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Court of Appeals  
Division II  
State of Washington  
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No. 51331-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**JAMES N. FOTINOS,**

Appellant,,

vs.

**CRAIG J. KALICH and JULIET D. KALICH,**  
**Husband and Wife,**  
**COLDWELL BANKER KLINE and**  
**ASSOCIATES, a Washington Corporation, and**  
**LOREN HOWARD, an individual,**

Respondents.

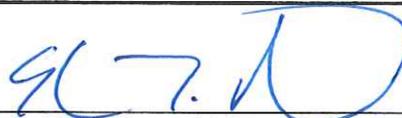
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Appeal from the Superior Court of Washington for Lewis County

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**Respondent LOREN HOWARD'S Brief**

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## I. ISSUES

- A. Did the trial court abuse its discretion when deciding not to consider Plaintiff's untimely briefs and supporting materials?
- B. Did the trial court err when it denied Plaintiff's motion for reconsideration?<sup>1</sup>

## II. STATEMENT OF THE CASE

Plaintiff filed suit against each of the Defendants on November 3, 2016. CP 3-15. Defendant Howard answered the Complaint on January 9, 2017. CP 16-23. Discovery was conducted over a period of months. See, for example, CP 114-118.

In mid June, 2017, Joel Wright, counsel for Defendant Coldwell sent a letter to all counsel informing the parties that he had reserved a hearing date of August 25, 2017, for a summary judgment hearing. CP 433, 31.

On July 20, 2017, Defendant Howard filed a motion for Summary Judgment to be held on on August 25, 2017, with attached exhibits. CP 33-126. The remaining defendants filed Summary Judgment motions the following week, on July 27. CP 127, 300.

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<sup>1</sup> Respondent Howard has restated the Appellant's issues to conform with the actual issues on appeal, but does not thereby intend to cross-appeal. Respondent Howard does not respond to Appellant's Assignment of Error 3 as he is not affected thereby.

With a hearing date of August 25, 2017, Plaintiff Fotinos' reply was due 11 calendar days prior to the hearing, or Monday, August 14, 2017. Civil Rule 56. This would have allowed the Defendants to respond no later than Monday, August 21, 2017, and provided the trial court 3 calendar days to review all pleadings. *Id.*

Unfortunately, Plaintiff Fotinos failed to serve or file any responsive pleadings on or prior to August 14, 2017; instead, on Wednesday, August 16, 2017, at 4:43PM counsel for Plaintiff sent an email to each of Defendants' attorneys asking for an extension of the deadline to Friday, August 18, 2017, or essentially two additional days to respond, for a total of four days beyond the deadline. CP 440.

The next day, August 17, at 4:59PM, apparently frustrated that Defendants had either not responded or had denied the request, Plaintiff's counsel sent another email indicating that he intended to request a continuance of the summary judgment hearings. CP 444.

A hearing was held on Plaintiff's motion on August 18, 2017, and the Court granted Plaintiff's motion to shorten time to allow Plaintiff's counsel an opportunity to be heard on his motion to continue the summary judgment hearings. RP 8-18-2017 at 3-4.

At the hearing, counsel for Plaintiff explained that he only needed two days to complete his briefing, "And so I contacted the parties. That was two days ago. I said, If you could extend the time to respond, let me know. I would do it by Friday. We could go forward with the hearing, no delays." RP 8-18-2017 at 5.

Counsel for Plaintiff indicated that he was unable to timely respond to the motions for summary judgment because his wife had an early delivery of a baby on July 14 and that he became overwhelmed. RP 8-18-2017 at 6.

Counsel for Defendant Coldwell offered to accept a late filed brief on Monday or Tuesday (August 21 or 22), allowing Plaintiff an additional four calendar days to respond, but requested that the Court maintain the August 25 hearing date. RP 8-18-2017 at 7-9. Counsel for Defendants Kalich reiterated that the summary judgment rules had been complied with and noted that Plaintiff did not ask for an extension or to continue the hearings until after the deadline had been missed. RP 8-18-2017 at 9. Counsel for Defendant Howard next noted that the summary judgment motion had been filed and went out a week in advance of the 28-day deadline, and noted how late Plaintiff was now requesting the relief with respect to the hearing date. RP 8-18-2017 at 10.

Counsel for Plaintiff then reiterated that, "I offered, instead of asking for a continuance, for their hearings to be heard next Friday if they would agree to an extension to today, and they didn't." RP 8-18-2017 at 11.

