

No. 39672-6-II
Consolidated w/ No. 41009-5-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
BY 

ELINOR JEAN TATHAM,

Respondent,

v.

JAMES CRAMPTON ROGERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR JEFFERSON COUNTY
THE HONORABLE CRADDOCK VERSER

BRIEF OF RESPONDENT

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I. INTRODUCTION

After obtaining an adverse ruling at the conclusion of a trial held on April 20, 2009, Rogers, a severely mentally ill individual, hired a private investigator to determine whether the trial judge and opposing counsel were having an intimate/romantic relationship, despite having no factual basis for this belief. Thirteen months later, after having uncovered no evidence of any such relationship, Rogers filed a motion under Civil Rule 60(b)(5) to vacate the judgment, relying on publicly disclosed and widely publicized prior associations between the trial court and opposing counsel, all of which were known to both of Rogers' trial counsel.

This Court should reject Rogers' contention that the trial court's failure to recuse itself *sua sponte* based on its prior professional associations with opposing counsel violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Furthermore, this Court should find that any due process claims were waived by Rogers' failure to timely assert them. Finally, this Court should condemn the inclusion of unsubstantiated factual statements, rumors, and hearsay statements of unidentified individuals in an appellate brief, sanction

Rogers' counsel, and award Tatham the attorney's fees she incurred in responding to this appeal.

II. RESTATEMENT OF THE ISSUES

1. Rogers appealed the trial court's order distributing the parties' property upon the dissolution of their committed intimate relationship. One year after this order was entered, and while his appeal was pending, Rogers moved to vacate the trial court's order by alleging for the first time that the trial court should have recused itself *sua sponte* based on its prior professional associations with Tatham's counsel. It is undisputed that both of the attorneys who represented Rogers during the two and one-half years the matter was pending had actual knowledge of the facts upon which Rogers' motion to vacate is based. Did Rogers waive his due process and appearance of fairness claims by failing to assert them in a timely manner?

2. The trial court denied Rogers' motion to vacate under CR 60(b)(5), finding that the motion was both untimely and without merit. Was the trial court's denial of Rogers' motion a manifest abuse of discretion?

3. The trial court denied Rogers' motion that the court recuse itself from hearing Rogers' motion to vacate under CR

60(b)(5), rejecting the argument that hearing the motion would place the court in the position of determining whether the court had violated Judicial Canon 3D. Did the trial court abuse its discretion in denying Rogers' motion that it recuse itself from hearing the post-judgment motion?

4. The trial court complied with Jefferson County Local Court Rule 5.5(c) by refusing to consider pleadings filed by Rogers' attorney which were not served on Tatham's attorney. Did the trial court err by not placing the burden on Tatham's attorney to correct the non-compliance of Rogers' attorney with local court rules?

5. Rogers' brief is replete with references to alleged factual statements unsupported by the record, rumor, innuendo, and hearsay statements of unidentified persons. Should this Court disregard these statements, sanction Rogers' attorney, and award Tatham her attorney's fees for having to respond to these statements?

III. RESTATEMENT OF THE CASE

A. Procedural History

On January 10, 2007, Elinor Tatham filed a Petition for Equitable Distribution of Quasi-community Property in Jefferson County Superior Court. (CP 1) On February 6, 2007, H. Clifford

Tassie filed a Notice of Appearance and Response on behalf of Defendant James Rogers. (CP 5) On October 4, 2007, the matter was set for trial on January 3, 2008. On November 17, 2007, the trial was administratively continued until March 12, 2008. (CP 9) In early 2008, the parties agreed to strike the trial date and engage in further settlement negotiations.

On July 2, 2008, Mr. Tassie withdrew from his representation of Rogers. (CP 2) On October 17, 2008, the matter was set for trial on January 20, 2009. (CP 14) On January 6, 2009, Steven L. Olsen filed his Notice of Appearance on behalf of Rogers and immediately requested that the trial date be continued. (CP 16) The trial was continued to April 20, 2009. (CP 17)

The matter was heard on April 20, 2009 in Jefferson County Superior Court by the Honorable Craddock Verser – the sole Superior Court judge in Jefferson County. (CP 44) Neither Mr. Tassie nor Mr. Olsen filed a motion to disqualify Judge Verser in the two and one-half years the matter was pending.

