a presumption of incompetency, State v. Smith, 97 Wn.2d 801, 803 (1982), until rebutted by a offering him as a witness. RCW 5.60.050(2). State v. Smith, 97 Wn. 2d 801 (1982). That is enough. However, that finding was essentially adopted by this same Civil Trial Court ordering, at respondents' motion no less, a Guardian Ad Litem be

appointed for Mr. Munce due to his lack of competency. CP 1328, 189-191.

It is conceded a person judged incompetent can be determined competent later. However, that is for the Court to decide based on its first hand observations combined with medical testimony. State v. Moorison, 43 Wn.2d 23, 31 (1953).

Moorison did not adopt a checklist to determine competency. It allowed a Court to determine competency on the fly and strike testimony it later decided was incompetent. That is now disfavored; competency is a necessary determination pre-trial. See State v. Avila, 78 Wn.App. 731, 737 (1995).⁷ Regardless of timing, it is a decision that must be made by the Trial Court. Id. at 33. The Trial Court must observe the witness itself and have proper medical testimony, at id.:

...the trial court had an opportunity to observe the condition and demeanor of the witness while on the stand, and had the testimony of a physician as to her sanity.

This is common sense. An incompetent person may not even be put under oath; they have been judged to not understand it. See RCW 5.60.050. But, being under oath is a condition precedent to being a sworn witness. RCW 5.60.020. Presumed not competent to take an oath, they

⁷ Avila is admittedly a child competency case. Under the statutes, competency as to an adult versus as child have slightly different mental requisites but there is no distinguishing factor as to when competency should be determined.

may not be put under oath until a subsequent Court determines they are competent to take the oath. Smith.

The Fifth Amendment privilege requires no detailed discussion:

The Fifth Amendment privilege permits a person to refuse to testify at a criminal trial, or to refuse to answer official questions asked in any other proceeding, where the answer might tend to incriminate him or her in future criminal proceedings. The privilege extends to answers that would furnish a link in the chain of evidence”

King v. Olympic Pipeline Co., 104 Wn.App. 338, 351-352 (2000). The lack of an active charge is not determinative; provided the jeopardy is not speculative, the objection should be given weight. Id.

If there is any dispute, the appropriate “procedure for ruling on the propriety of an invocation of a Fifth Amendment privilege is ordinarily an in camera proceeding on a closed record.” Id. at fn. 34.

Trial Courts have discretion handling such objections ranging from a stay of the civil proceeding to “protective orders and conditions when the interests of justice seem to require such action.” Id. at 352.

However, what may not happen is for the Trial Court to strip a civil litigant of one Constitutional Right to exercise another:

The Supreme Court has disapproved of procedures which require a party to surrender one Constitutional right in order to assert another. Similarly, the Court has emphasized that a party claiming the Fifth Amendment privilege should suffer no penalty for his silence. In this context "penalty" is not restricted to fine or imprisonment. It means, as we said (before), the imposition of any

sanction which makes assertion of the Fifth Amendment privilege "costly."

Wehling v. Columbia Broadcasting System, 608 F.2d 1084, 1088 (5th Cir. 1980) (citing Simmons v. U.S., 390 US 377, 88 S. Ct. 967 (1968)). That is the 9th Circuit rule:

It is obvious that dismissal of an action is costly and therefore would not survive the Griffin test.

* * *

In light of the Supreme Court decisions on the Fifth Amendment privilege, a plea based on this privilege in the discovery stage of a civil case cannot automatically be characterized as "willful default" resulting in dismissal.

Campbell v. Gerrans, 592 F.2d 1054, 1058 (9th Cir. 1979).

The proper balance is a negative inference from the assertion, not issue preclusion, much less default:

...once a witness in a civil suit has invoked his or her Fifth Amendment privilege against self-incrimination, the trier of fact is entitled to draw an adverse inference from the refusal to testify.

King, 104 Wn.App. at 355-356.

CR 26 contemplates: (1) question, (2) answer or objection, (3) ruling on objection, and (4) compelling a response if the objection is not sustained. See CR 26(c). If a party's objections lack merit, the Court's role is to overrule them and order answers. CR 37(a)(2).

Because the intent of discovery is the exchange of information, the Court's use of sanctions is limited to that necessary to (1) compel that

exchange, and if the resisting party improperly refuses (2) to cure the prejudice caused by the failure. Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 355-356 (1993) (“...[T]he least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed.”). That is true even for a “willful” violation. Id. at

Issue preclusion/default is the harshest remedy, meted out only when no other remedy will cure the prejudice:

...it must be apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the Trial Court explicitly considered whether a lesser sanction would probably have sufficed.

Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 686-687 (2002).

A party's reasoned opposition to discovery does not provide cause to sanction even if the party is later judged to have been wrong:

Fair and reasoned resistance to discovery is not sanctionable. Rather it is the misleading nature of the... responses that is contrary to the purposes of discovery and which is most damaging to the fairness of the litigation process.

Id. at 346.

The Trial Court must, on the record, demonstrate it considered alternate sanctions and explain why only the sanction ordered suffices:

[I] t must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed, and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. We have also said that it is an abuse of discretion to exclude testimony as a sanction for noncompliance with a discovery order absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494 (1997) (internal citations omitted).

b. ARGUMENT

i. Written Discovery

It was error to issue any sanction on the basis of written discovery including the responses to requests for admission given Mr. Munce's timely objection after the discovery stay was lifted which clearly asserted lack of competency as the basis for an inability to more completely answer the responses and asserted the need for protection. CP 19-195, 448-464. A motion for protection followed which was never ruled on by the court but "reserved." CP 464. Despite bringing this to the court's attention numerous times the Trial Court refused to and never decided on the pending motion before granting respondents' post-deposition sanction motion.

On the merits of his objections, Mr. Munce's competency objections were well placed – at the least, they were not in bad faith given

the extant incompetency Order. He had been judged incompetent and was presumed such until a subsequent determination to the contrary. Smith.

As to the Fifth Amendment, there was no argument below Mr. Munce was not facing criminal jeopardy. If any of Mr. Munce's Fifth Amendment invocations were inappropriate the Trial court's duty was to overrule them and compel answers. It cannot be said they were all frivolous (even assuming any can be said without ultimate merit) as many of the discovery questions went to the heart of criminal jeopardy the very issue Judge Larkin contemplated and acknowledged by so ordering criminal counsel Mr. Bauer to be present and instruct and assert privileges accordingly. CP 464, VRP 7/2/09.

Respondents histrionics notwithstanding, there was no prejudice even assuming objections to written discovery were overruled. The objections were originally made in May 2009. CP 33-195. Mr. Munce filed his motion for rulings on them in June 2009. CP 19-32. Even as late as the time the Trial Court finally took the matter up, the Trial Court need only have ruled on the objections and ordered answers. There is no prejudice where the answers may be had and the party can prepare for trial - much less can the only remedy be issue preclusion. Fisons. The Trial Court should have ordered answers, extended the discovery deadline, etc., or even the trial date if need be. That the trial date was later continued

three times, twice at respondents' motion for over a year demonstrates there would have been no material prejudice by doing so to order answers.

There was no willful violation of an Order. There was no Order. The Trial Court refused to rule on a proper motion for protection. CP 464.

b. DEPOSITION

It will be conceded many (a lot, to be candid) of the questions drew an assertion of the Fifth Amendment. However, that begs the question of the propriety of ordering the deposition in the first place especially in light of the Court's comments that what happened at the deposition is exactly as expected and to the extent the order compelling the deposition itself provided for Mr. Munce's criminal lawyer to be present and participate. CP 464. VRP 12/18/09.

At the risk of repetition, the adjudication of incompetence was extant and presumed until proven otherwise. Smith. If respondents wanted to offer Mr. Munce as a witness, e.g., seek his sworn testimony, they had the affirmative obligation to prove his competence first. Smith. The way to do that was not by first putting Mr. Munce under an oath he was judged and presumed to not understand. Mooring. It was upside down logic for respondents to argue and the Trial Court Order: to determine if Mr. Munce is competent to be put under oath and asked questions, we will put him under oath and ask him questions. Yet, that is

exactly what happened.

Instead of seeking his deposition, respondents should have noted a competency hearing where the Trial Court could evaluate Mr. Munce first hand, take medical testimony, etc., to determine if the presumed incompetence had passed. Keep in mind plaintiff's never contested Mr. Munce's competency in the civil proceeding and in fact constantly sought and obtained a guardian based on that incompetency. Mooring. Given Mr. Munce's objection, that was what was required. Id.

If it was error to order an incompetent person to take an oath to be deposed, any overreaching in objections by criminal counsel are moot: he should not have needed to make objections in the first place.

However, even if this Court were to overlook putting an incompetent person under oath, it is incorrect as respondents have argued that Mr. Munce's criminal counsel made "blanket" privilege objections. It will be conceded he made many. However, he allowed each question to be put and only then objected. With that record, it was the Trial Court's role to rule on the objections with an in camera review if necessary. King. Given that the parties agreed to adjourn to take this back to the Trial Court to do that, it was an abuse of discretion to not do so. CP 467-1442.

As with the written discovery, other than having to start the deposition again, there was no prejudice. The Trial Court need only have

ruled on the objections and ordered a second deposition, at Mr. Munce's cost if the Trial Court saw fit. To not do so is to sanction with issue preclusion for the mere assertion of the Fifth Amendment.

That is an impressibly harsh remedy. It wrongly chills its use. It creates the Hobbesian choice of either waiving the right or, if wrong in its assertion, be defaulted. Incorrectly asserting a constitutional right cannot come with the equivalent of a civil death penalty. Wehling, Summers. If so, it makes the right impossible to assert because the consequence of being wrong, even if in good faith, is too great.

Here, the record is clear the Trial Court never considered the propriety of the objections. Instead, it baited into respondents' argument of "blanket objections" and sanctioned the penultimate sanction when ruling on them and ordering Mr. Munce to appear at a second deposition at his expense would have cured any alleged prejudice.

Respondents will no doubt complain that as Mr. Munce is now dead it would be unfair to reverse because he is not available to be deposed. There are two responses: (1) the Trial Court either erred or not. If it did, that is not obviated by the fact Mr. Munce since died. (2) Respondents cannot be heard to complain as it was their overreaching and inviting error by asking the Trial Court to grant relief they had no basis to request in the first place. It is Mr. Munce and his estate that have been

prejudiced by the respondents' original motion, not the respondents by the reversal of an erroneous order entered on their motion.

c. FORM OF ORDER

This largely inheres in the foregoing however the Trial Court did not engage in an analysis of the Burnet factors. It did not. Appellants challenge Respondents to point in the oral record where, if so. Signing an order of purported analysis the Trial Court never engaged in is not what the Supreme Court in Burnet had in mind.

The peril of the procedure employed here is well illustrated by the fact the Order signed fundamentally contradicted the oral Order the trial Court made by slipping in, in one sentence, that Mr. Munce's entire answer was stricken when the Trial Court orally refused to grant that relief and the actual conclusions of law proposed said that was not being done. With no disrespect intended to Judge Larkin, it is difficult to reconcile his signing that order with that contradiction with anything other than he either did not read the order closely or did not read it at all. If he had, that contradiction would have been glaring.

Thus, the danger. Burnet requires a trial court, itself and on the record, to work through the factors. The policy behind that is to require the trial court to itself give pause; if it cannot orally connect the dots between alleged misconduct, prejudice, and the sanction ordered that

should give the court pause to realize a lesser sanction should be ordered. That is the point of the factors in the first place. To not do that, issue a sanction, and have the requesting party propose their own order working backwards from the result they asked for, negates the process.

Finally, even if that upside down process is set aside here, even the written order can not justify the sanction of issue preclusion. The actual drafter, counsel for respondents, was circular and conclusory, stating no sanction other than issue preclusion would suffice while not articulating why. That may be a defect in drafting but it is ultimately a failure of the order. Not even the written order satisfies the Burnet factors.

d. RELIEF

All orders including the Judgment rely on the original sanction Order. If it is reversed, so too must all Orders assigned as error here.

The original sanction Order relies on Mr. Munce's objections to both written discovery and deposition.

Any sanction arising out of written discovery is error. Without that basis, (it is half the Order), the Order must be vacated. The matter should be remanded for rulings on Mr. Munce's objections to written discovery. Where that leaves the parties and Court depends on those rulings but at worse, objections should either be sustained or overruled.

As to deposition objections, the same must take place: if the Trial

Court erred ordering an incompetent person under oath, that moots the actual objections. If not, the objections must be individually ruled on.

If any objections are overruled, as to either written discovery or deposition, that places the parties in an evidentiary quandary as Mr. Munce is dead. However, that does not differ from if he was hit by a bus a week after suit filed or slipped into a coma. His death does not entitle respondents to a sanction.

Ordinarily, absent sufficient findings of fact on a discovery sanction the appropriate remedy is remand for entry of proper findings. However, on this record there is a more than sufficient basis to review and reverse the sanction of issue preclusion. That relief is requested with a remand to rule on objections and order answers where appropriate.

3. The Default Order Was Entered In Error

To obtain the default order, respondents argued the answer was stricken by the sanction order thus the allegations of the complaint were admitted. That was false: only affirmative defenses and counterclaims were struck.

From their original motion (it must be that original motion that is considered as it is the fountainhead of every subsequent order and motion on discovery) respondents asked for one of two forms of relief:

Mr. Munce must make an election between actively pursuing his counter-claim, affirmative defenses, or claims

of contributory negligence on the part of Munce, or he must waive his Fifth Amendment privilege.

CP 467-1442. Respondents never asked Mr. Munce's answer be stricken; just that his counter-claim, affirmative defenses and claims of contributory negligence be stricken. They said that several times. CP 467-1442

When the exact motion for default was before Judge Stolz it was denied. CP 2018-2052, 2113-2123, 2249-2265, 2268-2270. Yet, respondent filed the exact motion again ending up back to Judge Larkin who was not even an assigned judge at that time. CP 2491-2694. VRP 6/14/13.

Importantly, while Judge Larkin intended sanctions, Default, Directed Verdict or Directed Judgment was not his intent.

So what am I going to do. I am going to impose some sanctions. I am going to strike the counterclaims and the affirmative defenses.

I'm not going to grant your request for some kind of a directed verdict in the case.