The Court denied Plaintiff's motion to continue the hearing. RP 8-18-2017 at 12. Counsel Defendant Howard asked for a deadline for briefing:

"MR. NELSON: Your Honor, could we ask for a specific deadline for the briefs? We are looking at a week here. If we could have a deadline so we can respond to them.

"THE COURT: Mr. Jacobsen.

"MR. JACOBSEN: Tuesday? If they would accept them Tuesday by e-mail, I can do that.

"THE COURT: Mr. Nelson.

"MR. NELSON: I can do that.

"THE COURT: Mr. Jenkins, were you able to hear that proposal?

"MR. JENKINS: I think I heard plaintiff's counsel say he could get something to us on Tuesday by e-mail, and we would, of course, take that.

"THE COURT: All right.

"MR JONES: I'd be kind of silly to say otherwise.

"THE COURT: All right. Thank you, Mr. Jones. Is there a request for any clarification of my ruling." RP 8-18-2017 at 13-14.

A review of the record shows plainly that Plaintiff filed nothing between the Friday, August 18 hearing and the Friday, August 25 summary judgment hearing.

The summary judgment hearing was held as scheduled on August 25, 2017. RP 8-25-2017. The trial court, after identifying counsel and the parties, opened with the following statement and response from Plaintiff's Counsel:

"THE COURT: This comes on today for the defendants, all three, have filed motions for summary judgment.

"There was some procedural irregularities in this case in that there was not a response filed initially, the deadline for the initial response from plaintiff. There was a hearing in front of Judge Toynebee to hear plaintiff's request for a continuance of this hearing. He denied that but did give plaintiff an extension of the deadline to file and placed that deadline as of this Tuesday, three days ago, on August 22<sup>nd</sup>.

"And now we're here today. I did not see a response filed. There were some replies to a response but I don't know if a response was ever filed because I never saw anything and as of ten to 5:00 last night when I checked with the clerk there was nothing that had been filed.

"So, I guess, Mr. Jacobsen, is there any response? Was there something ever filed?

"MR. JACOBSEN: There is a full responses, Your Honor. We just hadn't filed them. They were either –

"THE COURT: When?

"MR. JACOBSEN: -- completed yesterday or just the day before. And my only way to get them filed was to step away from making the other responses. So it's either get one filed and not respond to the other two or respond to all three and file them this morning.

"THE COURT: So are you saying that you filed them this morning?

"MR. JACOBSEN: They are all ready to file right now.

"THE COURT: You haven't filed them yet?

"MR. JACOBSEN: No." RP 8-25-2017 at 2-3.

Counsel for Mr. Howard requested that the briefs not be considered, "I received an email from the plaintiff yesterday at 4:23. I filed a motion this morning, assuming that that had been filed, emailed to me, asking the Court to strike that. So that would be our request, if anything is filed, that it be stricken and not considered." RP 8-25-2017 at 5.

After the Court heard argument from all three Defendants, Plaintiff then offered his briefing to the Court. RP 8-25-2017 at 12. In explaining why he did not at least file prior to the hearing, Plaintiff's counsel offered the following: "The reason I didn't file them downstairs is because I was running late to the courtroom and I came straight here so I would be present and timely for the hearing." RP 8-25-2017 at 12. The Court noted that Plaintiff had violated the earlier order to have the documents filed by "Tuesday the 22<sup>nd</sup>" by missing that deadline as well as the original deadline. RP 8-25-2017 at 13.

Throughout the hearing the trial court noted six times, some before ruling on the summary judgment motion and some after, that the court had no opposing facts to consider because Plaintiff had not filed anything, despite Plaintiff's attempt to file mid-hearing. RP 8-25-2017 at 13 ,15, and 16.

The trial court stated, "I'm going to grant the motions for summary judgment. And I really don't have any choice in this matter. The rules are very clear; and despite those rules, you were given additional time and still not give any response.

"I mean, I don't think it's that overwhelming. The motions appear – there's a lot of documents that are attached, but I mean, through your discovery those are all documents that you would have been well familiar with, I mean, it wasn't difficult for me in reading these documents to figure out what the issues were. And so responding to them should not have been an insurmountable problem. Whether it was difficult or no matter how hard you tried, what I'm left with is a case where there are motions for summary judgment and there's no response to any of them." RP 8-25-17 at 15-16.

The court's grant of summary judgment was reduced to a writing for each of the Defendants. CP 509-516.

Noted in a handwritten portion of the Order on Defendant Howard's Summary Judgment Motion is the fact that the trial court considered "Nothing filed by Plaintiff on 8-25-2017." CP 509.