On May 12, 2009, Judge Verser issued his Memorandum Opinion. (CP 47) Rogers filed objections to the trial court's ruling, but did not raise the issue of recusal. (CP 50) A final judgment was entered on July 15, 2009. (CP 56) Rogers filed a motion for

reconsideration, but did not raise the issue of recusal. (CP 58) On August 5, 2009, Judge Verser denied Rogers' motion for reconsideration. (CP 62)

On August 11, 2009, Rogers filed a Notice of Appeal. (CP 63) On September 23, 2009, Rogers filed his Designation of Clerk's Papers. (CP 63) On November 25, 2009, Rogers filed the Verbatim Report of Proceedings. (CP 77-81)

In early January 2010, the day before Rogers' Opening Brief was due, Olsen withdrew and James E. Lobsenz appeared on Rogers' behalf. (CP 86) Lobsenz immediately requested a two-month extension to file the Appellant's Brief.

On March 3, 2010, Lobsenz filed Appellant's Brief which did not assign error to Judge Verser having heard the case. The Respondent's Brief was filed on April 9, 2010. Appellant's Reply Brief was filed on May 12, 2010.

On May 19, 2010, seven days after all of the permitted briefs had been filed with the Court of Appeals in Case No. 41009-5-II Rogers filed a motion in Jefferson County Superior Court requesting that the judgment entered on July 15, 2009 be vacated under Civil Rule 60(b)(5) and that a new trial be held before a judge other than the Honorable Craddock Verser. (CP 88) Rogers also

requested that Judge Verser recuse himself from hearing the motion.

B. The Post-trial Investigation

In support of his motion to vacate judgment, Rogers filed a declaration in which he stated that “[l]ong after the trial was over, I hired a private investigator” (CP 91) because he had “heard that Bierbaum and the judge have had an intimate/romantic relationship.” (CP 91) Rogers acknowledged that he had “no proof” of that allegation. (CP 91) Also filed with the motion was the Declaration of Rose Winqvist, the private investigator hired by Rogers. (CP 92) Winqvist states that “Rogers had heard that Bierbaum and the judge were involved in an intimate relationship with each other, but he did not have anything other than rumors to base that on.” (CP 92) Winqvist further states that she “did some investigation to see if [she] could discover any relationship between the judge and attorney Bierbaum.” (CP 92)

In fact, Rogers did not wait until “long after the trial was over” to undertake his investigation. Rogers’ motion for reconsideration was denied on August 5, 2009. (CP 62) On August 24, 2009, Rogers obtained a copy of the incident report of Judge Verser’s DUI arrest on February 3, 2003 from Jefferson County District

Court. (CP 92, Ex. E) The next day, Rogers hired Rose Winqvist to conduct her investigation. (CP 92)

Winqvist's investigation consisted of the following:

1. She accessed the Jefferson County Superior Court's public website to review Judge Verser's biography which reflects the fact that he and Tatham's attorney had been law partners for seventeen months five years prior to trial; (CP 92, Ex. A)

2. She read the DUI arrest report provided to her by Rogers which reflects the fact that Tatham's attorney had been with the judge, then her law partner, when he was arrested for DUI some six and one-half years earlier. (CP 92, Ex. B) She also read the DUI Narrative Report of Officer Chad Kinder and Supplemental Narrative Report of Deputy Brett Anglin, both of which had already been obtained by Rogers. (CP 92, Ex. C and Ex. D) She accessed via the internet the docket information related to the DUI arrest. (CP 92, Ex. E)

3. Winqvist then reviewed the Washington State Public Disclosure Commission filings related to Judge Verser's 2004 election campaign which reflect the fact that Tatham's attorney had played an active role in Judge Verser's campaign and had

contributed over \$2,000 in cash and in-kind contributions. (CP 92, Ex. G and Ex. I)

4. Winqvist obtained newspaper articles from The Port Townsend Leader and erroneously reported to Rogers that Tatham's attorney had written a letter to The Leader on October 27, 2009 identifying herself as Judge Verser's campaign manager for his second election campaign. (CP 92, Ex. H) In fact, the letter identified by Winqvist had been published some five years earlier on October 20, 2004. (CP 92, Ex. H)

5. Winqvist accessed the public records of the Jefferson County Auditor's Office and discovered that on April 3, 2005, Tatham's attorney had executed a Durable Power of Attorney nominating her husband as her attorney-in-fact and nominating Judge Verser as alternative attorney-in-fact if her husband was either unable or unwilling to act. (CP 92, Ex. J)