VRP 12/18/09 16:16-21 at 35:16-20. (the issue of directed verdict arose from oral argument).

Judge Larkin affirmed his original intent when unilaterally put back on the case by Judge Johnson⁸:

⁸ Appellants have not assigned error to Judge Johnson's handing that issue off back to Judge Larkin only because they are unable to identify a specific Court Rule violated by it. However, it is suggested that does not make it right. Once the matter is

Respondents' Counsel: ... no one's ever said that we're trying to go back and say that your intent was at the time to enter an order of default.

Judge Larkin: It was not my intent. So we can settle that issue. I have a strong memory of that.

VRP 06/14/13, p. 10.

The conclusions of law in the original sanction Order are clear; only Mr. Munce's affirmative defenses and counter-claims were stricken:

... This court sees no alternative but to strike the defendant's affirmative defenses, and dismiss the defendant's counterclaim pursuant to CR 37 and CR 41(b).

(CP 1418-1442). The answer was not stricken. Liability was not directed.

Although respondents' proposed order ranged far and wide, weighing for Judge Larkin lesser sanctions and conducting analysis he never did for himself, initially at least they restrained themselves to the relief actually orally ordered by Judge Larkin:

The court in the exercise of its discretion shall not award the following the sanctions requested by the plaintiff in this matter; (1) the court shall not enter an order of default, which would be tantamount to a directed verdict on the issue of liability in this matter...

assigned to a judge, it is that Judge's case unless Judicial Administration, for logistic reasons and without consideration of substance, decides a matter must be reassigned; most often because a Judge is being transferred to a juvenile calendar, etc. The Court has never meaningfully explained why that one motion had to be handed back to Judge Larkin. It is suggested it creates, at best, an odd appearance particularly given how many times this case changed hands and the lack of continuity that created.

CP 1427-1428, p. 10 of Order. The conclusions of law in the order are set forth immediately above and follow that.

However, couched within that 32 page order is a contradiction contrary to Judge Larkin's oral order, the conclusions of law, in contravention of his own statement of intent when put back on the case several years later, and contrary to what even respondents conceded was their understanding of the Order. In the Findings of Fact, respondents' zeal got the better of them and while summarizing (needlessly) the 11 pages of findings (Judge Larkin never articulated himself), aggrandized and granted themselves relief Judge Larkin told them was denied:

... The court will impose sanctions as follows: (1) defendants affirmative defenses and answers shall be stricken; (2) defendants counterclaim shall be stricken and forthwith be dismissed.

(CP 1427-1428, p. 11 of order). Judge Larkin was clear when orally issuing his ruling he was not striking the answer or directing liability. Respondents created the appearance of that by 32 other pages to that effect.

Mr. Munce filed objections to the proposed order and tried to force the Trial Court to deal with each objected Finding of Fact or Conclusion of Law. Both times oral argument was had on the sanction order it was on a busy Friday docket, rushed with next to no time to allow sufficient

consideration on the Order. CP 1363-1370 and 1408-1412. VRP 12/18/09 and 2/2/10.

It does this court and the process no good to dance around the issue. It seems more likely Judge Larkin never fully read (if it all) the order he signed; or at best, he read it and did not see that language striking the answer or if he did it lost its significance within 32 pages of “his” findings he never articulated. It also seems likely he never read Mr. Munce’s objections. If he had, they would have alerted him to both the over breadth of that sentence and the contradiction within the order itself. CP 1363-1370.

If nothing else, it is clear respondents proffered an order well beyond what they were directed to provide, knew its contents, perhaps hoped they could slide by a little overreaching language within a 32 page proposal (this Court need not find that although perhaps it should), and as history has shown not only were they successful in doing so but were rewarded for their effort years later by obtaining a default Judge Larkin explicitly said, and even they concede, was never intended.

When respondent years later moved for default, seeking to exploit that sentence in the Order, Mr. Munce objected strenuously, pointing out all of the forgoing. The court deferred. Later, by letter, Judge Larkin without analysis indicated he would sign a default order if presented.

Respondents, ex parte, presented an order when they knew counsel for Mr. Munce was out of the country and Judge Larkin signed it.

Entering default was error.

Frist, It is suggested to defy common sense and fairness for a Trial Court, admitting he never intended to enter a default, to do so anyway because of what both the Court and the party who proffered the proposed Order admit was a scrivener error. Not to mention a second Amended Answer was filed to protect the procedural posture. CP 2589-2593.

Second, although done much later, that default order is the direct descendent of the original sanction order: it is a discovery sanction. The Trial Court was bound to work the Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494 (1997) factors ordering default in July 2013 as it was when it entered the original sanction order. Yet, it clearly did not.

Third, the default Order is fatally flawed because Judge Larkin already explicitly did not order default, Judge Stolz did not so order and in fact denied it and the Court of Appeals remanded the matter for trial post discretionary review. Directing liability years after the fact was not an appropriate sanction for discovery years earlier. Nothing had changed. And what had changed, several trial continuances at respondents' own request often on the eve of trial, mitigates against any further sanction because with passing time there was time to have cured any alleged

prejudice which ultimately resulted in plaintiffs filing a motion for summary judgment on liability.

By seizing on an admitted inconsistency in their own proposed order, respondents have created an irreconcilable catch-22. They must rely on the original sanction order to support the later default. Yet, the original sanction order said default was inappropriate and was never so ordered.

Finally, although Mr. Munce need not rely on this, the inappropriateness of respondents presenting and the Court signing the order on default when they knew Mr. Munce's counsel was out of the country was not good practice and contrary to CR 5.

4. The Judgment Is In Error

The Judgment relies on the Default Order, which relies on the original sanction Order. Reversal of either of those antecedent orders compels reversal of the Judgment. However, independent errors in the judgment require its reversal standing alone.

a. MR. MUNCE WAS ENTITLED TO A JURY TRIAL – OR AT LEAST A BENCH TRIAL – ON DAMAGE

All prior Trial Judges and this Court determined Mr. Munce was entitled to a jury trial to determine damage despite striking of portions of Mr. Munce's answer and other relief granted to respondents. Despite that,

the final Trial Judge determined damages at a hearing captioned by respondents as a “reasonableness hearing.” That was error. Mr. Munce was entitled to a jury. Further, what took place was not even a reasonableness hearing; if so, Mr. Munce should have been heard. The Trial Court denied Mr. Munce any opportunity to defend the evidence. What took place was a one sided ‘prove up’ hearing on default.

i. Mr. Munce Was Entitled To A Jury Trial

Even assuming default was appropriate, that only constituted an “admission of all factual allegations necessary to establish the plaintiff’s claim for relief.” Smith v. Behr Process Corp., 113 Wn. App. 306, 333 (2002) (citation omitted). It did not constitute admission of “any conclusions of law contained within the complaint or the amount of damages.” Id. That is true even when default is entered “based on a party’s failure to defend.” Id.

Essentially directly on point, in Smith where default was entered because of discovery violations (worse than alleged here), a jury trial on damage was still held. Id. Candidly, Smith did not hold a jury trial shall be held per se. However, it is not clear the case involved noneconomic damage. The preponderance of the case was products liability and CPA violations; to the extent general damage was at issue, given the claims it was slight.

In Washington, the right to a trial by jury is “inviolable” and cannot be impaired by legislative or judicial action. CONST. art. I, § 21; CR 38(a); See Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656 (1989). A civil defendant has a constitutional right to have damages decided by a jury. Id. at 645. “To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts – and the amount of damages in a particular case is an ultimate fact.” Id. See also James v. Robeck, 79 Wn.2d 865, 869 (1971); Worthington v. Caldwell, 65 Wn.2d 269, 273 (1964). The jury's role in determining noneconomic damages is even more essential than economic damages. In Bingaman v. Grays Harbor Comm'ty Hosp., 103 Wn.2d 831, 835 (1985).

Given the Constitutional preference and protection of a jury determination for damage, Mr. Munce was entitled to a jury to determine damage. Here, as in most sanction cases, a defendant's interference is on liability evidence in defendant's possession thus a default on liability is directly related to (and perhaps necessary) cure the prejudice of interfering with liability discovery. The sanction must be the least possible to cure the prejudice. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494 (1997). That was true in Smith. The plaintiff usually, and here, controls their damage evidence. Even assuming an original discovery sanction was appropriate a damage trial was not tainted by any discovery

abuse.

Defaulting on damage, when the discovery interference was on liability is overbroad and devoid of link between the misconduct, the cure, and even in the most aggressive of views, the punishment. Burnet. It constitutes an unnecessary abrogation of the otherwise inviolate constitutional right to trial by jury. Other jurisdictions have agreed. Payne v. Dewitt, 1999 OK 93, 995 P.2d 1088, 1091, 1094–95 (1999).

Here, assuming there is discretion to deny a jury trial on damage as a discovery sanction, this court abused it. There is no correlation between what has been pointed to as Mr. Munce’s misconduct on liability discovery and respondents’ ability to present evidence of their own damage. Even assuming the default order was appropriately entered, at most that can be interpreted is as a default on liability and striking affirmative defenses and the counterclaim. Smith. It constituted no default on damage. Id. There is an absence of cause and effect between the conduct, the default, and the deprivation of the constitutional right to a jury on damage much less the total stripping of even a bench trial and the protections even that constitutionally less favored procedure provides.

Albeit, perhaps the question is more simple.

This Court in this case understood that, indicating even after Judge Stoltz’s summary judgment Order on liability “the issue of damages, at

least, still remained for trial.” App. 32-41.

It is important to comment on this Court’s inclusion of the sanction Order’s contradictory language that “Munce will be precluded from presenting his previously stricken answer.” As discussed above, the answer was not stricken by the Conclusions of Law or by the court’s oral decision. At best, it might be said respondents in 32 pages of findings, included one line that the answer was stricken that is contrary to the Trial Court’s clear oral order and intent, the other 32 pages saying the answer was not stricken, that directing liability was not appropriate, etc. Under law of the case principles, it may be said that sentence was erroneous and works a hardship. Folsom v. County of Spokane, 111 Wn.2d 256 (1998). It should be revisited and refined. However, respondents can find no refuge in it. While they no doubt will reply by complaining this Court should not reach back to its prior opinion to correct that misstatement and the Trial Court committed no error because it was bound to follow it even if wrong, they cannot have it both ways: the sentence of this Court they would contend supports the answer was stricken also clearly says Mr. Munce was entitled to a “trial” and later in the opinion that is clearly stated to be a trial by jury, on damages.

ii. IT WAS ERROR TO DENY MR. MUNCE AN ABILITY TO CONTEST DAMAGE

Respondents sharply noted their hearing as a “reasonableness hearing.” It was not. A reasonableness hearing under RCW 4.22.060 requires the interested party (here Mr. Munce) have an opportunity to respond and contest damage. Cross examination and adversarial process is intended to make Judge determined damages “reasonable.” Here, Judge Johnson deprived Mr. Munce all opportunity to fully participate, struck the declarations he filed, and did not let him cross-examine witnesses or object to exhibits. Judge Johnson, somewhat inconsistently, allowed Mr. Munce to speak on legal issues but that falls short of an ability to appear and contest damages. App. 53-56, VRP 8/5/13.

If it was not a jury trial, nor a reasonableness hearing, it was a prove up hearing on damages following default.

Smith is clear and requires no further discussion: entry of default constitutes only an admission of the facts of liability. Damages must still be proven. That alone demonstrates the error. Washington does not appear to have a case specifically on point to this scenario, other states that have addressed this issue are in accord with this analysis.

By operation of CR 55 (consistent with Smith) default does not resolve matters not contained within the complaint. Damages, particularly personal injury damages, may not be pled in Washington and were not pled here. They are unliquidated damages. “By their very nature,

unliquidated damages are not susceptible to exact calculation and involve a range of possible answers. For this reason, a defaulting defendant admits facts establishing liability but not any claimed amount of unliquidated damage.” Paradigm Oil, Inc. v. Retamco Operating, Inc., 372 S.W.3d 177, 186 (Tex. 2012). Other states agree: Payne v. Dewitt, 95 P.2d 1088, 1095 (Okla. 1999) (stripping the defaulted defendant “of basic due process truth-testing devices is contrary to the orderly process of assessing damages”); Bashforth v. Zampini, 576 A.2d 1197, 1200-01 (R.I. 1990) (holding that in a hearing on the question of damages, the defendant, even though in default, is entitled to full participation; American Central Corp. v. Stevens Van Lines, Inc., 103 Mich. App. 507, 303 N.W.2d 234 (1981) (Defaulted parties who have not admitted unliquidated damages have a right to participate in jury trial in which unliquidated damages are assessed); Bonilla v. Trebol Motors Corp., 150 F.3d 77, 82 (1st Cir. 1998) (noting general rule that a defaulting party “is entitled to contest damages and to participate in a hearing on damages, should one be held”) (citing 10A CHARLES ALAN WRIGHT, ARTHUR B. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2688 (3D. ED. 1998); B. Finberg, Annotation: Defaulting Defendant’s Right to Notice and Hearing as to Determination of Amount of Damages, 15 A.L.R.3d 586 (1967) (collecting cases).

As a matter of common sense, there is a distinction between defendants who default because they do not appear and defaults entered for some reason such as a discovery sanction. Usually, as here, a defendant interferes with discovery when they obfuscate and are penalized for doing so. Yet the punishment must be in response to the bad behavior not beyond what is necessary. Fisons, Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494 (1997). This was recognized in Paradigm holding “barring the defaulted defendant from participation in the damages trial served no purpose other than punishment and thus was more severe of a sanction than necessary” for the discovery violations. 372 S.W.3d at 186.

This is not to say that misconduct may never lead to a default on damage. If damage discovery is interfered with such might be entertained. But, respondents admit that is not true and this Court already found that:

Even though the ruling deprived Munce of his affirmative defenses, there remained for trial at that point the issue of liability and damages. And even if entry of a default judgment might arguably have been an option when the second judge later granted Gerald’s estate’s motion for summary judgment on the issue of Munce’s liability, the issue of damages, at least, still remained for trial.

Rickey v. Munce, 174 Wn. App. 1019 (2013).