On September 5, 2017, eleven days after the trial court's rulings, Plaintiff filed a motion for reconsideration in violation of the

local court rule that all motions must be filed within ten days. CP 517, LCR 7(A)(5)(a). Six days later, on September 11, 2017, the trial court issued an order denying Plaintiff's motion. CP 547. This appeal followed.

### III. ARGUMENT

#### A. THE COURT DID NOT ERR WHEN IT DECLINED TO CONSIDER PLAINTIFF'S UN-FILED MATERIALS.

Plaintiff essentially argues that any reasonable human being would have agreed to allow Plaintiff to file his briefing and then considered that briefing, despite the fact that it was filed mid-hearing and in violation of the CR 56 deadline of August 14 and the subsequent ruling extending that deadline eight days to August 22.<sup>2</sup>

##### 1. Standard Of Review.

The decision to accept or reject an untimely filed affidavit is reviewed for abuse of discretion. *Brown v. Park Place Homes Realty*, 48 Wn.App. 554, 559-560, 739 P.2d 1188 (1987).

##### 2. There was no abuse of discretion when the trial court declined to consider the materials filed for the first time part way through the summary judgment hearing.

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<sup>2</sup> Although set forth in a different order, Defendant Howard intends to respond to all of Plaintiff's arguments.

Here, Plaintiff was afforded two opportunities to file his briefing and supporting affidavits, on August 14 and then after the extension to August 22, 2017, and Plaintiff failed to file any documentation by either deadline. RP 8-25-2017 at 2-3 and 16.

In order to show that a trial court abused its discretion in striking an untimely response, the aggrieved party must show excusable neglect. CR 6(b), *Brown v. Park Place Homes Realty*, 48 Wn, App. 554, 559, 739 P.2d 1188 (1987).

Plaintiff shows no excusable neglect. Plaintiff's counsel states that he spent 5 days in the hospital supporting his family beginning June 22, 2017. CP 526. This occurred nearly a month before Defendant Howard's motion for summary judgment was filed on July 20. CP 33. Plaintiff's counsel's child was born healthy on July 14, nearly a week before the first of Defendants' motions were filed and a month before Plaintiff's response was due on August 14. CP 526.

Plaintiff's counsel decided to take paternity leave until sometime in August, rather than prepare for a summary judgment motion he had been notified of in June. CP 526 and 433.

Plaintiff's counsel did not request an extension of time until *after* he missed his deadline, and then only requested 4 days. CP 440. On August 18 the Court and Defendants' counsel could

sympathize with counsel's need for an extension and an extension was granted to August 22. RP 8-18-2017. This gave Plaintiff a total of 8 additional days to file a response, and constituted the court enlarging time *after* the expiration, which tacitly implies that the Court granted the additional time for Plaintiff's excusable neglect. CR 6(b)(2).

Plaintiff made no showing that there was any *additional* excusable neglect between the August 18 hearing and the August 25 summary judgment hearing. The court considered Plaintiff's excusable neglect on August 18 and decided to afford him the additional time to respond but not to continue the hearing date.

Had the trial court again enlarged time and accepted Plaintiff's briefs half way through the summary judgment hearing on August 25, each of the Defendants would have been severely prejudiced. Defendants are normally entitled to 6 calendar days to respond to the opposing materials, and had agreed to a reduced period of time to only 6 work-hours. CR 56(c), RP 8-18-2017 at 8.

At the August 18 hearing, Plaintiff agreed that he could meet the extended August 22 deadline, and even proposed it himself. RP 8-18-2017 at 14. Plaintiff's counsel was simply not diligent enough to

file the briefs in a timely manner, even after being granted an extension to the date he requested.

Trial courts have a great deal of discretion to either accept or to strike an untimely response. *Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 499, 183 P.3d 283 (2008). Here, the trial court noted that Plaintiff missed his CR 56 deadline and the extension. RP 8-25-2017 at 16. The court noted that Plaintiff's counsel should not have been particularly overwhelmed with the summary judgment motions because counsel was well aware of all of the facts before even receiving the summary judgment motions and further noted that the issues were not difficult to respond to or spot. *Id.*

The Plaintiff attempts to make much of the fact that the trial court did not expressly rule on whether or not Plaintiff's briefing and supporting materials were being stricken. However, a plain reading of the transcript makes it obvious that the items were stricken or never filed or considered, because the court stated 6 separate times that Plaintiff *failed to file anything*, despite Plaintiff's arguments to the contrary. Finally, the trial court noted on Defendant Howard's Order that none of Plaintiff's materials filed on 8-25-2017 were considered. CP 509.