6. Winqvist photographed a plaque in the Superior Court courtroom which identifies the attorneys with whom Judge Verser has had prior professional associations. (CP 92, Ex. L and Ex. M)

7. Finally, Winqvist discovered that on December 3, 2008, Tatham's attorney accepted an appointment as a part-time Superior Court Commissioner in Jefferson County. (CP 92, Ex. N)

Winqvist's investigation did not uncover any factual information other than that which is publicly available and which had been widely publicized throughout the local community. It is undisputed that both of Rogers' counsel – Tassie and Olsen – were aware of (1) Judge Verser's 2003 DUI arrest and the presence of Tatham's counsel at the arrest; (2) Judge Verser's seventeen-month law partnership with Tatham's attorney; (3) the participation of Tatham's counsel in Judge Verser's 2004 election campaign; and (4) the appointment of Tatham's attorney as a part-time Superior Court Commissioner.

Most significantly, despite having hired Investigator Winqvist on August 25, 2009 to uncover publicly available information regarding the prior professional associations between Judge Verser and Tatham's attorney, Rogers waited nine months before raising the issue of recusal and denial of due process.

C. Prior Associations Between Trial Court and Tatham's Counsel

Judge Verser and Tatham's attorney met in 1999 when they were both private attorneys in Jefferson County. (CP 97) Both of them socialized with other members of the local bar. (CP 97) In November 2002, they formed a law partnership. (CP 97) Three

months later, in February 2003, Verser was arrested for DUI. (CP 97) Tatham's attorney was present at the time of the arrest and posted her law partner's \$500 bail. Verser, represented by local counsel Richard Davies, subsequently pled guilty to negligent driving in the first degree. (CP 92, Ex. E)

The partnership was dissolved seventeen months after its formation when Judge Verser was appointed to the bench by Governor Locke on February 27, 2004. Tatham's attorney managed Verser's election campaign in the summer of 2004 and made monetary contributions. (CP 97) Verser received widespread support among virtually all of the members of the local bar, many of whom served on his campaign committee and contributed funds to his campaign. (CP 97) Verser's campaign, the involvement of Tatham's attorney, and Verser's prior DUI arrest were widely publicized by the local press. (CP 97, Ex. A) The campaign concluded with Verser's election on September 19, 2004.

On April 3, 2005, in connection with an isolated real estate transaction, Tatham's attorney and her husband executed Durable Powers of Attorney, each naming the other as their attorney-in-fact. (CP 97, Ex. C) Tatham's attorney nominated Judge Verser as her alternate attorney-in-fact if her husband was unable or unwilling to

serve. There is no dispute that neither Tatham's counsel nor her husband ever acted as each other's attorney-in-fact. Furthermore, it is undisputed that Tatham's attorney's husband was never unwilling or unable to serve as his wife's attorney-in-fact, thereby necessitating the assumption of that role by Judge Verser.

On December 3, 2008, Tatham's attorney accepted an appointment as one of Jefferson County's three very part-time Superior Court Commissioners. Withdrawn Ethics Advisory Opinion 03-14 stated that a part-time court commissioner may not appear before the bench on which they sit "**when they are representing clients in the same types of matters over which they preside.**" It is undisputed that Tatham's attorney did not preside over any family law matters from the date she was appointed until the date of trial. (RP, page 14)

On April 2, 2009, Judge Verser requested reconsideration of Ethics Advisory Opinion 03-14, at least as it applied to rural counties. (CP 97, Ex. E) On June 30, 2009, the Ethics Advisory Committee withdrew Opinion 03-14, replacing it with Opinion 09-2, which states that the Canons of Judicial Conduct do not mandate a blanket prohibition, but rather consideration of a variety of factors. The Committee concluded its opinion by stating:

When a part-time court commissioner appears as counsel in a matter of the same type over which the court commissioner presides, ***and opposing counsel is not aware of the judicial service***, the court commissioner should so inform the opposing counsel or unrepresented party.

