

FILED

MAR 18 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

NO.: 29335-1

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION III

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AARON DOYLE,

Plaintiff/Respondent/Cross-Appellant.

v.

HALEY TAYLOR, PEGGY GRAY and ROBERT GRAY

Defendants

and

BRIAN CHASE

Appellant

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APPELLANT'S REPLY BRIEF AND RESPONSE TO CROSS-  
APPELLANT'S OPENING BRIEF

---

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## **I. ADDITIONAL STATEMENT OF THE CASE**

The following portion of Judge Sperline's oral ruling on September 18, 2009, is material:

Judge Sperline: \* \* \* By a preponderance of the evidence, the documents relating to Mr. Doyle were acquired from him unlawfully. It is unnecessary to say by whom. They were acquired from him unlawfully. For that reason, and in support of the Court's inherent authority and authority under the rules to control and regulate the discovery process, the originals or any copies; paper or electronic, of those documents, in the hands of any party, the counsel for any party, or the former counsel for any party in these four cases should be immediately returned to counsel for Mr. Doyle. The documents should not be – no other use should be made of the documents without leave of the court. They should not be disseminated to any person other than counsel for Mr. Doyle. \* \* \* But I think we need an order that does not recite all of the findings and just says here's what the court orders in granting this motion.

Garth Dano: Very well, Your Honor, I'll draft an Order and circulate it.

CP 535-36.

## **II. SUMMARY OF RESPONSE AND REPLY**

Doyle incorrectly states that Haley Taylor stole his thumb drive. Doyle Brief pp. 10 and 33, and he refers to the documents from the thumb drive Taylor gave to Brian Chase as "stolen" about 15 times. Judge Sperline did not decide Taylor took Doyle's property and did not use the word "stolen." Doyle's Statement of the Case is argumentative – not factual.

Judge Sperline told Doyle's attorney to prepare a written order and his attorney agreed to do that. Judge Sperline intended his order to be in writing. Judge Sperline's reducing Doyle's fee request to \$1,000 was not an abuse of discretion.

Doyle does not respond to our argument on the fundamental errors underlying this litigation that making copies of documents is not conversion or theft and that a court's sealing of the clerk's record does not make copies of those documents contraband. These points are conceded. Doyle also dismissed the Federal Case unilaterally and without reservation on February 19, 2010. CP 597. Dismissal extinguished the case, and no court has jurisdiction to act, even on a pending contempt. Finally, Doyle's claim that Chase was in court and courts have inherent authority to control discovery does not address the jurisdictional issue of properly bringing an action to recover property.

### **III. ARGUMENT**

#### **A. Doyle's Statement of the Case is argumentative and unsupported by the record.**

RAP 10.3(b)(5) requires a statement of the case to be "a fair statement of the facts and procedures relevant to the issues presented for review without argument. Reference to the record must be included for each factual statement." Doyle's statement of the case fails to comply with this rule and should be disregarded by the court.

Doyle's references to the record are sometimes vague or inaccurate. E.g., Doyle claims he obtained an order to show cause on December 4, 2009 and directs the reader to 45 pages of the record. Brief p.13. This, however, appears to refer to a one page order to show cause dated November 20, 2009. CP 61. Doyle incorrectly claims Chase received an order to show cause on November 3, 2009. Brief p.16. Chase received the order November 25. CP 212.

Doyle misinterprets the portion of Judge Sperline's decision quoted in our Reply Statement of Facts, *supra*. Doyle claims Haley Taylor stole his thumb drive, Brief p. 10 & 33, but Judge Sperline made no such finding. Doyle's characterizations of the material on the thumb drive as "personal and confidential" or having "absolutely no relevance to these underlying proceedings" is his opinion, not a fact. Brief p. 10. Brian Chase felt it had relevance and described it in detail in his declaration. CP 278-79. The material was a letter terminating Doyle's employment as a deputy sheriff for Sierra County. CP 117 (73:17-25).<sup>1</sup>

Doyle spends over two pages of his response, Brief pp.17-19, trying to demonstrate that Chase was less than truthful about his December 2nd declaration and that his staff had nothing to do with

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<sup>1</sup> The letter has never been filed or placed in evidence in this case.  
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preparing materials to return to Doyle's attorney.<sup>2</sup> He claims that Chase's secretaries, Mary Nunamaker and Laura Chase, testified that they had nothing to do with rounding up these materials and that all of the information was "kept in a small box in Chase's office." Brief 18. Mary Nunamaker was asked if she had assisted Chase in assembling documents which Judge Sperline had ordered returned. She said she didn't know. CP 134 (39:13-19). She later said she was unaware of Judge Sperline's order. CP 135-36 (40:23-41:15). Laura Chase answered just about the same way. CP 141 (10:6-24).