**3. Trial Courts should not be held hostage by parties who refuse to follow court rules and orders.**

Plaintiff is essentially arguing that, even though he received an extension on August 18 to a date of his own request, he should be able to ignore the Court's order because it was not sufficient to allow him to file his briefing and supporting materials.

Plaintiff did not file another motion to enlarge time at the summary judgment hearing. Plaintiff did not make any additional showing of excusable neglect. Plaintiff did nothing other than attempt to file his documents mid-hearing because he was, again, late. RP 8-25-2017 at 12.

If there was excusable neglect, it was dealt with on August 18 when the Court extended Plaintiff's deadline to August 22. When Plaintiff ignored the August 22 deadline and chose not to file until part way through the summary judgment hearing, there was no abuse of discretion when the Court chose not to consider Plaintiff's documentation.

Any other ruling would allow every party responding to a summary judgment motion to simply wait until the hearing to file, and thereby receive an unfair advantage. This is not a case where a responding party was a few days late – he missed two deadlines and

waited until after his case was actively being argued at hearing to even bother filing a single document.

**B. THE COURT DID NOT COMMIT ERROR WHEN IT DENIED PLAINTIFF'S MOTION FOR RECONSIDERATION.**

Plaintiff's untimely motion for reconsideration was properly denied by the trial court.

**1. Standard Of Review.**

This Court reviews a denial of a motion for reconsideration for only a manifest abuse of discretion. *Wilcox v. Lexington Eye Inst*, 130 Wn.App. 234, 241, 122 P.3d 729 (2005).

**2. Plaintiff's motion for reconsideration was not timely filed and therefore properly denied.**

Lewis County Superior Court Local Rule requires that motions for reconsideration "must be filed and served on opposing counsel, or the opposing party, if unrepresented, and a copy delivered to the Judge or Commissioner making the ruling, within ten (10) days after entry of the judgment or order." LCR 7(5). The orders on summary judgment were entered on August 25, 2017. CP 509-516. Eleven days later, on September 5, 2017, Plaintiff filed his motion for summary judgment. CP 517.

It is worth noting here that the record does not reflect any attempt by Plaintiff to enlarge time to file an untimely motion for reconsideration.

Plaintiff's motion for reconsideration is simply another attempt to relitigate the summary judgment motion and another showing that Plaintiff refused to comply with the rules.

The trial court reviewed the record and denied the motion for reconsideration on September 11, 2017. CP 547. This denial is not an abuse of discretion.

**C. PLAINTIFF IS NOT ENTITLED TO ATTORNEY FEES FROM  
DEFENDANT HOWARD**

Plaintiff has provided nothing in the record to indicate that Plaintiff and Defendant Howard had any contract or agreement as to attorney's fees. Plaintiff argues that *if* he had such an agreement it *would have* contained a provision related to attorney's fees. No such contract is before this court and Plaintiff is not entitled to recover fees from Defendant Howard.

Further, there is no legal requirement that such a contract exist with respect to attorney fees. The only mandatory provisions of a home inspector's contract are 1) the address of the property, 2) what the home inspector will charge, 3) a general description of what

the home inspector will inspect, and 4) that the inspection will not include the investigation of environmental issues such as water, soil, mold, or air quality. WAC 308-408C-050.

#### **IV. CONCLUSION**

At no point did the trial court abuse its discretion in these proceedings. Rather, Plaintiff is attempting to recharacterize his dilatory actions as the fault of the judge or opposing parties.

Plaintiff failed to comply with his initial deadline, then after missing that deadline, requested and was granted an extension to accommodate his schedule. Plaintiff then missed that extended deadline, and rather than seek another extension, decided to appear late for court and try to file his motions part way through his summary judgment hearing. The trial court rejected his filings and ruled in favor of Defendants.

Plaintiff then filed a motion for reconsideration but did so outside of the time allotted in the rule. The court denied the motion.

These rulings do not constitute abuses of discretion. Trial courts are given broad discretion in managing their caseloads and should not be held hostage by parties who habitually refuse to comply with the rules and court orders.

Finally, Plaintiff has provided no basis for an award of fees to this Court and his request should be denied.

RESPECTFULLY submitted this 12<sup>th</sup> day of March, 2018.