Paradigm, at id., also addressed this, explaining “the damages issues is materially different” than defaulting a defendant on liability for interfering with liability discovery.

iii. The Trial Court Made Errors Of Evidence

The Trial Court struck and would not consider the declaration of Dr. Clifford Nelson, offered by Mr. Munce. Dr. Nelson was timely disclosed in discovery and his declaration explained in great detail why it was more likely the decedent realized no pain and suffering after being shot, but if he did it was light and short in duration. CP 3288-3298. App. 3347-3348, VRP 8/5/13. That evidence was directly relevant and admissible. It was an abuse of discretion to exclude it as well as refuse any evidence from Mr. Munce. CP 3347-3348.

The trial court admitted and considered jury verdicts from other cases. It is well settled evidence of other verdicts is inadmissible to the trier of fact to prove the value of the case at bar. Joyce v. State, Dept. of Corrections, 116 Wn. App. 569, 632, 75 P.3d 548 (2003), aff'd in part, rev'd in part on other grounds, 155 Wn.2d 306, 119 P.3d 825 (2005) (damage award affirmed), citing Adcox v. Children's Orthopedic Hosp. and Medical Center, 123 Wn.2d 15, 33, 864 P.2d 921 (1993) (Hospital improperly tried to compare the size of its verdict to jury verdicts in other cases); Henderson v. Tyrrell, 80 Wn. App. 592, 910 P.2d 5522 (1996) (In reviewing the amount of a jury award, it is improper for the court to compare it with verdicts in other cases). CP 3367-3458.

Respondents argued the Trial Court's consideration of verdicts to

determine value in Sharbono v. Universal Underwriters, 139 Wn. App. 383, 404-05; 161 P.3d 406 (2007) was affirmed. Sharbono admitted them at a reasonableness hearing which is a narrow proceeding based on statute. This was not a reasonableness hearing. Here, the trial court was the trier of fact determining damages.

Either one of these errors of evidence is sufficient to reverse on the damages awarded. Both the directly bear on the damage award and the court entered its Findings before even considering its Post Reasonableness Hearing Brief. CP 3359-3376.

5. The Amount Of Damages Awarded Is Error

The Trial court awarded \$1.5 million to the decedents' adult children for loss of consortium, \$400,000 for pre-death pain and suffering, and \$132,261 in economic damage by the estate. That was error.

Decedent's adult children's' non-economic damages are limited. Cases awarding meaningful loss of parental consortium in Washington almost exclusively involve minor children. See Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 397, 261 P.2d 692 (1953) (minor two years and five months); Pike v. U.S., 652 F.2d 31 (9th Cir. 1991) (two minor children awarded loss of parental consortium damages); Ueland v. Reynolds Metals Co., 103 Wn.2d 131, 691 P.2d 190 (1980) (two minor children awarded loss of consortium damages). The Kramer

court declined to establish a bright-line cutoff age for minor's parental consortium damages, leaving it to the jury to decide how long a two and half-year old minor would suffer pecuniary loss from his mother's death. Ueland similarly involved minor children. The Ueland court recognized "minors are the group most likely to suffer real harm due to a disruption of the parent-child relationship." Ueland, 103 Wash.2d at 139.

At best for respondents, the grey area is how young children may be, to be children where loss of consortium justifies a meaningful award. The respondents, both in their forties, are far from children. Since Ueland, there is no published decision awarding loss of consortium damages to an adult child. See Kelley v. Centennial Contractors Enterprises, Inc., 169 Wn.2d 381, 236 P.3d 197 (2010); Higgins v. Intex Recreation Corp., 123 Wn. App. 821, 840, 99 P.3d 421 (2004).

\$1.5 million for loss of parental consortium to two, 40-plus year old children with their own families is essentially per se unreasonable; at the very least, the evidence demonstrates no unusual compelling need for the award such as an unusually close (above average) relationship or unique circumstance where the 40 year-olds were emotionally dependent on their father.⁹ The primary reason behind a parental consortium is "the plaintiff's status as a minor child" because "monetary

⁹ Appellant is not attempting to minimize the inherent loss of a parent. It is, however, not inappropriate to address this in the legal terms this question presents.

1481, 1486 (E.D.Wa. 1994). Without legally sufficient proof of consciousness following an accident, a claim for conscious pain and suffering must be dismissed. Kevra v. Vladagin, 96 A.D.3d 805, 806, 949 N.Y.S.2d 62 (2012). Mere conjecture, surmise, or speculation cannot sustain a cause of action to recover damages for conscious pain and suffering. Cummins v. County of Onondaga, 84 N.Y.2d 322, 325, 618 N.Y.S.2d 615, 642 N.E.2d 1071.

The estate bore the burden of proving decedent experienced conscious pain and suffering for a measurable period to recover. Otani ex rel. Shigaki v. Broudy, Wn.2d 750, 761 (2004) (RCW 4.20.046, as amended in 1993, “still requires that a plaintiff consciously experience suffering in order to permit recovery”)

Here, even assuming decedent experienced any consciousness (which is pure speculation, respondents presented no evidence of it) it could only be at best for a short period of time; that is not a “measurable” period of time required to award damage. St. Clair v. Denny, 245 Kan. 414, 422, 781 P.2d 1043 (1989) (plaintiff had not presented evidence of consciousness despite the sheriff testifying that the decedent had a pulse, because there was no indication the decedent had responded to stimuli or otherwise moved or made noise after impact)

Here, a few minutes of insensible consciousness does not meet the

“measurable time” threshold to recover pre-death pain and suffering. There is no evidence in this case that any period of “consciousness” differed from the “periods of insensibility which sometimes intervene between fatal injuries and death” or that he experienced a period of “heightened awareness” following his injuries. See Ghotra by Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050 (9th Cir. 1997).

Finally, the Court erred by awarding the estate \$132,267 in economic loss. Economic loss in a survivorship claim, with no dependent statutory beneficiaries as was the case here, is limited to health care, funeral expenses, and net accumulations of income. RCW 4.20.046, Wilson v. Grant, 162 Wn.App. 731, 741 (2011).

Net accumulations must be established by the deceased’s future net earnings, less all probable deductions for personal and family expenses and any other adjustments required, and reducing that figure to its present value. Wagner v. Flightcraft, Inc., 31 Wn. App. 558, 568 (1982). Factors considered include deceased’s age, health, life expectancy, occupation, habits of industry, responsibility, and thrift. Prancratz v. Turon, 3 Wn.App. 182, fn. 5 (1970).

Appellant does not contest awarding funeral expenses. However, anything over that was error. There was no economic loss to the estate

because future expenses exceeded income.¹⁰ Decedent was receiving full, permanent partial disability. His income was fixed, including Social Security, Labor and Industries benefits, and his School District pension. CP. 3288-2398. *See* Declaration of William Partin, page 3-4. There is no indication his income would increase. Further, for years before death decedent's spending exceeded his income. There is no economic loss where decedent's consumption exceeds income.

6. The Trial Court Erred By Not Recusing Himself

The final Judge who conducted the prove-up hearing (Johnson) committed error by not recusing himself. Judge Johnson¹¹ had a direct conflict of interest, called to his attention, that while in private practice his firm by one of his partners directly represented the decedent's children (plaintiff's) in a directly related matter. His Judgment should be reversed as he should not have been on the case to begin with.

Due process, the appearance of fairness, and the Code of Judicial Conduct require disqualification if the judge may be biased for or against a party or if the mere appearance of that exists. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992); CJC 3(D)(1). Where a trial

¹⁰ See Declaration of Bill Partin.

¹¹ Care is taken to emphasize appellants do not allege Judge Johnson was "unfair." At the risk of ingratiating, Judge Johnson in the undersigned's experience always shows himself to be an extremely hard working, well researched, and thoughtful jurist.

judge's decisions are subject to even the mere appearance of impartiality, the effect on the public's confidence on our judicial system is debilitating. State v. Graham, 91 Wn. App. 663, 669 (1998) (quoting Sherman v. State, 128 Wn.2d 164, 205 (1995)).

A judge who merely “associated” (practiced) with an attorney who represented a party is disqualified. Canon 2.11 states a “judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned,” including but not limited to the following circumstances:

The judge...served as a lawyer in the matter in controversy, or **was associated with a lawyer who participated substantially as a lawyer** or a material witness in the matter during such association.

CJC Canon 2.11(A)(6)(a) (emphasis added).¹² See also Kurbitz v. Kurbitz, 77 Wn.2d 943, 947, 468 P.2d 673 (1970) (attorney whose associate represented adverse client disqualified because he had access to confidential information).

Diimmel v. Campbell, 68 Wn.2d 697 (1966), is a close case, affirming recusal where the judge’s former firm represented a party while the judge was still practicing with the firm. Id. at 699. The only material difference is in Diimmel, the Judge did recuse himself and the issue

¹² The Canons of Judicial Conduct were amended in 2010. CJC Canon 2.11(A)(6)(a) is largely the same as former CJC Canon 3(C)(1)(b).

presented was whether ordering a new trial because of the need for recusal was error; the Supreme Court held it was not, affirming the appropriateness of recusal. Id.

In fairness to Judge Johnson, his firm did not represent respondents in the case at bar. However, a closer relationship short of that is not possible. The case at bar is for wrongful death arising directly out of Mr. Munce shooting decedent. The case involving Judge Johnson's former firm while Judge Johnson was still a member involved representing respondents in contemporaneous litigation. CP 3355-3358. Are they the same case: no. Do they arise out of the same circumstances, involving the direct representation of the same party: yes. Judge Johnson was glad the potential conflict was brought to his attention but thought little of it. He recalled the case, his firm's clients who are the very plaintiffs in this action and some of the facts involving his firm's representation of the very same parties he would be awarding damages to. Yet he proceeded. CP 3355-3358, VRP 8/15/13.

The appearance of conflict arising from the conflict is suggested obvious to even a layperson, Here, a very real appearance of fairness exists by a Judge determining damages for a former client arising out of the same subject matter his former firm was representing respondents on.

While appellant does not rely on this, there is an old saying that

rings true: if a person has to ask themselves whether they should be doing something, they probably shouldn't. This conflict and its appearance of unfairness when the Judge's former firm directly represented respondents was error. As explained by Diimmel:

It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties.

Id.

G. Relief Requested

Any decision resulting in the reversal of the sanction Order requires reversal of the Default and Judgment Orders as both were founded upon the sanction Order. However, error has been assigned to the Orders individually. The question becomes, at what point in the time line is error found. Wherever it is found, all Orders going forward must be reversed as all were dependent on the propriety of the Orders before them.

1. If the Trial Court erred in not ruling on Mr. Munce's motions for protective order and/or to quash his deposition, this Court should remand with instructions to rule on Mr. Munce's written discovery objections and to compel answers as need be.

2. If the Trial Court erred sanction Order, this Court should remand with instructions to rule on Mr. Mr. Munce's written discovery objections and to compel answers as need be. It should also remand with

instructions to resolve Mr. Munce's lack of capacity. Albeit, that is somewhat moot be his intervening death and given that death ruling on individual objections at deposition is similarly moot but it is what it is.

3. If the Trial Court erred entering the default Order, the case should be remanded with the extant summary judgment order on liability against Mr. Munce that has not been appealed and the matter tried on damage as it appears this Court intended in its previous opinion.

4. If the Judgment was in error, how the case proceeds relies on why it was error. Even if the default was not error, Mr. Munce is entitled to a jury trial as the default at best is limited to liability. At very worse for Mr. Munce, it offends due process to deny him any ability to participate even in a Judge directed damage hearing. Recusal of Judge Johnson should be ordered.

DATED this 21st day of October, 2014.

McGAUGHEY BRIDGES DUNLAP, PLLC

By: Shellie McGaughey
Dan L. W. Bridges, WSBA #24179
Shellie McGaughey, WSBA #16809
Attorneys for Clarence Munce

1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies under penalty of perjury under the laws of the State of
3 Washington that on the below date I caused Appellant's Amended Opening Brief to be
4 delivered via next day Legal Messenger delivery to:
5

6 Ben Barcus
7 LAW OFFICES OF BEN F. BARCUS & ASSOCIATES
8 4303 Ruston Way
9 Tacoma, WA 98402
10 ben@benbarcus.com

11 **Via Email Only**

12 Michael B. Smith, Esq.
13 Comfort Davies & Smith, P.S.
14 1901 65th Ave. West
15 Fircrest, WA 98466
16 attorneys@cdsps.com

17 Dated this 24th day of October, 2014, at Seattle, Washington.

18 
19 _____
20 Dave Loeser

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COURT OF APPEALS
DIVISION II
2014 OCT 27 AM 9:42
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

2014 SEP 17 PM 4: 57

No. 45255-3-II STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL B. SMITH as Litigation Guardian Ad Litem for CLARENCE
G. MUNCE,

Appellant,

vs.

KRISTY L. RICKEY and KELLEY R. CAVAR, individually, and as Co-
Executrixes of the Estate of Gerald Lee Munce, Deceased,

Respondents.

APPENDIX TO APPELLANT'S OPENING BRIEF

Dan'L W. Bridges, WSBA # 24179
Shellie McGaughey, WSBA #16809
McGaughey Bridges Dunlap, PLLC
3131 Western Avenue, Suite 401
Seattle, WA 98121
(425) 462 - 4000

ORIGINAL



08-2-10227-6 30439202 CME 09-02-08



IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

KRISTY L RICKEY
Plaintiff(s)

vs.

CLARENCE G MUNCE
Defendant(s)

Cause Number: 08-2-10227-6
MEMORANDUM OF JOURNAL ENTRY
Page 1 of 2

Judge/Commissioner: THOMAS P. LARKIN
Court Reporter: ~~Amy Resto~~ *Dorilee Reyes*
Judicial Assistant/Clerk: JULIE RATLEY

RICKEY, KRISTY L	Benjamin Franklin Barcus	Attorney for Plaintiff/Petitioner
CAVAR, KELLEY R	Benjamin Franklin Barcus	Attorney for Plaintiff/Petitioner
MUNCE, GERALD LEE ESTATE OF	Benjamin Franklin Barcus	Attorney for Plaintiff/Petitioner
MUNCE, CLARENCE G	MICHAEL THOMAS PFAU	Attorney for Defendant

Proceeding Set: Motion
Proceeding Outcome: Motion Held
Resolution:

Outcome Date: 08/29/2008 9:04

Clerk's Scomis Code: MTHRG
 Proceeding Outcome code: MTHRG
 Resolution Outcome code:
 Amended Resolution code:

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

KRISTY L RICKEY

Cause Number: 08-2-10227-6

**MEMORANDUM OF
JOURNAL ENTRY**

vs.