D. Rogers' Motions to Vacate Judgment and for Recusal of Trial Judge

Rogers' motions to vacate the judgment entered on July 15, 2009 and for recusal of the trial judge were heard on June 18, 2010. (CP 103) In compliance with Jefferson County Local Court Rule 5.5(b), Tatham filed responsive pleadings and caused those pleadings to be personally served on Rogers' attorney before 12:00 p.m. on June 16, 2010. (CP 101) The next day, Rogers' attorney faxed filed a Reply Brief in Support of Motion for Recusal and Relief from Judgment. (CP 99) Rogers also fax filed a Declaration of James E. Lobsenz containing nothing other than hearsay statements of both identified and non-identified individuals. (CP 100)

Jefferson County Local Court Rule 5.5(c) requires that all reply documents be served on opposing counsel by 12:00 p.m. on the day prior to the hearing. Rogers' attorney apparently attempted to comply with LCR 5.5(c) by emailing the reply materials to Tatham's attorney at approximately 1:35 p.m., but made no attempt

to comply with CR 5(b)(7) which requires that service by means other than personal service or U.S. mail be “consented to in writing by the person served.” Furthermore, Rogers made no attempt to comply with Jefferson County LCR 7.4 which requires that all parties provide a bench copy for the court’s consideration.

As a result of Rogers’ failure to comply with Local Court Rule 7.4 and 5.5(c), both the court and Tatham’s counsel were unprepared to address or consider Rogers’ reply materials. Tatham’s counsel moved to strike the materials, citing Jefferson County LCR 5.5(c) which provides that “[n]o additional documents shall be filed, served or considered by this court” after the 12:00 p.m. deadline. (RP, page 7-8) Rather than complying with Jefferson County LCR 7.5 which provides that the moving party may continue the hearing or strike the hearing and re-note the matter for another date and time, Rogers responded by suggesting that Tatham move to continue the hearing. (RP, page 9) Tatham declined Rogers’ suggestion and Rogers did not himself move to continue or strike the hearing. As a consequence, the reply materials were not considered by the court. (RP, page 10)

The court heard the argument of counsel and denied Rogers’ motion that the court recuse itself from hearing the CR

60(b) motion. (RP, page 7) The court also heard the argument of counsel on the issue merits of the CR 60(b)(5) motion and denied that motion as well. (CP 102)

On June 28, 2010, Rogers filed a Motion for Reconsideration of the court's rulings. (CP 109) On July 14, 2010, the court issued its Memorandum Opinion denying the Motion for Reconsideration. (CP 115) Rogers filed his second Notice of Appeal to Division II on August 4, 2010. (CP 118)

E. Rogers' Unfounded Allegations and Unsubstantiated Rumors.

Winqvist was hired by Rogers to uncover evidence of a romantic/intimate relationship between Judge Verser and Tatham's attorney. Winqvist ultimately discovered nothing other than publicly available information and unsubstantiated rumors from unidentified individuals.

On June 8, 2010, Rogers' attorney responded to a letter from Tatham's attorney requesting that Rogers' withdraw his statements regarding an alleged romantic/intimate relationship between Judge Verser and Tatham's attorney. Rogers' attorney responded as follows:

You have expressed concern over Mr. Rogers' statement that he has heard that you and the judge have had an

intimate/romantic relationship for many years. You suggest that I should agree to withdraw this statement. This is a truthful statement as to what Mr. Rogers has heard and he would so testify in court. I would also point out that I never based any part of my motion on my client's belief. It was included in his declaration as part of the history of why he hired the investigator.

In any event, you obviously have personal knowledge of whether or not you ever had an intimate/romantic relationship with the judge. As an officer of the court, if you will write me by the end of the week that you have never had an intimate/romantic with the judge the I will advise Mr. Rogers to withdraw that part of this declaration. Without such a letter from you, I can only assume that what Mr. Rogers says he has heard is true.

(CP 100, Appendix A)

In response to the letter from Rogers' attorney, Tatham's attorney sent an email stating:

Just out of curiosity, do you make it a practice to ask male attorneys who prevail at trial to declare that they have never had sexual relations with the judge?

(CP 100, Appendix B)

The retort from Rogers' attorney was:

Consistent with my obligations to my client, I would do exactly the same thing if you were a man and the judge were a woman.

(CP 100, Appendix B)

And, finally, Tatham's attorney responded:

And what if they were two white men – as historically they've been. Do you ask them whether they are having

sex? By the way, I've declined your suggestion that I assert to you in writing that I am not having/have never had/do not intend to have/don't fantasize about having a romantic/intimate relationship with Judge Verser. I honestly don't think that the day has come when women attorneys who prevail at trial have to declare in writing that they have not had sexual relations with a judge to avoid a due process claim. By the way, I've heard some really unseemly stuff about you, too. Should I give you an opportunity to refute those rumors in writing before I include them in my briefing materials?