Q. Have you, yourself, done any work on the litigation, the lawsuit involving your brother and Aaron Doyle?

A. I don't believe so.

Q. Have you drafted any pleadings with regard to that litigation?

A. I don't believe so.

CP 140 9:18-23). The only litigation involving Aaron Doyle and Laura Chase's brother was the Federal District Court Case in which that deposition was taken, not this case. CP 139. If she was confused, it is hardly a wonder. Nonetheless, she never contradicted Brian Chase's declaration.

The questioning of Mary Nunamaker was no more adroit:

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<sup>2</sup> CP 44-45 to which Doyle refers, Brief p. 17, is a declaration Chase August 25, 2009. The quote is from a declaration Chase made November 30, 2009, and filed December 3, 2009. CP 77-78.  
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Q. Did you assist Mr. Chase in making copies of Mr. Doyle's records to submit back to send a letter back to me?

MR. CAMERON: Objection, the question is vague. What records are we discussing? Go ahead and answer if you can.

Would you r e p e a t the question?

Q. Did you assist Mr. Chase in producing the documents that he was to send to our office?

A. I don't know. I don't think so.

Q. Do you know if any other office personnel assisted Mr. Chase in assembling the documents which Judge Sperline ordered him to return to our office?

A. No.

Q. You don't know or nobody else helped Mr. Chase do that?

A. I don't know. I didn't do it and I don't know.

CP 133-34 (28:25 – 39:19). Why would Nunamaker make copies, when the judge ordered all the copies and documents returned?

Doyle's claim that the only file Chase needed to look at was a small box in his office is not a correct description of the two banker's boxes and Expando-file that really existed. CP 150-151 (19:24-20:22).

Doyle takes no issue with Chase's statement of the case and it accurately and without arguments states the relevant facts. This Court should otherwise disregard Doyle's argumentative misstatement of the case and facts.

**B. Response to Doyle's Cross Appeal.**

1. **The trial court's oral order was not enforceable because it was not intended to be enforceable.**

Judge Sperline's oral ruling on September 18, 2009, by its very terms was not intended to be an enforceable order. The court clearly

instructed Doyle's counsel to prepare a new order and present it for the court's signature and the attorney said he would do so. CP 536. While oral orders may be enforceable, *Stella Sales, Inc. v. Johnson*, 97 Wn.App. 11, 985 P.2d 391 (1999), the cases cited by Doyle do not support his contention that the September 18, 2009, oral ruling was enforceable. *State ex rel. Curtiss v. Erickson*, 66 Wash. 639, 120 P. 104 (1912), involved the issuance of a temporary restraining order enjoining engineers from opening the Lake Washington ship canal thus permanently reducing the level of Lake Washington.

The court imposed a fine of \$300 and imprisonment for 60 days upon appellant Erickson, and a fine of \$100 upon appellant Carlson. This sentence is erroneous in so far as Erickson is concerned. The testimony shows that the waters of Lake Washington were not appreciably lowered by blasting out the embankment, and it does not appear that any right or remedy of Bilger and his coplaintiffs was defeated or prejudiced. Rem. & Bal. Code, § 1050. Under this section the court had no jurisdiction to assess a fine in excess of the sum of \$100.

The further point is made that, under the final decision of the *Bilger* [*v. State*, 63 Wash. 457, 116 P. 19, (1911)], no right of the plaintiffs in that case was interfered with, and hence the court had no jurisdiction to punish for contempt. The loss of or interference with a right or remedy is only material, or to be considered, in fixing punishment. It is enough that the court was exercising jurisdiction to hear and determine the case then before it, and defendants were guilty of 'disobedience of \* \* \* a lawful order \* \* \* of the court.' The mere fact that this court held Bilger and his coplaintiffs to be without present remedy does not rob the superior court of its power to enforce its orders issued

pendente lite, in a case where it has jurisdiction of the parties as well as of the subject-matter.

