

FILED  
Court of Appeals  
Division II  
State of Washington  
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**COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION II**

GARY LIVINGSTON, and  
PATRIOT SEALCOAT, INC.,

Appellants,

v.

DAVE ROBERTS,

Respondent.

NO. 51749-3-II

BRIEF OF  
RESPONDENT

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Suzan Clark

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**BRIEF OF RESPONDENT**

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## TABLE OF CONTENTS

	TABLE OF AUTHORITIES.....	3
I.	INTRODUCTION.....	4
II.	ASSIGNMENTS OF ERROR.....	4
III.	ARGUMENT.....	5
IV.	CONCLUSION.....	8

**TABLE OF AUTHORITIES**

**Statutes**

A. **CR**  
CR 37.....6  
CR 45.....4, 5, 6, 7, 8, 9  
CR 45(a)(1)(c).....6, 7  
CR 45(c)(2)(b).....4, 7, 8  
CR 45(g).....7

B. **RAP**  
RAP 5.2.....5  
RAP 5.2(a).....6  
RAP 5.2(b).....6  
RAP 18.1.....8, 9

C. **RCW**  
RCW 7.21.020.....8

## I. INTRODUCTION

Respondent Dave Roberts (“Roberts”) moves the Court to affirm the trial court’s ruling granting Respondent an Order of Contempt against Appellants Gary Livingston and Patriot Sealcoat, Inc. (collectively “Livingston”).

## II. ASSIGNMENTS OF ERROR

1. Livingston cannot ask this Court to review the trial court’s order shortening time for the contempt hearing as the time-period to appeal that order has passed.

2. The court was correct in granting Roberts’ motion for contempt as no order compelling discovery is required under CR 45.

3. The court was correct in granting Roberts’ motion for contempt as Roberts complied with CR 45(c)(2)(b).

4. The court was correct in awarding attorney fees to Roberts as the order of contempt was properly entered and attorney fees are allowed under CR 45.

### III. ARGUMENT

**Livingston cannot ask this Court to review the trial court's order shortening time for the contempt hearing as the time-period to appeal that order has passed.** Livingston's first assignment of error is that the trial court erred in granting Roberts' ex parte motion to shorten time and that this deprived Livingston of due process. However, the time-period for appealing the order to shorten time has passed.

The trial court entered the Order Shortening Time for Hearing on May 10, 2017 (CP 1). Under RAP 5.2, Livingston had thirty days from May 10, 2017, or until April 10, 2017, to appeal the Order Shortening Time for Hearing. Livingston did not appeal this order in the requisite time-period. In fact, Livingston never filed a notice of appeal of the Order Shortening Time. Therefore, Livingston's argument that he was not given proper notice of the contempt hearing is improperly before this Court and cannot be considered by this Court in determining whether the trial court properly granted an Order of Contempt. This Court must accept the ruling in the Order Shortening Time.

**The court was correct in granting Roberts' motion for contempt as no order compelling discovery is required under CR 45.**

First, Livingston's appeal of the Order of Contempt is untimely. The trial court entered the Order of Contempt on January

19, 2018 and an Order Denying Reconsideration on April 2, 2018. (CP 116) Under RAP 5.2(a), a notice of appeal must be filed in thirty days after the entry of the decision. RAP 5.2(b) allows a notice for discretionary review to be filed within the longer of thirty days after the act of the trial court or thirty days after entry of an order deciding a timely motion for reconsideration. RAP 5.2(a) would apply here because Livingston filed a notice of appeal and not a notice for discretionary review. As such, the appeal of the January 19, 2018 Order of Contempt is untimely because the notice of appeal was filed on April 12, 2018 which is well after the thirty-day time-period. As such, the Court can only consider Livingston's appeal of the Order Denying Reconsideration.

Second, Livingston mistakenly relies on CR 37 and ignores the plain reading of CR 45. Livingston argues that CR 45 "provides the legal mechanism to compel a non-party to appear at a deposition, but it does not control the conduct of the deposition." See Brief of Appellant (Corrected), 18. This is incorrect. CR 45(a)(1)(c) states each subpoena shall "command each person to whom it is directed to attend *and give testimony*" (emphasis added). CR 45 does not simply direct a person to appear. It would do little good to have a person appear and not give testimony CR 45 clearly allows a subpoena to command a person not only to appear but to give testimony. Therefore, if a person appeared but

failed to give testimony they would not be complying with the subpoena.

Further, CR 45(a)(1)(c) states that each subpoena shall command each person to “permit inspection and copying of designated books, documents, or tangible things...” If a person failed to permit the inspection and copying of designated books, documents, or tangible things they would also not be complying with the subpoena.

CR 45(g) states:

Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.

Livingston does not deny that he was properly served with a subpoena under CR 45 and that he failed to answer several questions and that he failed to produce several designated documents. The trial court did not find that Livingston had a proper excuse. As such, it was proper for the trial court to hold Livingston in contempt under CR 45(g).

**The court was correct in granting Roberts’ motion for contempt as Roberts complied with CR 45(c)(2)(b).** Livingston also incorrectly relies on CR 45(c)(2)(b). First, this rule only speaks to the production and copying of documents and not to appearing and giving testimony at a deposition. Livingston was held in contempt for not answering questions. CR 45(c)(2)(b) does not apply in this scenario.

Second, CR 45(c)(2)(b) states, in pertinent part, that

If an objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued.

Roberts complied with this rule. Livingston filed objections to producing the documents and Roberts obtained an order from the court directing Livingston to produce said documents. This order was the Order for Contempt which directed Livingston to produce the requested documents. (CP 103)

**The court was correct in awarding Mr. Roberts attorney fees as the order of contempt was properly entered and attorney fees are allowed under CR 45.** The trial court may award costs and attorney fees to the party seeking a contempt order. RCW 7.21.020. As such, the trial court properly awarded Roberts his attorney fees in seeking the order of contempt.

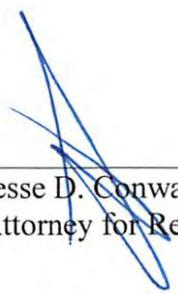
**Roberts should be awarded his attorney fees and expenses for the cost of this appeal.** Roberts respectfully asks this court that he be awarded his attorney fees and expenses for this appeal pursuant to RAP 18.1.

#### IV. CONCLUSION

Roberts properly issued a subpoena to Livingston. Livingston did not comply with that subpoena. Roberts properly

sought an order of contempt under CR 45. The trial court's ruling granting the Order of Contempt should be upheld and Roberts should be granted his attorney fees for the appeal under RAP 18.1.

*RESPECTFULLY SUBMITTED* this 14 day of October,  
2018.

  
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Jesse D. Conway, WSBA #41677  
Attorney for Respondent

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## CERTIFICATE OF SERVICE

I certify that I caused true and correct copies of the BRIEF OF RESPONDENT to be served on the following:

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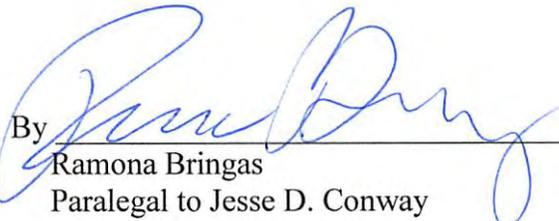
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DATED this 4<sup>th</sup> day of October, 2018.

By   
\_\_\_\_\_  
Ramona Bringas  
Paralegal to Jesse D. Conway

**THE LAW OFFICE OF JESSE D. CONWAY**

**October 04, 2018 - 1:02 PM**

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**Superior Court Case Number:** 13-3-01077-9

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