(CP 100, Appendix B)

IV. ARGUMENT

A. Rogers' waived his due process and appearance of fairness claims by not timely asserting them.

1. The knowledge of Rogers' attorneys is imputed to him.

It is undisputed that both of Rogers' attorneys during the two and one-half years this matter was pending had actual knowledge of the facts upon which the motion to vacate is based. Mr. Olsen acknowledged this by informing Rogers' appellate counsel that "by the time he began to represent Rogers, the court had already made discretionary rulings and it was too late to affidavit the court to get a different judge." (CP 100, p. 1). Mr. Olsen also apparently told Rogers' appellate counsel that he had consistently advised the trial court that it should not hear cases where one of the parties was represented by Tatham's counsel. (Brief of Appellant, page 46) In

any case, neither of Rogers' trial counsel has denied that he had actual knowledge of the prior professional associations between the trial court and Tatham's counsel.

In a declaration filed in support of his motion to vacate, Rogers states that "[h]ad I known these things when Elinor Tatham first filed this suit against me in January of 2007, I would have exercised my legal rights to get a different judge." (CP 91, p. 3)

But what Rogers may or may not have known at any stage of these proceedings is irrelevant as the knowledge of his attorneys is imputed to him. In *Hill v. Dept. of Labor & Indus.*, 90 Wash.2d 276, 580 P.2d 636 (1978), the Washington Supreme Court rejected plaintiff's argument that she was not personally aware of a potential basis for an appearance of fairness claim stating:

The Plaintiff raises two arguments in support of her position that there was no waiver of objection to Bork's dual capacity. First she contends that she was not personally aware of Bork's two positions. While this may be true, it is immaterial. At all times before the Board and the Superior Court, she was represented by present counsel. Counsel has acknowledged that he was aware of Bork's dual capacity. Knowledge by the attorney is imputed to the client. *Yakima Fin. Corp. v. Thompson*, 171 Wash. 309, 318, 17 P.2d 908 (1933); *Stubbe v. Stangler*, 157 Wash. 283, 288 P.916 (1930).

Hill, 90 Wash.2d at 278. **See also *Buckley v. Snapper Power Equipment Co.***, 61 Wash.App. 932, 940, 813 P.2d 125 (1991)

(rejecting appellant's argument that her counsel's actual knowledge of a grounds for a judge's disqualification was irrelevant); ***Deering v. Holcomb***, 26 Wash. 588, 597, 67 P. 240 (1901) (notice to the attorney is notice to his client and applies to all knowledge acquired by attorney during the proceeding).

Even if it were not true that the knowledge of Rogers' counsel is imputed to him, this Court should view with skepticism Roger's claim that he had no knowledge of the facts which now form the basis for his due process and appearance of fairness claims. The Court should consider, for example, that only six weeks after having received the court's ruling, Rogers himself – not his investigator – obtained the trial court's 2003 DUI arrest record. (CP 92, Ex. E) It is difficult, if not impossible, to believe that Rogers acquired no information about any potential basis for disqualification in the two and one-half years the matter was pending, but in the six weeks immediately after obtaining an adverse ruling, he learned of the trial court's DUI arrest and easily obtained copies of the public court records.

The Court might also consider that the trial court's appointment to the bench, his prior professional association with Tatham's counsel, his DUI arrest, and the involvement of Tatham's

counsel in the court's judicial campaign were widely publicized in the local press over the course of several years. (CP 97, Ex. A)

Finally, the Court should take notice that the involvement in and contributions of Tatham's counsel in the trial court's 2004 election campaign were fully disclosed as mandated by the Public Disclosure Act. (CP 92, Ex. I) This issue was squarely addressed in ***State v. Carlson***, 66 Wash.App. 909, 833 P.2d 463 (1992), *review denied*, 120 Wash.2d 1022, 844 P.2d 1017 (1993). In response to a claim that an appellate judge's participation in a case violated the appearance of fairness doctrine because of the concurrent involvement of a lawyer in the judge's election campaign, the ***Carlson*** Court stated:

Once the requirements of the Public Disclosure Act become applicable to a judge who is seeking to retain her position, compliance with those requirements satisfies the judge's duty to disclose as to the matters covered therein. As the title of the Act implies, disclosures made pursuant to the Act are disclosures to the public. Appellant and his counsel are members of the public, and are therefore charged with notice of the information contained in the Public Disclosure Commission filing.