CLARENCE G MUNCE

Page: 2 of 2
Judge/Commissioner:
THOMAS P. LARKIN

MINUTES OF PROCEEDING

Judicial Assistant/Clerk: JULIE RATLEY
Start Date/Time: 08/29/08 9:05 AM

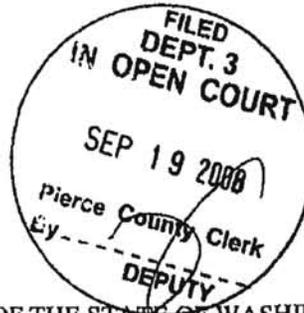
Court Reporter: Amy Roetto

August 29, 2008 09:04 AM Ben Barcus present on behalf of plaintiffs. Attorney Tim Allen present on behalf of defendants. Motion by plaintiff for appointment of GAL to review the mental capacity of defendant. Court takes matter under advisement. Court wants to receive initial report from Western State.

End Date/Time:



The Honorable Thomas Larkin
Hearing Date and Time: September 19, 2008 at 9:00 a.m.
With Oral Argument



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

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KRISTY L. RICKEY and KELLEY R.)
CAVAR, individually, and as Co-Executrixes)
of the Estate of Gerald Lee Munce, Deceased,
Plaintiffs,
vs.
CLARENCE G. MUNCE,
Defendant.

NO. 08-2-10227-6

ORDER GRANTING MOTION TO STAY
CIVIL PROCEEDING

THIS MATTER came on regularly for consideration before the court on defendant's
Motion to Stay Civil Proceeding And/Or For Protective Order. The Court having heard
argument of the parties and reviewed and considered the following pleadings:

1. Defendant's Motion to Stay Civil Proceeding And/Or For Protective Order;
2. The Declaration of Erik L. Bauer;
3. Plaintiffs opposition to Motion to Stay;
4. Defendant's Reply;
5. _____;

COPY

ORDER GRANTING MOTION TO STAY - 1-


MCGAUGHEY BRIDGES DUNLAP PLLC
325 - 118th AVENUE SOUTHEAST, SUITE 209
BELLEVUE, WASHINGTON 98005 - 3539
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IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

In considering all evidence presented, including the applicable factors from the matter of *King v. Olympic Pipeline Co.*, 104 Wn. App. 338 (2000), Defendant's Motion to Stay Civil Proceeding is ~~GRANTED~~. *Reserved pending out of competency hearing.*

TEA

IT IS FURTHER ORDERED, ADJUDGED AND DECREED as follows:

~~This civil proceeding, including all future discovery directed at any party or non-party, is stayed until the parallel criminal matter of *State v. Munce*, Pierce County Cause No. 08-1-03011-5, is fully completed.~~

TEA

~~A new case schedule shall accordingly be issued adjusting all applicable dates based on the stay.~~

DONE IN OPEN COURT ON: Sept 19, 2008.

Th L
The Honorable Thomas L. Liki

FILED
DEPT. 3
IN OPEN COURT
SEP 19 2008
Pierce County Clerk
By *[Signature]*
DEPUTY

PRESENTED BY:
McGAUGHEY BRIDGES DUNLAP, PLLC
By: *[Signature]*
Shellie McGaughey, WSBA #16809
Timothy E. Allen, WSBA #29415
Attorney for Defendant Munce

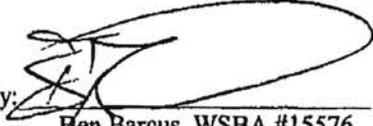
ORDER GRANTING MOTION TO STAY - 2-

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APPROVED FOR ENTRY; NOTICE OF PRESENTATION WAIVED:

THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES

By: 

Ben Barcus, WSBA #15576
Attorney for Plaintiffs

ORDER GRANTING MOTION TO STAY - 3-



McGAUGHEY BRIDGES DUNLAP PLLC

325 - 118TH AVENUE SOUTHEAST, SUITE 209
BELLEVUE, WASHINGTON 98005 - 3539
(425) 462 - 4000
(425) 637 - 9638 FACSIMILE

October 29 2008 10:43 AM

Honorable Thomas J. Judd
COUNTY CLERK
Hearing Date and Time: November 7, 2008 at 9:00 AM
NO. 08-2-10227-6

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

KRISTY L. RICKEY and KELLEY R.)
CAVAR, individually, and as Co-Executrixes) NO. 08-2-10227-6
of the Estate of Gerald Lee Munce, Deceased,)

Plaintiffs,)

vs.)

CLARENCE G. MUNCE,)

Defendant.)

DEFENDANT'S NOTICE OF
PRESENTATION

PLEASE TAKE NOTICE that the undersigned will present to the Court an Order relevant to a proposed temporary stay relevant to the above-referenced case.

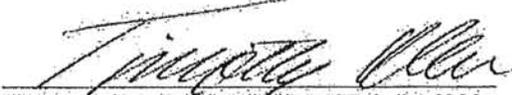
The Order reflects a temporary stay of this matter. This issue was previously before the Court on September 19, 2008, pursuant to Defendant's Motion for Stay. The Court subsequently entered an Order reserving any ruling pending the outcome of Mr. Munce's competency hearing. That hearing was completed on September 23, 2008, before Judge Culpepper. Following the hearing, Mr. Munce was found not competent to stand trial. Pursuant to statute, he is undergoing additional evaluation and treatment. A subsequent competency hearing is scheduled for December 16, 2008. Because it is not clear whether the

1 competency report is part of the public record, it is not being disclosed by the parties at this
2 time.

3 This Order is now presented in light of the previous ruling from the Court. It is
4 expected the plaintiffs will be submitting a separate proposed Order of temporary stay with
5 alternative language. The parties previously attempted to agree to a stipulated order of
6 temporary stay but were unable to do so.

7
8 DATED this 29th day of October, 2008.

9
10 McGAUGHEY BRIDGES DUNLAP, PLLC

11 
12 SHELLIE McGAUGHEY, WSBA # 16809
13 TIMOTHY ALLEN, WSBA # 29415
14 Attorneys for Defendant Clarence Munce

15 GORDON THOMAS HONEYWELL MALANCA

16 
17 Steven Reich, WSBA # 24649
18 Attorney for Defendant Clarence Munce
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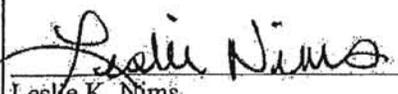
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused the foregoing document to be delivered via facsimile and legal messenger to:

Ben Barcus
LAW OFFICES OF BEN F. BARCUS & ASSOCIATES
4303 Ruston Way
Tacoma, WA 98402

Dated this 29th day of October, 2008, at Bellevue, Washington.



Leslie K. Nims



08-2-10227-6 30887555 ORSP 11-10-08

Honorable Thomas Larkin
Hearing Date and Time: November 7, 2008 9:00 a.m.



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

8 KRISTY L. RICKEY and KELLEY R.) 9 CAVAR, individually, and as Co-Executrixes) 10 of the Estate of Gerald Lee Munce, Deceased,) 11 Plaintiffs,) 12 vs.) 13 CLARENCE G. MUNCE,) 14 Defendant.)	NO. 08-2-10227-6 DEFENDANT CLARENCE MUNCE'S PROPOSED ORDER FOR TEMPORARY STAY
---	--

Defendant Clarence G. Munce, by and through his attorneys of record, hereby submits this Order for Temporary Stay for presentation. This order is based on all briefing submitted to the Court related to Defendant's Motion to Stay Civil Proceeding as identified in the Court's September 19, 2008, Order, whereby the Court reserved a ruling pending the outcome of Mr. Munce's competency hearing. This order is also based on arguments by the parties both at the September 19, 2008, hearing at the November 7, 2008, Notice of Presentation.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Any discovery directed to defendant Clarence Munce that would require his personal input, feedback, or presence, including, but not limited to written discovery and depositions, is temporarily stayed for 120 days from the date of this order, following the outcome of the

PROPOSED ORDER FOR TEMPORARY STAY -
1-


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 325 - 118th AVENUE SOUTHEAST, SUITE 209
 BELLEVUE, WASHINGTON 98005 - 3539
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*
 JB
 Tea

TL

competency proceeding in the criminal matter of *State v. Munce*, Pierce County Superior Court Cause No. 08-1-03011-5, which is scheduled for hearing on December 16, 2008.

All other permissible discovery directed toward non-parties or the plaintiffs, excluding discovery related to the parties' financial assets, may proceed subject to proper notice under the Court Rules and an opportunity for the parties to move for protective orders if necessary.

At the termination of 120 days, ~~the judge will either (1) lift the stay or (2) continue the order, the stay shall be automatically lifted.~~ *From the date of this order, the stay shall be automatically lifted. Any stay for a later defined period of time. However, no decision will be made in this regard continuation of the stay would require a subsequent without a duly scheduled hearing and an opportunity for the parties to submit briefing regarding their positions to either lift or continue the stay.*

TL

DONE IN OPEN COURT ON: *Nov 7th*, 2008.

Th L
The Honorable Thomas Larkin

Presented by:

MCGAUGHEY BRIDGES & DUNLAP, PLLC

Shellie McGaughey

Shellie McGaughey, WSBA #16809
Timothy Allen, WSBA #29415
Attorney for Defendant Clarence Munce

GORDON THOMAS HONEYWELL MALANCA

Timothy Allen, Jr.

Steven Reich, WSBA # 24649
Attorney for Defendant Clarence Munce



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Approved for Entry: Notice of Presentation Waived:

THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, P.L.L.C.



Ben F. Barcus, WSBA #15576
Attorney for Plaintiff

PROPOSED ORDER FOR TEMPORARY STAY -
3-



McGAUGHEY BRIDGES DUNLAP PLLC

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IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

KRISTY L RICKEY,

Plaintiff(s)

vs.

CLARENCE G MUNCE,

Defendant(s)

Cause No: 08-2-10227-6

ORDER

(OR)

(1) PLAINTIFFS' AND DEFENDANT'S REQUESTS FOR ONE-PARTY CONTACT AND THE MOTION FILED IN THAT REGARD IS DENIED;

(2) THE COURT FINDS THAT CLARENCE MUNCE IS NOT COMPETENT;

(3) THE COURT FINDS THAT A GUARDIAN SHOULD PROPERLY BE APPOINTED FOR CLARENCE MUNCE; THE PARTIES SHOULD ATTEMPT TO AGREE UPON THE SELECTION OF A GUARDIAN, OR THE COURT WILL DO SO IF THE PARTIES CANNOT AGREE UPON A SEPARATE HEARING WITH EACH SIDE PRESENTING ITS POSITION.

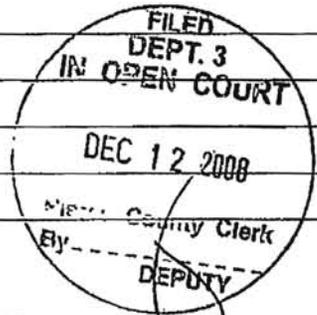
(4) THE COURT DENIES PLAINTIFFS' MOTION FOR THE APPOINTMENT OF AN "INDEPENDENT" GUARDIAN ON BEHALF OF CLARENCE MUNCE;

(5) THE RECORDS CONCERNING MR. MUNCE'S

1 Psychological or medical records shall be
2 sealed; Financial records shall be
3 part of case court record, with proper
4 redaction of identifying numbers such as
5 Social Security and Bank Account Numbers;

6 b) Dennis' wife shall continue to submit
7 Accounting every 90 days as previously
8 ordered by the court.

9 c) Redacted financial records as referenced
10 above shall be filed by the deponent
11 within 14 days of this order.



17 DATED this 12th day of December, 2008.

18 *Th P*
19 JUDGE THOMAS P. LARKIN

20 *[Signature]*
21 Attorney for Plaintiff/Petitioner
22 WSBA# 15576

20 *[Signature]*
21 Attorney for Defendant/Respondent
22 WSBA# 29415



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Honorable Thomas Larkin
FILED
DEPT. 3
IN OPEN COURT
MAR 06 2009
Pierce County Clerk
By DEPUTY

**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

KRISTEY L. RICKEY and KELLEY R.
CAVAR, individually, and as Co-Executrixes of
the Estate of Gerald Lee Munce, Deceased,

Plaintiffs,

v.

MICHAEL B. SMITH as Litigation Guardian Ad
Litem for CLARENCE G. MUNCE,

Defendant.

No. 08-2-10227-6

**ORDER LIFTING
STAY OF DISCOVERY**

THIS MATTER having come on duly and regularly for hearing upon Plaintiffs' Motion to Lift Stay of Discovery, the Plaintiffs represented by and through their attorney of record, Ben F. Barcus, of The Law Offices of Ben F. Barcus & Associates, PLLC; and the Defendant Clarence G. Munce represented by and through his attorneys of record, Timothy E. Allen of McGaughey Bridges; Steven Reich of Gordon, Thomas, Honeywell; and Michael B. Smith as Litigation Guardian Ad Litem for Defendant Clarence G. Munce; the Court having reviewed the files and records herein, and being fully advised in the premises, now, therefore, it is hereby

**ORDER LIFTING
STAY OF DISCOVERY- 1**

ORIGINAL

Law Offices Of Ben F. Barcus
4303 Ruston Way
Tacoma, Washington 98402
(206) 752-4444 • FAX 752-1035

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ORDERED, ADJUDGED AND DECREED that the Temporary Stay of Discovery in the above-captioned matter previously entered on November 7, 2008, shall be and is hereby **LIFTED** and the parties shall proceed with normal and customary discovery consistent with all applicable Civil Rules.

Dated this 6 day of ^{March} February, 2009.