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KEVIN T. NELSON, WSBA 45184  
Attorney for Defendant Howard

# Appendix A

Lewis County Local Court Rule

LCR 7

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## Lewis County Superior Court

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### LCR NO. 7

#### PLEADINGS ALLOWED; FORM OF MOTIONS

#### A. Motions and other papers

##### 1. How Made

Reapplication for order. When an order has been applied for and refused in whole or in part (unless without prejudice), or has been granted conditionally and the condition has not been performed, the same application for an order shall not be presented to another Judge or Commissioner. If a subsequent application is made upon a different statement of facts or law, it shall be shown by affidavit or certified statement what application was made, when and to what Judge or Commissioner, what order or decision was made thereon; and what new facts or law are claimed to be shown.

Failure to comply with this requirement shall, at the request of an opposing party or counsel, result in any order thus obtained being set aside and terms assessed against the counsel or party obtaining the order.

##### 2. Form

All motions and responses or replies thereto shall be in writing, shall be typewritten, or hand printed and shall be presented on paper 8-1/2 by 11 inches in size, on paper containing a vertical line of numbers at the left margin, and shall be double spaced. No pleadings shall be filed or presented which are hand written in cursive form, unless a typed or hand printed version of such pleading is attached to such pleading. The court shall not consider any hand written or cursive pleading without such a typed or hand printed version attached, for any purpose.

### 3. Required Provisions in Orders Mandating Personal Appearance

In all proceedings wherein an order is to be issued requiring or mandating the personal attendance of a person or a party in open court, the order shall include the following words in capital letters:

YOUR FAILURE TO APPEAR AS ABOVE SET FORTH AT THE TIME, DATE AND PLACE STATED MAY CAUSE THE COURT TO ISSUE A BENCH WARRANT FOR YOUR APPREHENSION AND CONFINEMENT IN JAIL UNTIL SUCH TIME AS THE MATTER CAN BE HEARD OR UNTIL BAIL IS POSTED.

No bench warrant shall be issued in such cases for the apprehension of the cited person if such language has been omitted.

### 4. Failure to Appear

If the party noting a motion fails to appear for the scheduled hearing, and the opposing party appears, the motion shall be denied or stricken. If the moving party appears and the opposing party does not appear the requested relief shall be granted, if warranted. If neither the moving nor the responding party appears, the motion shall be stricken.

### 5. Motions For Reconsideration

A. Motions for reconsideration of rulings and all pleadings and documents in support thereof, must be filed and served on opposing counsel, or the opposing party, if unrepresented, and a copy delivered to the Judge or Commissioner making the ruling, within ten (10) days after entry of the judgment or order. Such pleadings shall set forth specific grounds for the reconsideration, and the arguments and authorities in support thereof.

B. The opposing party may, within ten (10) days after receipt of the motion, file and serve on the moving party, and the Judge or Commissioner making the ruling, pleadings and documents in opposition.

C. Each party shall prepare and include in the materials submitted, a proposed order sustaining their respective position on such motion.

D. Oral argument on a motion for reconsideration shall be scheduled only if so ordered by the Judge or Commissioner to whom

the motion is submitted. In no case shall a motion for reconsideration be noted for hearing on the motion calendar unless ordered by the Judge or Commissioner to whom the matter has been submitted. Twenty days after a motion for reconsideration has been submitted and served upon the parties or their counsel as provided for in this rule, and no ruling has been made, either party may submit to the Judge or Commissioner a certification that the matter is ready for a ruling on the motion for reconsideration.

## B. Filing of Documents

### 1. Filing: Case Numbers

Except in consolidated cases, no documents shall be filed with more than one case number, unless sufficient copies are simultaneously provided for each case. Where there are multiple case numbers and no copies provided, the clerk shall place the documents only in the first case number designated.

(effective September 1, 2001)

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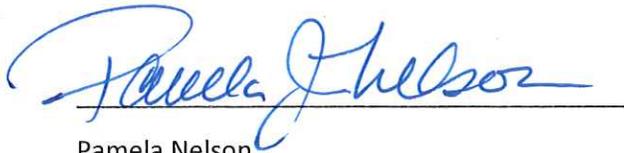
I, Pamela Nelson, certify under penalty of perjury under the laws of the State of Washington, that I am citizen of Lewis County, Washington, I am over the age of 18 years, not a party herein, and on March 12, 2018, I served a copy of *Respondent LOREN HOWARD'S Brief* on the following individuals by first class mail:

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Signed at Centralia, WA, March 12, 2018.



Pamela Nelson

Office Manager, Buzzard O'Rourke PS

**BUZZARD O'ROURKE, PS**

**March 12, 2018 - 4:09 PM**

**Transmittal Information**

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