The judgment is affirmed as to the defendant Carlson, and the cause remanded, with instructions to the lower court to assess a fine against Erickson not exceeding the sum of \$100.

*State v. Erickson*, 66 Wash. 641-42. *Erickson* was a criminal contempt proceeding. This case is not. *Rollins v. Commonwealth*, 211 Va. 438, 177 S.E. 2d 639 (1970), involved a written order to enjoin civil rights demonstrations, and the other cases cited by Doyle all involved criminal actions arising out of the violation of orders intended to preserve the status quo. Judge Sperline altered the status quo.

While Judge Sperline treated this case as a discovery matter, Doyle relies on CR 65 and injunction cases for his authority. All such orders must be in writing, must clearly indicate the reasons for granting the order and its specific terms. *Turner v. Walla Walla*, 10 Wn. App. 401, 517 P.2d 985 (1974). Were his order an injunction, Judge Sperline was doing nothing other than follow the law. CR 65(d) requires written orders. *See*, CR 52(a)(2). Perhaps the best argument for insisting on a written order is that the court altered the proposed order when it was presented. CP 64-67. Court's oral rulings are often not precise, and that is why they should always be reduced to writing, especially when they require the performance of an act as opposed to refraining from acting.

2. **The Trial Court's award of fees less than those requested was not an abuse of discretion.**

If we assume that the trial court could award Doyle some fees, the standard for review is whether the trial court abused its discretion in awarding less money than Doyle requested. By the time he actually had the judge's ear, Doyle wanted a \$148,000.00 fine or 20 days in jail. CP 637. These claims are clearly unsupported; only the prosecuting attorney may bring a criminal action for contempt. RCW 7.21.040. Until Judge Sperline issued his letter opinion, Doyle's quest for punitive sanctions dominated the proceedings. Doyle wanted a pound of flesh, Chase defended against it, and the judge thought he was settling a discovery dispute. VRP 29:1-9.

Assuming he had the authority, the trial court did not abuse his discretion in awarding Doyle less attorney's fees than requested. CP 57-61.<sup>3</sup> While Doyle directs us to no portion of the record concerning his application for fees, we have found Garth Dano's declaration. CP 490-96. The one-page letter he wrote to Brian Chase September 30, 2009, CP 69, consumed a half-hour of his time as did the second letter he wrote on October 5, 2009. CP 73. He charged another 1½ hours for conferring with his client about the order to show cause and spent three hours researching and drafting a five page order to show cause asking for \$2,000 a day in

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<sup>3</sup> Doyle's application was primarily for \$2,000.00 a day in penalties not attorneys' fees. This appears to have been abandoned in his cross appeal.  
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finer. These charges were unwarranted. Certainly, by the December 18 hearing, there was no justification charging Brian Chase for additional time. The hourly rate of \$250 was also inappropriate. Doyle claimed an appropriate rate for Grant County was \$200 per hour. CP 446.

The appellate court's review of the reasonableness of attorney's fees falls under the abuse of discretion standard. "A trial court's fee award will not be overturned absent an abuse of discretion." *Washington State Physician's Insurance Exchange v. Fisons, Corp.*, 122 Wn.2d 299, 335, 853 P.2d 1053 (1993). The trial court is accorded broad discretion in fixing the amount of attorney's fees. Doyle does not suggest that the court has abused its discretion, only there is no evidence that he incurred less than \$3,000 in fees. As his itemized expenses are about \$1,600, there certainly is some evidence that the trial court could have seen his requested fees as not only exorbitant but unwarranted. If there was any abuse of discretion it was in awarding any fees at all.

**C. Reply to Plaintiff's Response.**

- 1. The mere erroneous entry of an order is not a defense to violating such an order.**

The mere erroneous entry of an order is not a defense to violating such an order. We take no argument with this argument. Brief pp. 24-25.