(Plaintiffs' Request for Discovery Report for admission & of testimony of Dept for Production) Shall
TEA

The Honorable Thomas P. Larkin
Pierce County Superior Court, Dept. 3

Presented by: *be deemed served on the date of this order. TEA P*

Ben F. Barcus WSBA# 15817 for
Ben F. Barcus, WSBA# 15576
Attorney for Plaintiffs

Approved as to Form and Content;
Notice of Presentation Waived:

Timothy E. Allen
Timothy E. Allen, WSBA# 29415
Attorney for Defendant

Steven T. Reich
Steven T. Reich, WSBA# 24708
Attorney for Defendant

Michael B. Smith, WSBA# 13747
Litigation Guardian Ad Litem



**ORDER LIFTING
STAY OF DISCOVERY - 2**

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4303 Ruston Way
Tacoma, Washington 98402
(206) 752-4444 • FAX 752-1035



08-2-10227-6 33544110 LTR2 01-11-10

**SUPERIOR COURT
OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY**

KATHERINE M. STOLZ, JUDGE
LINDA SHIPMAN, Judicial Assistant
Department 02
(253) 798-7573

334 COUNTY-CITY BUILDING
930 TACOMA AVENUE SOUTH
TACOMA, WA 98402-2108

January 8, 2010

Benjamin Franklin Barcus
4303 Ruston Way
Tacoma, WA 98402

Steven Thomas Reich
600 University St Ste 2100
Seattle, WA 98101-4185

Michael Thomas Pfau
701 5th Ave Ste 4730
Seattle, WA 98104-7097

Shellie McGaughey
325 118th Ave SE Ste 209
Bellevue, WA 98005

RE: KRISTY L RICKEY vs. CLARENCE G MUNCE
Pierce County Cause No. 08-2-10227-6

Dear Counsel:

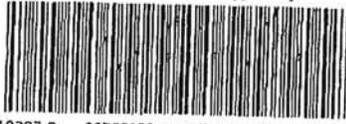
The above referenced case has been reassigned to The Honorable KATHERINE M. STOLZ, Department 02. The original trial date conflicts with the court's schedule. Please find enclosed an Order Amending Case Schedule. If you have any questions please call me at (253) 798-7573.

Sincerely,

LINDA SHIPMAN
Judicial Assistant

cc: Pierce County Clerks Office for filing





THE STATE OF WASHINGTON
PIERCE COUNTY

KRISTY L RICKEY

Plaintiff(s)

vs.

CLARENCE G MUNCE

Defendant(s)

No. 08-2-10227-6

**ORDER AMENDING
CASE SCHEDULE**

Type of Case: WDE
Estimated Trial (days):
Track Assignment: Amended Standard
Assigned Department: 02 - Judge KATHERINE M. STOLZ
Docket Code: ORACS

Joint Statement of Evidence	02/02/10
Pretrial Conference (Contact Court for Specific Date)	Week Of 02/16/10
Trial	09/21/10 9:00

Unless otherwise instructed, ALL Attorneys/Parties shall report to the trial court at 9:00 AM on the date of trial.

Additional dates may be added to the Amended Case Schedule upon order of the court.



NOTICE TO PLAINTIFF/PETITIONER

If the case has been filed, the plaintiff shall serve a copy of the Case Schedule on the defendant(s) with the summons and complaint/petition: Provided that in those cases where service is by publication the plaintiff shall serve the Case Schedule within five (5) court days of service of the defendant's first response/appearance. If the case has not been filed, but an initial pleading is served, the Case Schedule shall be served within five (5) court days of filing. See PCLR 1.

NOTICE TO ALL PARTIES

All attorneys and parties shall make themselves familiar with the Pierce County Local Rules, particularly those relating to case scheduling. Compliance with the scheduling rules is mandatory and failure to comply shall result in sanctions appropriate to the violation. If a statement of arbitrability is filed, PCLR 1 does not apply while the case is in arbitration.

DATED: 2/12/10

Judge Katherine M. Stolz
Department 02 (253) 798-7573

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

KRISTY L RICKEY

Plaintiff(s)

vs.

CLARENCE G MUNCE

Defendant(s)

No. 08-2-10227-6

**ORDER AMENDING
CASE SCHEDULE**

Type of Case: WDE

Estimated Trial (days):

Track Assignment: Amended Standard

Assigned Department: 02 - Judge KATHERINE M. STOLZ

Docket Code: ORACS

CC: ~~MIKE D SMITH, Pro Se~~
Benjamin Franklin Barcus, Atty
Shellie McGaughey, Atty
Steven Thomas Reich, Atty

July 13 2010 12:30 PM

The Honorable Katharine M. Stolz
COUNTY CLERK
NO. 08-2-10227-6
Hearing Date: July 23, 10

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**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

**KRISTY L. RICKEY and KELLEY R.
CAVAR, individually, and as Co-Personal
Representatives of the Estate of Gerald Lee
Munce, Deceased,**

Plaintiffs,

v.

CLARENCE G. MUNCE,

Defendant.

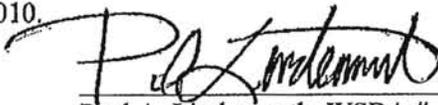
NO. 08-2-10227-6

**MOTION FOR
CONTINUANCE OF TRIAL DATE**

COMES NOW, Plaintiffs, by and through their attorney of record, Paul A. Lindenmuth, of *The Law Offices of Ben F. Barcus, PLLC*, and hereby moves the Court for a continuance of the trial date herein, based upon a scheduling conflict occurring as a result of a pre-assigned trial in another matter in the King County Superior Court.

This motion is based upon PCLR 40 (2) (B), the Affidavit of Counsel appended hereto, as well as the files and records herein.

Dated this 13 day of July, 2010.



Paul A. Lindenmuth, WSBA # 15817
Attorney for Plaintiffs

**Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.**
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

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DECLARATION OF PAUL A. LINDENMUTH

Paul A. Lindenmuth, under penalty of perjury of laws of the State of Washington, states as follows:

Counsel for the Plaintiff herein, requested this matter be continued to a mutually convenient time for all parties and the Court. This Motion is predicated on that fact that currently Plaintiff's counsel's law firm has a irreconcilable conflict with another case set for a two week Jury Trial commencing September 13, 2010, *Goodin v. Kone, et. al.*, King County Cause No. 07-2-15344-6 SEA. The *Goodin* case, is in the process of being pre-assigned, and has a nearly guaranteed trial date given such a pre-assignment. As the *Goodin* case is set to commence on September 13, 2010 and this case on September 21, 2010, counsel for the Plaintiff simply will be unable to be in two places at once.

The *Goodin* case, is a complex personal injury case, involving a work site accident that resulted in catastrophic injuries to Plaintiff's counsel's client, Donald ("Sonny") Goodin. Mr. Goodin, following the industrial accident, was rendered a paraplegic, suffered brain injuries, and a variety of other significant injuries. The *Goodin* case is set for a two week trial starting on the above-date and for lack of better words, is an expert heavy case, involving a number of experts from out-of-state as well as out-of-state co-counsel.

Co-counsel in this matter is Don Keenan, of Atlanta, Georgia, who prior to the *Goodin* trial, will need to make necessary calendar arrangements, travel arrangements, as well as appropriate arrangements for lodging. Also, Plaintiffs in the *Goodin* matter intend to call expert witnesses from the State of Florida and South Carolina (Dr. Bernard F. Pettingill, Jr.; Dr. David Krause; and Dr. Craig

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Lichtblau). As with Mr. Keenan, special arrangements for travel and lodging with regard to these otherwise busy, out-of-state expert witnesses will need to be made.

The *Goodin* matter, because of the catastrophic nature of the injuries, is an extraordinary case, wherein the life care plan along, to your Declarant's understanding, is in an amount in excess of \$17 million. Both parties in the *Goodin* matter have expended, and will continue to expend, substantial time and resources on that case, and given its nature, it is not a matter that can be disrupted and/or interfered with by other matters currently on Plaintiff's counsel's calendar. It is likely in the *Goodin* matter that the Defendants themselves will be calling a number of out-of-state experts, as well as numerous experts from the local area.

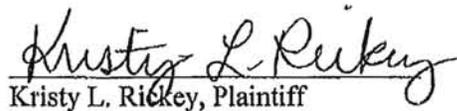
As such, due to this irreconcilable conflict, it is respectfully requested that Plaintiff's Motion to Continue this matter be granted. As indicated by the signature of the Plaintiffs Co-Executrixes) below, they have been fully consulted on this issue and is concurrence with this effort to continue the trial.

YOUR DECLARANT FURTHER SAYETH NAUGHT.

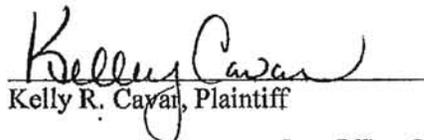
DATED this 13 day of July, 2010, at Tacoma, Washington.



Paul A. Lindenmuth, WSBA#15817
Attorney for Plaintiff



Kristy L. Riekey, Plaintiff



Kelly R. Cavan, Plaintiff



The Honorable Katherine M. Stolz
Department 2
Hearing date: July 23, 2010



**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

KRISTY L. RICKEY and KELLEY R.
CAVAR, individually, and as Co-Personal
Representatives of the Estate of Gerald Lee
Munce, Deceased,

NO. 08-2-10227-6

ORDER CONTINUING TRIAL DATE

Plaintiffs,

v.

CLARENCE G. MUNCE,
Defendant.

THIS MATTER having come on regularly upon motion of the Plaintiffs, by and through their attorney of record, Paul A. Lindenmuth, of *The Law Offices of Ben F. Barcus & Associates, PLLC*; the defense appearing by and through Shellie McGaughey, of *McGaughey Bridges Dunlap, PLLC*; and the Court having considered the files and records herein, and having been otherwise fully advised in the premises; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the currently scheduled trial date in this matter of September 21, 2010, shall be and is hereby adjusted for good cause shown, to wit:

granted; and it is further

ORDERED, ADJUDGED AND DECREED that the trial date shall be adjusted herein to the 28th day of July, 2010. *PLC SUE* *[Signature]*

NOTE FOR MOTION- 1

ORIGINAL

The Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

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DONE IN OPEN COURT this ^{ym} 30 day of July, 2010.

[Handwritten signature]
The Honorable Katherine M. ~~Stolze~~ *Stolze*
Dept. 2, Pierce County Superior Court

Presented by:

[Handwritten signature: Paul A. Lindenmuth]
Paul A. Lindenmuth, WSBA # 15817
Attorney for Plaintiff

Approved as to form and content;
Notice of presentation waived:

[Handwritten signature: Shellie McGaughey]
Shellie McGaughey, WSBA # 16809
Attorney for Defendant

FILED
DEPT. 2
IN OPEN COURT
JUL 30 2010
Pierce County Clerk
By *[Signature]* DEPUTY

NOTE FOR MOTION- 2

The Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

January 20 2011 11:55 AM

The Honorable Katherine M. Stolz
COUNTY CLERK
NO. 08-2-10227-6
Hearing Date: January 28, 2011

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**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

**KRISTY L. RICKEY and KELLEY R.
CAVAR, individually, and as Co-Personal
Representatives of the Estate of Gerald Lee
Munce, Deceased,**

Plaintiffs,

v.

CLARENCE G. MUNCE,

Defendant.

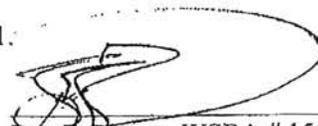
NO. 08-2-10227-6

**MOTION FOR
ADJUSTMENT OF TRIAL DATE**

COMES NOW, Plaintiffs, by and through their attorney of record, Ben F. Barcus, *of The Law Offices of Ben F. Barcus, PLLC*, and hereby moves the Court for an adjustment of the trial date herein, based upon a scheduling conflict occurring as a result of a pre-assigned trial in another matter in the King County Superior Court.

This motion is based upon PCLR 40 (2) (B), the Affidavit of Counsel appended hereto, as well as the files and records herein.

Dated this 19th day of January, 2011.



Ben F. Barcus, WSBA # 15576
Attorney for Plaintiffs

**Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.**
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

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DECLARATION OF BEN F. BARCUS

I, Ben F. Barcus, hereby declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

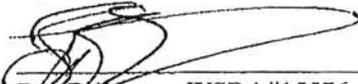
Counsel for the Plaintiff herein, requests that the trial date in this matter be adjusted to a mutually convenient time for all parties and the Court. This Motion is predicated on that fact that currently Plaintiff's counsel's law firm has an irreconcilable conflict with another case set for a two week Jury Trial commencing February 28, 2011, *Feneis v. Ryder*, King County Cause No. 09-2-18303-1 KNT. As the *Feneis* case is set to commence on February 28, 2011, and this case is also scheduled to commence on February 28, 2011, counsel for the Plaintiff is simply unable to be in two places at once.

The *Feneis* case is a complex personal injury case, involving a three-level cervical fusion injury, and has multiple experts (5-7), some of which are from out of state.

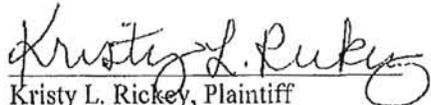
Due to this irreconcilable conflict, it is respectfully requested that Plaintiff's Motion to Adjust the Trial Date in this matter be granted. As indicated by the signature of the Plaintiffs Co-Executrixes) below, they have been fully consulted on this issue and is concurrence with this effort to adjust the trial.

YOUR DECLARANT FURTHER SAYETH NAUGHT.

DATED this 17 day of January, 2011, at Tacoma, Washington.


Ben F. Barcus, WSBA#15576
Attorney for Plaintiff

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Kristy L. Rickey, Plaintiff


Kelly R. Cavar, Plaintiff

MOTION FOR
CONTINUANCE OF TRIAL DATE - 3

Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035



08-2-10227-6 35796816 ORCTD 01-28-11

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The Honorable Katherine M. Stolz
Department 2
Hearing date January 28, 2011



**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

KRISTY L. RICKEY and KELLEY R.
CAVAR, individually, and as Co-Personal
Representatives of the Estate of Gerald Lee
Munce, Deceased,

NO. 08-2-10227-6

ORDER ADJUSTING TRIAL DATE

Plaintiffs,

v.

CLARENCE G. MUNCE,
Defendant.

THIS MATTER having come on regularly upon motion of the Plaintiffs, by and through their attorney of record, Ben F. Barcus, of *The Law Offices of Ben F Barcus & Associates, PLLC*; the defense appearing by and through Shellie McGaughey, of *McGaughey Bridges Dunlap, PLLC*; and the Court having considered the files and records herein, and having been otherwise fully advised in the premises; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the currently scheduled trial date in this matter of February 28, 2011, shall be and is hereby adjusted for good cause shown, to wit:

July 11th, 2011; and it is further

ORDERED, ADJUDGED AND DECREED that the trial date shall be adjusted herein to the *11th* day of *July*, 2011, and there shall be no further continuance

~~COPY~~

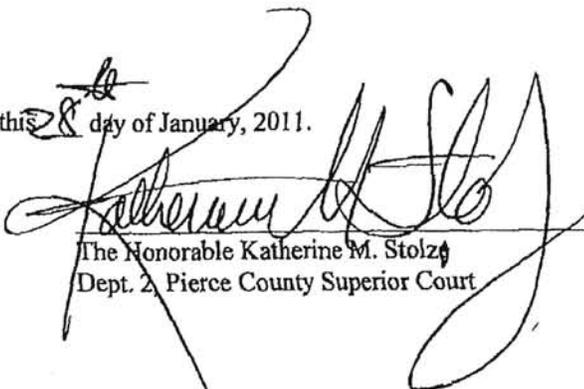
The Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

ORDER ON MOTION TO CONTINUE TRIAL DATE- 1

ORIGINAL

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DONE IN OPEN COURT this 28 day of January, 2011.

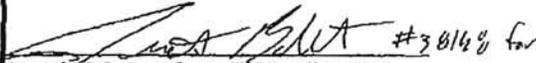

The Honorable Katherine M. Stolz
Dept. 2, Pierce County Superior Court

Presented by.


Ben F. Barcus, WSBA # 15576
Attorney for Plaintiff

FILED
DEPT. 2
IN OPEN COURT
JAN 28 2011
Pierce County Clerk
By 
DEPUTY

Approved as to form and content;
Notice of presentation waived:

 #38168 for
Shellie McGaughey, WSBA# 16809
Attorney for Defendant

Hon. Katherine M. Stolz
Plaintiffs' Motion for Reconsideration
Friday, June 10, 2011 at 9:00 a.m.



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

KRISTY L. RICKEY and KELLEY R.)
CAVAR, individually, and as Co-Executrixes)
of the Estate of Gerald Lee Munce, Deceased,)

Plaintiffs,)

vs.)

MICHAEL B. SMITH as Litigation Guardian)
Ad Litem for CLARENCE G MUNCE,)

Defendant.)

NO. 08-2-10227-6

ORDER ON PLAINTIFFS' MOTION FOR
RECONSIDERATION



THIS MATTER having come before the court upon the Plaintiffs' Motion for Reconsideration, and the Court having considered the files and records herein, the pleadings submitted in support of and in opposition to said motion, specifically including the following:

- 1) Plaintiffs' Motion for Partial Summary Judgment re: Negligence and Proximate Cause;
- 2) Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment re: Negligence and Proximate Cause,
- 3) Declaration of Paul Lindenmuth, with the exception of the exhibits identified in the order on Defendant's Motion to Strike,
- 4) Defendant's Opposition to Plaintiffs' Motion for Summary Judgment re: Negligence and Proximate Cause;

ORDER DENYING PLAINTIFFS' MOTION FOR
RECONSIDERATION - 1-



McGAUGHEY BRIDGES DUNLAP PLLC
325 - 118 + AVENUE SOUTHEAST SUITE 209
BELLEVUE WASHINGTON 98005 - 3539
(425) 462 - 4000
(425) 637 - 9638 FACSIMILE

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- 5) Declaration of Shellie McGaughey and the attached exhibits;
- 6) Plaintiffs' Reply to Defendant's Response to Plaintiffs' Summary Judgment re: Negligence and Proximate Cause;
- 7) Affidavit of Paul A. Lindenmuth in Support of Plaintiffs' Reply to Defendant's Response to Plaintiff's Motion for Partial Summary Judgment;
- 8) Plaintiffs' Motion for Reconsideration Regarding the Court's May 23, 2010 (sic) Ruling RE "Contributory Negligence;"
- 9) Plaintiffs' Memorandum in Support of Motion for Reconsideration Regarding the Court's May 23, 2010 (sic) Ruling RE "Contributory Negligence;"
- 10) Defendant's Opposition to Plaintiffs' Motion for Reconsideration Regarding the Court's May 23, 2010 (sic) Ruling RE "Contributory Negligence;"
- 11) Declaration of Justin Bolster in Support of Defendant's Opposition to Plaintiffs' Motion for Reconsideration Regarding the Court's May 23, 2010 (sic) Ruling RE "Contributory Negligence;"
- 12) Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Reconsideration Regarding the Court's May 23, 2011 Ruling RE "Contributory Negligence;"
- 13) _____;
- 14) _____;
- 15) _____;
- 16) _____;
- 17) Oral argument of counsel for both parties

The Court finds there are insufficient grounds to reconsider its prior decision on Plaintiffs' Motion for Partial Summary Judgment and hereby DENIES Plaintiffs' Motion for

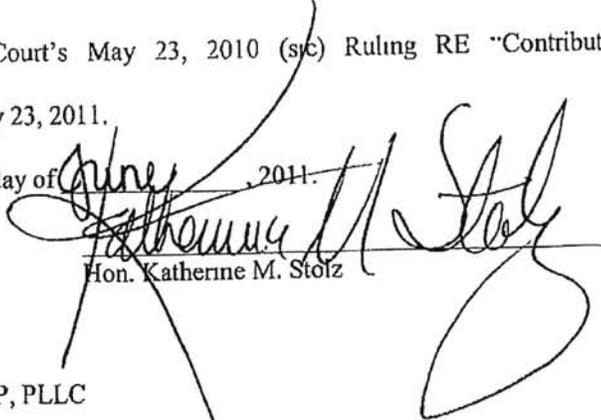
ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION - 2-



McGAUGHEY BRIDGES DUNLAP PLLC
325 - 118th AVENUE SOUTHEAST SUITE 209
BELLEVUE WASHINGTON 98005 - 3539
(425) 462-4000
(425) 637-9638 FACSIMILE

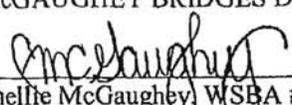
1 Reconsideration Regarding the Court's May 23, 2010 (sic) Ruling RE "Contributory
2 Negligence" that was issued on May 23, 2011.

3 ORDERED this 15th day of June, 2011.

4 
5 Hon. Katherine M. Stolz

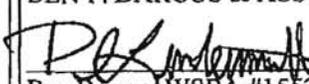
6 Presented by:

7 McGAUGHEY BRIDGES DUNLAP, PLLC

8 
9 Shellie McGaughey, WSBA #16809
Attorney for Defendant

10 Approved as to Form; Notice of Presentation Waived:

11 THE LAW OFFICES OF
12 BEN F. BARCUS & ASSOCIATES

13 
14 Ben Barcus, WSBA #15576
Attorney for Plaintiffs



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ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION - 3-



McGAUGHEY BRIDGES DUNLAP PLLC

325 - 118th AVENUE SOUTHEAST SUITE 209
BELLEVUE WASHINGTON 98005 - 3539
(425) 462 - 1000
(425) 637 - 9638 FACSIMILE

April 24 2013 3:18 PM

KEVIN STOCK
COUNTY CLERK
NO: 08-2-10227-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KRISTY L. RICKEY and KELLY R.
CAVAR, individually, and as Co-Executrixes
of the Estate of Gerald Lee Munce, Deceased,

Appellants,

v.

CLARENCE G. MUNCE,

Respondent.

No. 42245-0-II

MANDATE

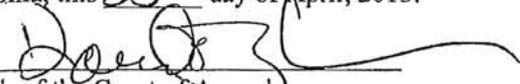
Pierce County Cause No.
08-2-10227-6

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on March 19, 2013 became the decision terminating review of this court of the above entitled case on April 19, 2013. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 23rd day of April, 2013.


Clerk of the Court of Appeals,
State of Washington, Div. II

CASE #: 42245-0-II
Kristy Rickey and Kelley Cavar, Appellants v. Clarence Munce, Respondent
Mandate – Page 2

Dan'L Wayne Bridges
McGaughey Bridges Dunlap PLLC
325 118th Ave SE Ste 209
Bellevue, WA, 98005-3539
Dan@mcbdlaw.com

Shellie McGaughey
McGaughey Bridges Dunlap PLLC
325 118th Ave SE Ste 209
Bellevue, WA, 98005-3539
shellie@mcbdlaw.com

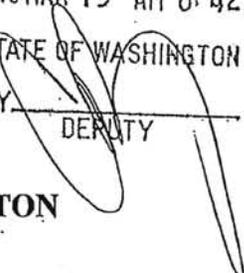
Paul Alexander Lindenmuth
Ben F. Barcus & Associates PLLC
4303 Ruston Way
Tacoma, WA, 98402-5313
paul@benbarcus.com

Benjamin Franklin Barcus
Ben F. Barcus & Associates PLLC
4303 Ruston Way
Tacoma, WA, 98402-5313
ben@benbarcus.com

FILED
COURT OF APPEALS
DIVISION II

2013 MAR 19 AM 8:42

STATE OF WASHINGTON

BY 
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

KRISTY L. RICKEY and KELLY R.
CAVAR, individually, and as Co-Executrixes
of the Estate of Gerald Lee Munce, Deceased,

Appellants,

v.

CLARENCE G. MUNCE,

Respondent.

No. 42245-0-II

UNPUBLISHED OPINION

HUNT, J. — Kristy L. Rickey and Kelly R. Cavar, co-executrixes of their father Gerald Munce's estate (Gerald's estate), appeal a superior court's reinstatement of Clarence Munce's (Munce) answer and his contributory negligence affirmative defense,¹ previously stricken by a different superior court as a discovery violation sanction. Gerald's estate argues that the reinstating superior court (1) lacked authority to revise the discovery sanction order entered by the original court; (2) even if the second superior court judge had such authority, it abused its discretion because the previous order was neither internally inconsistent nor in need of revision; and (3) alternatively, the second superior court should have resolved any inconsistency by relying on the original court's written order. We hold that although the second superior court

¹ Munce's original affirmative defenses included (1) contributory negligence, (2) self-defense, (3) assumption of risk, (4) apportionment, and (5) comparative fault. Only the contributory negligence defense is at issue in this appeal.

No. 42245-0-II

had authority to revise the original court's order, it abused its discretion by vacating the order sua sponte without justifiable reason. Accordingly, we reverse the second superior court's revision of the original court's discovery sanction order; and we remand for trial, at which Munce will be precluded from presenting his previously stricken answer and contributory negligence affirmative defense.

FACTS

In June 2008, Clarence Munce shot his son, Gerald², in the back, killing him. Munce told police that he had intended merely to scare Gerald. There were no other witnesses. The State charged Munce with first degree murder.

During the course of the criminal proceedings, Gerald's daughters, Kristy L. Rickey and Kelley R. Cavar, both individually and as co-executrixes of Gerald's estate, filed claims against Munce in superior court under Washington's wrongful death and survival statutes. In his answer to Gerald's estate's wrongful death complaint, Munce asserted several affirmative defenses—including self-defense, assumption of risk, apportionment, and comparative fault. He also asserted counterclaims for assault and battery.

I. STRIKING ANSWER AS DISCOVERY SANCTION BY ORIGINAL COURT

Pending a competency determination for Munce, the original superior court in the wrongful death action entered an order precluding Gerald's estate from requesting discovery from Munce for 120 days. When Munce was found incompetent to stand trial in the criminal case, the original court lifted the discovery stay in Gerald's estate's civil action against him and appointed Michael Smith to act as Munce's guardian ad litem.

² We refer to Gerald by his first name for clarity; we intend no disrespect.

Munce timely responded to Gerald's estate's pending discovery requests, but he provided little or no substantive information. Instead, he objected to most of the requests for admission and provided equivocal admissions and denials for the interrogatories based on his assertion of the Fifth Amendment³ privilege against self-incrimination and his alleged mental incompetency.

The original court ordered Munce to present himself for deposition; it also allowed Munce's criminal defense attorney, Erik Bauer, to attend the deposition with Munce to "instruct and assert privileges." Clerk's Papers (CP) at 46 (emphasis omitted). During Munce's deposition, Bauer instructed him to refuse to take the oath and, except for one question, not to answer any questions, based on the Fifth Amendment privilege against self-incrimination.

Gerald's estate moved for sanctions against Munce based on his inadequate responses to discovery requests and his abuse of the Fifth Amendment privilege during his deposition: Gerald's estate asked the original court to strike Munce's affirmative defenses and answer, to dismiss his counterclaims, and to deem him in default based on his failure to provide any meaningful substantive answer or response to discovery requests.

The original superior court ruled that Munce's blanket assertion of the Fifth Amendment privilege during his deposition was inappropriate and improper. Because Munce had failed to allow Gerald's estate to depose him in any meaningful way, Gerald's estate was unable to learn what relevant and admissible evidence his deposition could have provided had he answered the questions. The original court also ruled: "I am going to impose some sanctions. I am going to strike the counterclaims and the affirmative defenses. [But] I'm not going to grant your request

³ U.S. CONST. amend. V.

No. 42245-0-II

for some kind of a directed verdict in the case.” CP at 39. The original court’s written findings stated,

[T]he Court will impose sanctions as follows: (1) Defendant’s Affirmative Defenses and Answers shall be stricken; (2) Defendant’s Counter-claim[s] shall be stricken and shall forthwith be dismissed.

CP at 50 (Finding of Fact (FF) 19). And it reiterated, “[T]he Court shall not enter an Order of Default, which would be tantamount to a directed verdict on the issue of liability in this matter.”

CP at 50 (FF 19).

Munce moved for reconsideration of the sanction order, highlighting, “While this [c]ourt stated in its oral ruling that it was not imposing the most severe sanction of a directed verdict, the court has for all practical purposes, granted a directed verdict for the plaintiffs by dismissing the defendant’s affirmative defenses and counterclaims.” CP at 2241. The original court acknowledged Munce’s argument but signed Gerald’s estate’s proposed order striking Munce’s answer, including his affirmative defenses and counterclaims.

II. REINSTATEMENT OF STRUCK ANSWER BY SECOND COURT

The wrongful death case against Munce was then transferred to a different superior court judge. Gerald’s estate moved for (1) partial summary judgment on its negligence and proximate cause claims, and (2) an order of default. Gerald’s estate argued that, because the original court had struck Munce’s answer and affirmative defenses, Munce had “failed to plead, or otherwise defend” against Gerald’s estate’s claims. CP at 640.