2. **The Trial Court did not have authority to order the “return” of Haley Taylor’s property.**

We pointed out in our opening brief that Chase obtained the documents that Doyle claimed were his from his former client Haley Taylor. Doyle claimed she stole the documents from him. E.g. CP 15-16, 18-19, 647-51. The trial court treated this as a discovery issue. CP 535 (16:4-7). Doyle’s claims, “If parties . . . could simply turn over stolen property to their attorneys, and avoid any responsibility in the underlying litigation, it would tax the judicial system and create chaos.” Brief p. 28. He then goes on to claim, “the trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation.” *Matter of Firestorm 1991*, 129 Wash. 2d 130, 139, 916 P.2d 411, 416 (1996).<sup>4</sup> In *Firestorm*, our Supreme Court overturned a trial court sanction of removing an attorney from a case, because he had ex parte contacts with the opposing party’s expert. The sanction was excessive and the trial court failed to follow the rules.

*Firestorm* supports Chase’s position, not Doyle’s, but it begs the question of how Doyle could use a discovery motion to recover property he alleges was stolen, but which the owner claims is not stolen. As a matter of jurisdiction, if this were a discovery order, how could Doyle

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<sup>4</sup> Doyle attributes this quote to *State v. S.H.*, 102 Wash. App. 468, 8 P.3d 1058 (2000), but that case is not cited by the court in *Firestorm* which was decided four years before *S.H.* Brief p. 28.  
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move for sanctions without conducting a discovery conference? Chase brought this to the court's attention. CP 613. The fact is, Doyle was after \$148,000 or jail and discovery never crossed his mind. CP 637. Nonetheless, the trial court asserted that its only basis for holding Chase to anything was not its contempt power, but the power to control discovery.

The court's order that applied to Mr. Chase and Mr. Burns and I think to any other person who had acted as former counsel in the case was an order that was entered in pursuit of the court's inherent authority to control discovery in the case. And that's the only basis I can identify as to how it could apply directly to counsel for a party and former counsel for a party as opposed to applying to the party.

VRP 29:1-9. In the absence of proof that a party demanding discovery has complied with CR 26(i), a court is without power to compel discovery or impose sanctions. *Clarke v. State Attorney General's Office*, 133 Wash.App. 767, 138 P.3d 144 (2006) *review denied* 160 Wash.2d 1006, 158 P.3d 614. A court may not entertain a motion to compel unless the motion includes counsel's certification that the conference requirements have been met. *Thongchoom v. Graco Children's Products, Inc.*, 117 Wash.App. 299, 71 P.3d 214 (2003), *review denied* 151 Wash.2d 1002, 87 P.3d 1185.

All Garth Dano needed to do on November 20, 2009, was to call Brian Chase and ask him where the documents were. He would have found out they were collected and ready for delivery. CP 77. He did not

call. Instead he prepared a show cause order that in the end was a waste of time. It is just such waste of time the CR 26(i) is intended to avoid.

**3. The trial court lacked jurisdiction to order Chase to turn over Haley Taylor's property to Doyle.**

Doyle has not addressed our arguments concerning the court's power to resolve what essentially is a replevin action, focusing instead on the removal and dismissal of the case by the Federal District Court. The record is not in any dispute about what happened at the September 18, 2009, hearing. Brian Chase was present. He was there on other cases. CP 532:19-21. By the time he was even permitted to speak, Judge Sperline had made his decision that Doyle's thumb drive had been liberated from him unlawfully. CP 529:2-10. Haley Taylor was not yet a party to this case. CP 565-66. Given any construction of the evidence, it was she who gave the thumb drive to Chase saying she had received it in a letter from California and that thumb drive was in the Moses Lake police department. CP 533:5-534:3. Brian Chase was in court, but never represented Taylor in this case. The jurisdictional issue is how the court could acquire jurisdiction to dispose of copies of Haley Taylor's property, because of a motion filed months before when Taylor has not been served or appeared in the case. The issue is not whether courts have inherent power to control discovery or whether Brian Chase happens to be in court on another case.