The second superior court denied Gerald’s estate’s motion for an order of default but granted the motion for partial summary judgment on the liability component of the estate’s claims. Denying summary judgment on the proximate cause component of Gerald’s estate’s

No. 42245-0-II

claims, the second court instead (1) concluded that the original court's written findings of fact and conclusions of law were internally inconsistent and conflicted with its oral ruling⁴; and (2) based on these perceived inconsistencies, the second court sua sponte reinstated Munce's answer and contributory negligence affirmative defense.⁵ Gerald's estate appeals.

ANALYSIS

Gerald's estate argues that the second court abused its discretion in revising the original court's discovery sanction order because (1) it is "generally inappropriate for one trial court to revisit or revise an order from another trial court judge which has been entered unconditionally"; (2) there was no inconsistency between the original court's oral ruling and its written order; and (3) alternatively, the second court inappropriately revised the original court's order because the earlier written order should have controlled. Br. of Appellant at 29. We agree with Gerald's estate's second argument.

⁴ More specifically, the second court noted:

Now, looking at the findings of facts and conclusions of law that were entered by [the original court] . . . , it says here ["The Court, in the exercise of its discretion, shall not award the following sanctions requested by [Plaintiffs] in this matter: The Court shall not enter an order of default which would be tantamount to a directed verdict on the issue of liability."] And when he gets to the conclusions of law, he is striking the affirmative defenses. He has not stricken the Answer, no matter how inconsistent this might seem to [me]. Nonetheless, that's what he did . . . He struck the counter claim and affirmative defenses. He didn't strike the Answer; so at this point, we still have an Answer, such as it is.

Verbatim Report of Proceedings (May 20, 2011) at 17.

⁵ The second court provided no reason for reinstating Munce's contributory negligence defense. But the court did share its vision for trial on the issue of fault as follows:

The percentage of fault attributable to Clarence Munce is a question of fact for the jury to determine at trial as [Munce] will be allowed to argue contributory negligence [by Gerald] at trial and it will be for a jury to determine the relative percentage of fault between Clarence Munce and Gerald Munce.

CP at 1076.

I. AUTHORITY TO REVISE ORIGINAL SANCTION ORDER

A trial court is generally entitled to reexamine an issue and to reconsider a ruling unless it was a final decision. *Cent. Reg'l Transit Auth. v. Heirs & Devisees of Eastey*, 135 Wn. App. 446, 464-65, 144 P.3d 322 (2006) (Cox, J., concurring); accord *MGIC Fin. Corp. v. H.A. Briggs Co.*, 24 Wn. App. 1, 8, 600 P.2d 573, review denied, 92 Wn.2d 1038 (1979). Under CR 54(b), a decision that adjudicates fewer than all of the claims in an action is not final unless the trial court makes a written finding that there is no just reason for delay of the entry of judgment. In the absence of such a finding, a ruling resolving fewer than all claims "is subject to revision at any time."⁶ Moreover, the trial court has authority to modify sua sponte its initial judgment;⁷ and, where a case is transferred to a new judge at the same court, the transferee judge is not foreclosed from revisiting a ruling the previous judge made. *In re Estate of Jones*, 170 Wn. App. 594, 604-05, 287 P.3d 610 (2012).

Here, the original court's sanctions order did not resolve all of the claims against all of the parties; nor do the parties assert that the original court certified the finality of its discovery sanction order dismissing Munce's answer. Therefore, the second court had authority under CR 54(b) to modify the original court's sanction order. The next question we address, then, is whether the second court abused that authority in revising the original court's sanction order.

⁶ CR 54(b). See also *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992) (citing *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 504, 798 P.2d 808 (1990)).

⁷ *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 14 n.32, 206 P.3d 1255, review denied, 167 Wn.2d 1007 (2009).

II. ABUSE OF DISCRETION

Gerald's estate argues, "[I]t is simply beyond question that [the second court] abused [its] discretion" and acted arbitrarily and capriciously in revising [the first court's] sanction order because (1) there was no motion before the court to do anything to the sanction order; (2) there was no inconsistency between its oral ruling and his written sanction order; and (3) even if there was an inconsistency, the written order controlled. Reply Br. of Appellant at 16. We agree.

We leave reconsideration of any issue to the sound discretion of the superior court and will not reverse absent a clear manifest abuse of discretion. *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127, review denied, 108 Wn.2d 1035 (1987). A superior court abuses its discretion when it acts in a manner that is manifestly unreasonable or if its ruling is based on untenable grounds or reasons. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). Such is the case here.

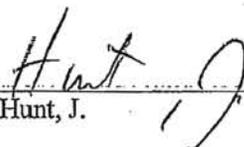
The second court's order granting partial summary judgment to Gerald's estate on the issue of liability also reinstated Munce's answer and contributory negligence affirmative defense, which the original court had stricken as a discovery violation sanction. Contrary to the second court's conclusion, however, there was no internal inconsistency in the original court's order dismissing Munce's answer while simultaneously denying Gerald's estate's motion for entry of a default judgment. Even though the ruling deprived Munce of his affirmative defenses, there remained for trial at that point the issues of liability and damages. And even if entry of a default judgment might arguably have been an option when the second judge later granted Gerald's estate's motion for summary judgment on the issue of Munce's liability, the issue of damages, at least, still remained for trial.

No. 42245-0-II

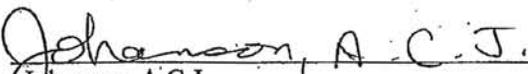
Moreover, Munce did not ask the second superior court to reinstate his affirmative defense of contributory negligence; nor did the parties or the second court discuss this issue at any hearing. Furthermore, in reinstating this affirmative defense sua sponte, the second court articulated no reason or any tenable ground. In short, because there was no internal inconsistency justifying the second court's sua sponte vacating portions of the original court's sanction order and reinstating Munce's answer and no explanation for reinstating his contributory negligence affirmative defense, we hold that the second court abused its discretion.⁸

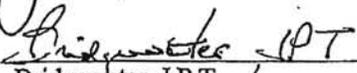
We reverse the second superior court's revision of the original court's discovery sanction order, and we remand for trial, at which Munce will be precluded from presenting his previously stricken answer and contributory negligence affirmative defense.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Hunt, J.

We concur:


Johanson, A.C.J.


Bridgewater, J.P.T.

⁸ Accordingly, we do not address Gerald's estate's third argument for abuse of discretion and reversal, namely that the superior court violated the well-settled legal principle that, when a superior court's oral decision conflicts with its written decision, the written decision controls. See *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963).

April 26 2013 3:10 PM

KEVIN STOCK
COUNTY CLERK
NO: 08-2-10227-6

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

KRISTY L RICKEY

Plaintiff(s),

vs.

CLARENCE G MUNCE

Defendant(s)

NO. 08-2-10227-6

NOTE FOR TRIAL SETTING

TO THE CLERK OF THE SUPERIOR COURT AND TO:

NAME: Benjamin Franklin Barcus
ADDRESS: 4303 Ruston Way
Tacoma, WA 98402-5313

PHONE: (253) 752-4444
WSB#: 15576
Attorney for Plaintiff/Petitioner

This case is at issue, and not subject to Mandatory Arbitration under the provisions of MAR 1.2, and is requested to be placed on the regular trial assignment calendar:

DATE REQUESTED FOR ASSIGNMENT OF TRIAL DATE

Friday - May 10, 2013 at 9:00 AM

Nature of case: Civil

Date filed: July 11, 2008

Estimated trial time: 4 day(s)

A jury of (six / twelve) persons (has / has not) been demanded.

Dated: April 26, 2013

Signed: /s/ PAUL ALEXANDER LINDENMUTH

NAME: PAUL ALEXANDER LINDENMUTH
ADDRESS: 4303 Ruston Way
TACOMA, WA 98402-5313

PHONE: (253) 752-4444
WSB#: 15817

THE ABOVE INFORMATION MUST BE COMPLETED AND SIGNED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

ADDITIONAL ATTORNEYS

NO. 08-2-10227-6

NOTE FOR TRIAL SETTING

NAME: Shellie McGaughey
ADDRESS: 325 118th Ave SE Ste 209
BELLEVUE, WA 98005-3539

PHONE: (425) 462-4000
WSB#: 16809
Attorney for Defendant

NAME: BRADLEY ALAN MAXA
ADDRESS: PO Box 1157
TACOMA, WA 98401-1157

PHONE: (253) 620-6431
Attorney for Counter Claimant

NAME: MIKE B SMITH
ADDRESS: 4830 N. 7TH ST.
TACOMA, WA 98406

PHONE: (253) 225-3081
Guardian Ad Litem

NAME:
ADDRESS:



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

KRISTY L RICKEY
Plaintiff(s)

vs.

CLARENCE G MUNCE
Defendant(s)

No. 08-2-10227-6

Request for Reassignment

For Trial

Issuance of Case Schedule

For Motion Only

Plaintiff/Petitioner's Attorney
Benjamin Franklin Barcus

Defendant/Respondent's Attorney
Shellie McGaughey

Other Attorney
Benjamin Franklin Barcus
BRADLEY ALAN MAXA

Reassignment 5/10/13

PART A

For due cause (Judicial Assignment Rotation / Other / Recusal / Juvenile Family Court / Referred to Family Court), the above entitled action is referred to Administration from Dept. 2 for reassignment.

Date April 29, 2013

KATHERINE M. STOLZ *[Signature]*
Judge/Judicial Assistant

PART B

() The above entitled action is reassigned for hearing to Dept. No. 5, Judge Vicki A. Pagan, this 30 day of April, 2013 at 4:13 a.m./p.m. All parties are to report directly and immediately to the above numbered department if reassignment is for immediate trial.

() Case to remain in Dept. No. _____, Judge _____ for monitoring and case management purposes but declared a Visiting Judge (VISI) case on _____ day of _____, 20____ by Presiding Judge _____.
A visiting Judge from another Washington State County will be assigned to preside over this case.

[Signature]
Calendar Coordinator



08-2-10227-6 40529477 AFPRJ 05-15-13



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**THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE**

KRISTY L. RICKEY and KELLEY R.
CAVAR, individually, and as Co-
Executrixes of the Estate of Gerald Lee
Munce, Deceased,

Plaintiffs,

vs.

MICHAEL B. SMITH as Litigation
Guardian Ad Litem for CLARENCE G.
MUNCE,

Defendant.

NO. 08-2-10227-6

AFFIDAVIT OF PREJUDICE

STATE OF WASHINGTON)
) ss
COUNTY OF PIERCE)

Paul Lindenmuth, being first duly sworn on oath, deposes and says:

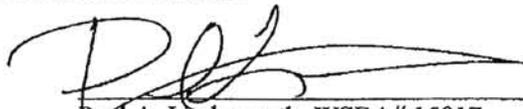
That your affiant is over the age of 18, competent to testify herein, and makes this
affidavit based upon information and belief.

AFFIDAVIT OF PREJUDICE - 1	THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, PLLC 4303 Ruston Way Tacoma, WA 98402 (253) 752-4444 • FAX (253) 752-1035
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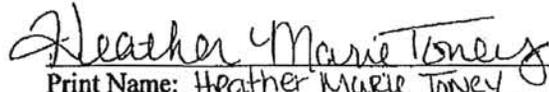
That I am the attorney of record for the Plaintiffs in these proceedings; that I have reason to believe that the Plaintiffs cannot have a fair and impartial hearing before the Honorable Judge Vicki L. Hogan, and do hereby request that this matter be heard before one of the other Judges of the above-Court, or in the alternative, a visiting Judge.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

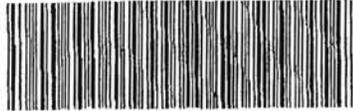

Paul A. Lindenmuth, WSBA# 15817
Of Attorney for Plaintiff

SUBSCRIBED AND SWORN to before me this 9th day of May, 2013.




Print Name: Heather Marie Toney
NOTARY PUBLIC in and for the State
of Washington; Residing at Tacoma
My commission expires: 9/28/14

AFFIDAVIT OF PREJUDICE - 2	THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, PLLC 4303 Ruston Way Tacoma, WA 98402 (253) 752-4444 • FAX (253) 752-1035
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08-2-10227-6 40529527 LTR10 05-15-13

**SUPERIOR COURT
OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY**



334 COUNTY-CITY BUILDING
930 TACOMA AVENUE SOUTH
TACOMA, WA 98402-2108

GAROLD E JOHNSON, JUDGE
LINDA SCHRAMM, Judicial Assistant
Department 10
(253) 798-7572

May 13, 2013

Benjamin Franklin Barcus
4303 Ruston Way
Tacoma, WA 98402-5313

Shellie McGaughey
325 118th Ave SE Ste 209
BELLEVUE, WA 98005-3539

RE: KRISTY L RICKEY vs CLARENCE G MUNCE
Pierce County Cause No. 08-2-10227-6

Dear Counsel/Litigant

The above referenced case has been reassigned to The Honorable GAROLD E JOHNSON, Department 10 The assignment to set the trial date is scheduled for Friday, May, 24, 2013 at 9 00 AM If you have any questions please call me at (253) 798-7572.

Sincerely,

LINDA SCHRAMM
Judicial Assistant for Department 10

cc. Pierce County Clerk for filing
Bradley Maxa

May 28 2013 8:31 AM

KEVIN STOCK
COUNTY CLERK
NO: 08-2-10227-6

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

KRISTY L. RICKEY and KELLEY R.)
CAVAR, individually, and as Co-Executrixes)
of the Estate of Gerald Lee Munce, Deceased,)

Plaintiffs,

vs.

MICHAEL B. SMITH as Litigation Guardian)
Ad Litem for CLARENCE G. MUNCE,)

Defendant.

NO. 08-2-10227-6

**NOTICE OF UNAVAILABILITY OF
COUNSEL**

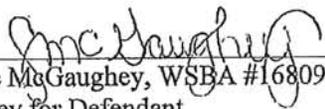
TO: The Clerk of the Court,

AND TO: All parties and counsel of record

PLEASE TAKE NOTICE that Shellie McGaughey, Attorney for Defendant, will be unavailable during the period from Monday, June 17, 2013 through Monday July 8, 2013. The undersigned respectfully requests that no matters be scheduled or correspondence issued that requires her direct response during that period of time.