Haley Taylor, the beneficial owner of the property as Chase's former client, should have had a trial on the issue of how she acquired the thumb drive. "All these cases recognize that flaws which do not go to the heart of the judicial power are insufficient to justify the flaunting of an otherwise lawful order. They implicitly narrow the casual dictum that 'jurisdiction of the parties and of the subject matter' is required, to the better-reasoned rule that only an absence of jurisdiction to issue the type of order, to address the subject matter, or to bind the defendant will vitiate contempt." *Mead Sch. Dist. No. 354 v. Mead Ed. Ass'n (MEA)*, 85 Wash. 2d 278, 284, 534 P.2d 561 (1975). Certainly, a court has power to order property returned to its rightful owner; Haley Taylor could have been brought into court, but she was not. Paraphrasing the question, "Did Judge Sperline have jurisdiction to issue the order to return property, to address the proper ownership of that property between Haley Taylor and Aaron Doyle?" Only if he followed the proper procedure and that he did not. Haley Taylor, the other claimant was neither present nor a party. No trial was held on the issue. Brian Chase was not a party. Our Supreme Court has answered this precise question.

This is, we think, an erroneous conception of the law applicable to the case. **The appellant was not a party** to that action, **was not served with process** therein, and **no relief was asked as against him**. The mere fact that the summons was served upon him as a representative of the defendant for that purpose did not make him a party to the

action. Such service was for the purpose of bringing the defendant bank into court, and for that purpose and no other it was effectual. *Ex parte Hollis*, 59 Cal. 405 [8 P.C.L.J. 307 (1884)].

By what authority, then, did the court adjudge that the appellant wrongfully took the securities in question from the safe of the defendant, prior to the commencement of the action, and that he should return them to the receiver? Obviously the court had no such authority, and the order was therefore void.

*State ex rel. Boardman v. Ball*, 5 Wash. 387, 388, 31 Pac. 975 (1892).

[Emphasis Added]. No more than the court was authorized to order Mr. Ball to return securities when he was not a party, could the Grant County Court order Haley Taylor or her former attorney to give Doyle Chase's copy of her thumb drive or papers without a proper trial on the issue.

4. **The Federal Court's dismissal of the action wiped the slate clean as if this case had never existed.**

Doyle finds some distinction in the fact that Judge Whaley dismissed this case without prejudice as opposed to with prejudice. Brief p. 27. Doyle misstates and avoids the fact that his settlement agreement with Taylor and the Grays made no reference to this case, but rather to them divvying up the imaginary proceeds of the now dismissed Federal case he then had pending against Chase. CP 624-25. The stipulated dismissal of the claims and the court's dismissal, CP 619-22, reserved nothing and was absolute on its face.

A voluntary dismissal wipes the slate clean and it is as if a suit had never been brought. This is true whether the stipulation is by agreement, voluntary dismissal or otherwise. As the 7<sup>th</sup> Circuit noted:

It is as if the suit had never been brought. No steps can be taken upon the suit after dismissal. Any steps taken thereafter are a nullity. The dismissal carries down with it previous proceedings and orders in the action, and all proceedings, both of the plaintiff and of the defendant, and all issues with respect to the plaintiff's claims.

*Bryan v. Smith*, 174 Fd. 2d 212, 214 (7th Cir. 1949)

Thus, as the dismissal carries down with it the original order of the court ordering Chase and Burns to return any copies of Doyle's allegedly purloined documents, as if this never occurred. There was no order left to enforce, no case to remand, no hearing to be held.

The Second Circuit Court of Appeals applied this principle to a trial court's attempted contempt proceedings following a voluntary dismissal by the parties. In *Hester Industries, Inc. v. Titon Foods, Inc.*, 160 Fd. 3d 911 (2nd Cir. 1998) the Court of Appeals found the trial court was without jurisdiction to enforce its mandates by contempt.

Tyson contends the district court lacked the authority to hold it in contempt of court for violating the district court's "stipulated order of dismissal". We agree, dismissal was effectuated by stipulation, or mutual agreement of the parties, and did not require any judicial action.

160 Fd.3 at 916. Thus when Doyle drug Chase into Superior Court only to find he had not remanded but dismissed the case, he went back to the

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Federal District Court and obtained an order of remand. That order was without effect, because the Federal court had by that time divested itself of jurisdiction as if the case had never been filed.

A summary of the timing of events illustrates the jurisdictional issue:

- Before February 4, 2009, Chase receives the termination letter from Haley Taylor. CP 647-52.
- February 5, 2009, this case filed. CP 218-24.
- October 21, 2009, Order to return property filed. CP 53-57.
- November 13, 2009, case removed to Federal Court CP 460-62.
- Case dismissed without prejudice February 19, 2010. CP 619-22.

Doyle obtained his order to show cause after removal, he attempted to cite Chase while the case was removed, and he then dismissed the case absolutely on February 19, 2010. What motion, order, hearing or decision was left after February 19, 2010 or in Grant County Superior Court after November 13, 2009? What sort of discovery order is left to enforce after the case is over? There is no discovery order, but a replevin action that was never properly commenced.

#### 5. **The Trial Court's Order was not clear.**

Doyle's argument that Chase violated a clear and unambiguous written order belies his own conduct which is as much a part of the order

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as anything else. He never explains why it took him over a month to reduce the court's decision to writing even though the judge told him to do it, he agreed to do it and Chase asked him to do it. Instead he writes letters complaining of Chase's delay. When he had the order signed, why did it take him two weeks to get it to Chase? Was the "integrity of the court and rule of law [] the overriding concern by Doyle's position in this appeal" or \$148,000? Brief p. 8.

Words have a way of meaning what the speaker or hearer wants them to mean. For example, Doyle "expeditiously" returned this case from Federal Court between December 18, 2009, and April 16, 2010. Brief 19 & 25. That is about four months. Doyle could have put a date on the written order; he did not. As we pointed out in our opening brief, Washington cases are not much help with the definition of immediately and Doyle cites to none that are.

Indiana courts have found an implied "reasonableness" time requirement when they have been called upon to define the word "immediate" in a statute or contract. *Oxford Fin. Group, Ltd. v. Evans*, 795 N.E.2d 1135, 1144 (Ind.Ct.App.2003). Specifically, "immediate" has been defined as "the act referred to shall be accomplished within such convenient time as is reasonably requisite." *Id.*

*Phillips v. Delks*, 880 N.E.2d 713, 718 (Ind. Ct. App. 2008). The *Phillips* court thought 75 days was too much considering the order was negotiated. This was not a negotiated order and 16 days is not unreasonable.

6. **The trial court lacked authority to assess attorneys' fees.**

The only justification the court had for attorneys' fees was to coerce performance of the court's order and the performance was completed by all accounts before the December hearing in 2009. *In re Estates of Smaldino*, 151 Wash. App. 356, 362, 212 P.3d 579, 582 (2009) *review denied*, 168 Wash. 2d 1033, 230 P.3d 1061 (2010), the court ordered a former personal representative's attorney to purge a contempt when he participated in the sale of property in violation of a temporary restraining order by asking the bankruptcy trustee to reconvey the property and the court imposed sanctions of \$1,000 per day until he did. In *Smaldino*, the contemnor had completed the act and the only action the trial court took was to force him to take those steps he could to undo the wrongful act. There was nothing for Brian Chase to do by May of 2010, because he had complied with the court's order by December of 2009. If he was dilatory, it could not be corrected; if he destroyed one of his thumb drives because it had other information on it, he could not undo that. There was nothing left to coerce.

#### IV. CONCLUSION

The court should reverse the trial court's decision of July 2, 2010, ordering Brian Chase to pay \$1,000, in attorneys' fees and vacate the order of October 21, 2009. The trial court lacked jurisdiction to settle the right

to possession of Chase's copies of his client's material. Chase completely complied with the trial court's ambiguous order and, consequently, was never in contempt. Doyle's cross appeal should be denied.

Respectfully submitted this 16<sup>th</sup> day of March 2011

LEE SMART, P.S., INC.

By:   
William L. Cameron, WSBA No. 5108  
Of Attorneys for Brian Chase

**CERTIFICATE OF SERVICE**

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on March 16, 2011, I caused service of the foregoing on each and every attorney of record herein:

**VIA UNITED STATES MAIL**

Garth Louis Dano  
Attorney at Law  
100 East Broadway  
PO Box 2149  
Moses Lake, WA 98837-0549

**VIA UNITED STATES MAIL**

Renee S. Townsley, Clerk  
Division III, Court of Appeals  
500 N Cedar St  
Spokane, WA 99210-2159

DATED this 16<sup>th</sup> day of March at Seattle, Washington.

  
Linda L. Bush, Legal Assistant