DATED this 28th day of May, 2013.

McGAUGHEY BRIDGES DUNLAP, PLLC


Shellie McGaughey, WSBA #16809
Attorney for Defendant

NOTICE OF UNAVAILABILITY OF COUNSEL - 1-


McGAUGHEY BRIDGES DUNLAP PLLC
325 - 118th AVENUE SOUTHEAST, SUITE 209
BELLEVUE, WASHINGTON 98005 - 3539
(425) 462 - 4000
(425) 637 - 9638 FACSIMILE

CERTIFICATE OF SERVICE

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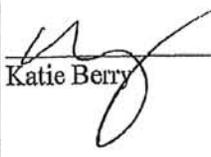
The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused the foregoing document to be delivered via legal messenger to:

Ben Barcus
LAW OFFICES OF BEN F. BARCUS & ASSOCIATES
4303 Ruston Way
Tacoma, WA 98402

Via Email Only

Michael B. Smith, Esq.
Comfort Davies & Smith, P.S.
1901 65th Ave. West
Fircrest, WA 98466

Dated this 25th day of May, 2013, at Bellevue, Washington.


Katie Berry



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

KRISTY L RICKEY
Plaintiff(s)

vs

CLARENCE G MUNCE
Defendant(s)

No. 08-2-10227-6

Request for Reassignment

- For Trial
- Issuance of Case Schedule
- For Motion Only 6/14/13

Plaintiff's Attorney
Benjamin Franklin Bercus

Defendant/Respondent's Attorney
Walter McQuigley

Other Attorney
Benjamin Franklin Bercus
BRADLEY ALAN MAXA

PART A

For due cause (Judicial Assignment Rotation / Other / Recusal / Juvenile Family Court / Referred to Family Court), the above entitled action is referred to Administration from Dept. 10 for reassignment.

Date June 6, 2013

Motion Only
Kristine Maine
Judge/Judicial Assistant
Calendar Coordinator

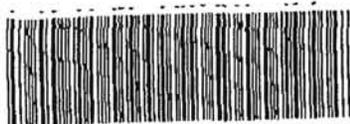
PART B

The above entitled action is reassigned for hearing to Dept. No. 3, Judge Tom Larkin, this 6 day of June, 2013, at 2:20 ~~a.m.~~ a.m. All parties are to report directly and immediately to the above numbered department if reassignment is for immediate trial.

Case to remain in Dept. No. _____, Judge _____ for monitoring and case management purposes but declared a Visiting Judge (VISI) case on _____ day of _____, 20____ by Presiding Judge _____.
A visiting Judge from another Washington State County will be assigned to preside over this case.

MOTION ONLY

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Calendar Coordinator



08-2-10227-6 40988755 CME 08-06-13



IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

KRISTY L RICKEY
Plaintiff(s)

vs

CLARENCE G MUNCE
Defendant(s)

Cause Number.08-2-10227-6
MEMORANDUM OF JOURNAL ENTRY
Page 1 of 2

Judge/Commissioner. GAROLD E. JOHNSON
Court Reporter LESLIE THOMPSON
Judicial Assistant/Clerk. LINDA SCHRAMM

RICKEY, KRISTY L	Benjamin Franklin Barcus	Attorney for Plaintiff/Petitioner
CAVAR, KELLEY R	Benjamin Franklin Barcus	Attorney for Plaintiff/Petitioner
MUNCE, GERALD LEE ESTATE OF	Benjamin Franklin Barcus	Attorney for Plaintiff/Petitioner
MUNCE, CLARENCE G	Shelle McGaughey	Attorney for Defendant
MUNCE, CLARENCE G	BRADLEY ALAN MAXA	Attorney for Counter Claimant
RICKEY, KRISTY L	Benjamin Franklin Barcus	Attorney for Counter Defendant
CAVAR, KELLEY R	Benjamin Franklin Barcus	Attorney for Counter Defendant
MUNCE, GERALD LEE DECEASED	Benjamin Franklin Barcus	Attorney for Counter Defendant
SMITH, MIKE B		

Proceeding Set Status Conference
Proceeding Outcome Status Conf Held
Resolution

Outcome Date 08/01/2013 15 11

<p>Clerk's Scomis Code:STAHRG Proceeding Outcome code STAHRG Resolution Outcome code Amended Resolution code</p>

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

KRISTY L RICKEY

vs

CLARENCE G MUNCE

Cause Number. 08-2-10227-6

**MEMORANDUM OF
JOURNAL ENTRY**

Page 2 of 2
Judge/Commissioner
GAROLD E. JOHNSON

MINUTES OF PROCEEDING

Judicial Assistant/Clerk LINDA SCHRAMM
Start Date/Time: 08/01/13 9:13 AM

Court Reporter LESLIE THOMPSON

August 01, 2013 09:12 AM

The Court calls the case for the record. Conference call set by the Court. Attorneys appear by phone, Paul Lindenmuth, Ben Barcus and Shellie McGaughey. 09:16 AM The Court addresses Atty McGaughey. Atty McGaughey responds. 09:16 AM Atty Lindenmuth responds, not properly noted, party cannot participate once default has been entered. 09:18 AM The Court responds. 09:18 AM Atty McGaughey responds as to filing brief, case cites. 09:19 AM Atty Lindenmuth objects. 09:19 AM The Court responds. 09:19 AM Atty Lindenmuth responds. Atty McGaughey responds. The Court responds. Colloquy re: prior rulings of Judge's Stolz and Larkin in this matter. The Court grants continuance and special sets hearing to next week to Monday August 5, 2013 at 9:00 AM. Counsel to submit briefing, briefing cites to the Court by the end of today Matter concluded, Recess.

End Date/Time: 08/01/13 9:40 AM



IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

KRISTY L RICKEY
Plaintiff(s)

Cause Number:08-2-10227-6

MEMORANDUM OF JOURNAL ENTRY

vs.

Page 1 of 4

CLARENCE G MUNCE
Defendant(s)

Judge/Commissioner: GAROLD E. JOHNSON
Court Reporter: LESLIE THOMPSON
Judicial Assistant/Clerk: LINDA SCHRAMM

RICKEY, KRISTY L	Benjamin Franklin Barcus	Attorney for Plaintiff/Petitioner
CAVAR, KELLEY R	Benjamin Franklin Barcus	Attorney for Plaintiff/Petitioner
MUNCE, GERALD LEE ESTATE OF	Benjamin Franklin Barcus	Attorney for Plaintiff/Petitioner
MUNCE, CLARENCE G	Shellie McGaughey	Attorney for Defendant
MUNCE, CLARENCE G	BRADLEY ALAN MAXA	Attorney for Counter Claimant
RICKEY, KRISTY L	Benjamin Franklin Barcus	Attorney for Counter Defendant
CAVAR, KELLEY R	Benjamin Franklin Barcus	Attorney for Counter Defendant
MUNCE, GERALD LEE DECEASED	Benjamin Franklin Barcus	Attorney for Counter Defendant
SMITH, MIKE B		

Proceeding Set: Hearing
Proceeding Outcome: Held
Resolution:

Outcome Date:08/07/2013 11:26

Clerk's Scomis Code:MTHRG
Proceeding Outcome code: HELD
Resolution Outcome code:
Amended Resolution code:

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

KRISTY L RICKEY

Cause Number: 08-2-10227-6

**MEMORANDUM OF
JOURNAL ENTRY**

vs.

CLARENCE G MUNCE

Page: 2 of 4
Judge/Commissioner:
GAROLD E. JOHNSON

MINUTES OF PROCEEDING

Judicial Assistant/Clerk: LINDA SCHRAMM
Start Date/Time: 08/05/13 9:18 AM

Court Reporter: LESLIE THOMPSON

August 05, 2013 09:17 AM

The Court calls the case for the record. Reasonableness hearing held. Attorneys Ben Barcus, Paul Lindenmuth, Shellie McGaughey and Michael Smith present. 09:21 AM The Court directs counsel Atty McGaughey to respond as to notice of default of ruling to Judge Larkin. Atty McGaughey addresses witnesses in the gallery. The Court allows them to remain, is open courtroom, opening hearing. 09:21 AM Atty McGaughey responds as to notice default. 09:21 AM The Court interrupts and states to counsel the ruling of Judge Larkin will state. 09:22 AM Atty Lindenmuth responds. 09:22 AM The Court move on to the next issue of the purpose of this hearing. 09:24 AM The Court proceeds with the reasonableness hearing for the record. 09:25 AM Atty Lindenmuth responds as to amount of damages left. 09:26 AM The Court responds as to CR55. 09:28 AM Atty Lindenmuth responds to rule. 09:36 AM Atty McGaughey presents arguments to the court. 09:51 AM Atty McGaughey addresses the issue regarding his past law firm representing this case, Atty Peter Kram. Colloquy re: remaining on this matter. 09:52 AM The Court will not recuse on this hearing, counsel agree. 09:52 AM Atty McGaughey resumes arguments. 09:57 AM The Court rules, no trial and will hold a reasonableness hearing in this matter for damages. 10:01 AM Atty Lindenmuth responds, move the Court to disregard Defense declarations for purposes of hearing. 10:02 AM Atty McGaughey responds. 10:10 AM The Court addresses Atty Lindenmuth. 10:10 AM Atty Lindenmuth responds. 10:13 AM The Court rules regarding Dr. Nelsons declaration will not be allowed, and reserves on Dr. Williams. 10:14 AM Atty McGaughey addresses the Court as to procedural issued. 10:15 AM Atty Barcus addresses the Court, presents revised proposed Findings of Facts and Conclusions of Law and Judgment Order. 10:19 AM Plaintiff calls witness, John Rohr. Witness is duly sworn and testifies on direct examination by Atty Barcus. 10:31 AM Witness stands down. 10:31 AM Atty McGaughey states standing objection, noted for the record. 10:32 AM Atty Barcus responds. 10:33 AM Plaintiff calls witness, Jason Rickey. Witness is duly

JUDGE/COMMISSIONER: GAROLD E. JOHNSON Year 2013

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

KRISTY L RICKEY

Cause Number: 08-2-10227-6

**MEMORANDUM OF
JOURNAL ENTRY**

vs.

CLARENCE G MUNCE

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Judge/Commissioner:
GAROLD E. JOHNSON

MINUTES OF PROCEEDING

sworn and testifies on direct examination by Atty Barcus. 10:53 AM Witness stands down. 10:54 AM Atty McGaughey notes objections for the record. 10:54 AM Attorney Barcus responds. 10:55 AM The Court responds reads statute for the record. 10:56 AM Atty Lindenmuth responds. 10:57 AM The Court responds with case cite. 10:58 AM Atty Lindenmuth responds. 10:59 AM Atty McGaughey responds. 11:00 AM The Court responds. 11:00 AM Atty Lindenmuth responds. 11:01 AM Atty McGaughey responds. 11:01 AM The Court responds. 11:01 AM Atty McGaughey responds. 11:03 AM The Court responds. 11:05 AM Atty Lindenmuth recites case cite for the record. 11:06 AM The Court responds. 11:07 AM Recess. 11:24 AM Court reconvenes. The Court has reviewed the case cite and addresses counsel. 11:25 AM Plaintiff calls witness, Mark Cavar. Witness is duly sworn and testifies on direct examination by Atty Barcus. 11:41 AM Witness stands down. 11:41 AM Plaintiff calls witness, Sunny Rhone. Witness is duly sworn and testifies on direct examination by Atty Barcus. 11:47 AM Objection by Atty McGaughey, overruled by the Court. Direct resumes. 11:49 AM Objection by Atty McGaughey, sustained by the Court, direct resumes. 11:52 AM Witness stands down. 11:52 AM Witness stands down. 11:52 AM Plaintiff calls witness, Bill Rhone. Witness is duly sworn and testifies on direct examination by Atty Barcus. 11:56 AM Witness stands down. 11:56 AM Counsel and parties excused and will resume at 1:30 PM. Recess.

End Date/Time: 08/05/13 11:56 AM

Judicial Assistant/Clerk: LINDA SCHRAMM
Start Date/Time: 08/05/13 1:37 PM

Court Reporter: LESLIE THOMPSON

August 05, 2013 01:42 PM

Court reconvenes. All parties present. 01:42 PM Plaintiff calls witness, Kelly Cavar. Witness is duly sworn and testifies on direct examination by Atty Barcus. 01:53 PM Objection by Atty McGaughey, sustained by the Court. 01:54 PM Objection by Atty McGaughey. Atty Barcus objects to Atty McGaughey noting objection during hearing.

JUDGE/COMMISSIONER: GAROLD E. JOHNSON Year 2013

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Objection sustained by the Court. 01:56 PM Objection by Atty McGaughey, overruled by the Court. 01:56 PM Objection by Atty McGaughey, overruled by the Court. 02:02 PM 02:02 PM Plaintiff calls witness, Kristy Rickey. Witness is duly sworn and testifies on direct examination by Atty Barcus. 02:16 PM Witness stands down. No further witnesses to be called. 02:16 PM Closing statement by Atty Barcus. 02:30 PM Objection by Atty McGaughey, overruled by the Court. Closing resumes. 02:41 PM Atty McGaughey addresses exhibits. 02:42 PM P-Exh#1 marked offered and admitted by the Court. 02:42 PM Atty McGaughey addresses the Court as to elements of damages. 03:02 PM Atty Barcus addresses the Court. 03:10 PM The Court responds to counsel as to the case law and compensation. 03:20 PM Atty Lindenmuth responds. 03:22 PM Atty Barcus addresses issue of trial date of other pending case in Department 6, Judge Nevin's court on September 9, 2013. The Court will take this matter under advisement and will advise counsel by written order of the decision. Counsel and parties excused. Matter concluded. 03:24 PM Recess.

End Date/Time: 08/05/13 3:25 PM

Judicial Assistant/Clerk: LINDA SCHRAMM
Start Date/Time: 08/08/13 11:18 AM

Court Reporter: NOT ON RECORD

August 08, 2013 11:17 AM

Off the record. The Court has signed the Order of revised findings of Fact, Conclusions of Law and Judgment. Original to be filed with the PC Clerk's Office, conformed courtesy copies to be mailed to counsel by the Court.

End Date/Time: 08/08/13 11:20 AM