Carlson, 66 Wash.App. at 915.

2. **Rogers' delay in asserting his due process and appearance of fairness claims was unreasonable, resulting in his waiver of those claims on appeal.**

Tatham filed her Petition for Equitable Distribution of Quasi-Community Property in January 2007. From February 2007 until July 2008, Rogers was represented by H. Clifford Tassie – an attorney who was aware of most, if not all, of the bases for Rogers' current claims. During that seventeen-month period, Mr. Tassie did not file an affidavit of prejudice against Judge Verser, nor did he file a motion for his disqualification. In fact, Mr. Tassie agreed to set the trial before Judge Verser in October 2007.

Rogers was unrepresented from July 2008 until January 2009, during which period there were no court proceedings in the matter. In January 2009, Mr. Olsen filed his Notice of Appearance and requested that the scheduled trial be continued until April 2009. Mr. Olsen represented Rogers during trial and throughout the initial appellate proceedings until his withdrawal on March 4, 2010, some fifteen months later. Although an affidavit of prejudice would have been untimely, Mr. Olsen could nevertheless have brought a motion for disqualification of the trial judge at any time prior to or during trial. He did not. Mr. Olsen could also have raised the issue of disqualification in his motion for reconsideration. He did not.

Mr. Lobsenz replaced Mr. Olsen as Rogers' appellate attorney in early January 2010. By that time, it had been over four

months since Rogers hired investigator Winquist and there is no question that Rogers had actual knowledge of all of the factual bases for his due process and appearance of unfairness claims. Yet instead of raising his due process and appearance of unfairness claims, Rogers filed his appellate brief on March 5, 2010, followed by a reply brief two months later on May 11, 2010, neither of which raised these issues.

A week after all permitted pleadings had been filed in the initial appeal, Rogers for the first time in three and one-half years asserted his claim that he was denied due process by filing a motion under CR 60(b)(5) and requested that the judgment entered a year earlier be declared “void.”

Washington courts have consistently held that a litigant who fails to object to a court’s qualifications in a timely manner waives those objections. ***State v. Bolton***, 23 Wash.App. 708, 714-15, 598 P.2d 734 (1979) (“Obviously defendant was willing to take his chances, hope for a favorable decision and resort to the appearance of unfairness argument only if he was unsuccessful.”); ***State v. Hoff***, 31 Wash.App. 809, 813-814, 644 P.2d 763 (1982) (defendant waived appearance of unfairness objection brought three months after verdict); ***Hill v. Dept. of Labor & Indus.***, 90

Wash.2d 276, 280, 580 P.2d 636 (1978) (objections of prejudice must be raised in timely fashion); **City of Bellevue v. King County Boundary Rev. Bd.**, 90 Wash.2d 856, 863, 586 P.2d 470 (1978) (allegations of bias or appearance of unfairness should be raised at earliest possible state of proceeding).

The waiver occurs even in circumstances giving rise to an alleged violation of due process. In **Brauhn v. Brauhn**, 10 Wash.App. 592, 518 P.2d 1089 (1974), the Court held:

One who claims that a judge trying claimant's case is biased may waive his right to complain thereof by not timely raising the objection and proceeding with the trial or continuing with a pending trial as if the judge were not disqualified. This rule is applicable when disqualification of the judge is sought under RCW 4.12.040 and 2.28.030. (citations omitted) **We see no reason for not applying a like rule when the disqualification claimed is based on due process grounds. Even a due process right may be waived.** See *In re Borchert*, 57 Wash.2d 719, 359 P.2d 789 (1961). Were the rule otherwise a litigant, notwithstanding his knowledge of the disqualifying factor, could speculate on the successful outcome of the case and then, having put the court, counsel, and the parties to the trouble and expense of the trial, treat any judgment as subject to successful attack.

Brauhn, 10 Wash.App. at 598. **See also In re Martin**, 154 Wash.App. 252, 262, 223 P.3d 1221 (2009) (waiver rule applies when disqualification is claimed based on due process).

Furthermore, the waiver rule has been applied in circumstances in which the litigant disavowed knowledge of the potentially disqualifying information where the litigant's counsel had such information. *Buckley*, 61 Wash.App. at 940.

In any case, [i]f counsel or a litigant has reason to believe that a judge of the panel should be disqualified, he must act promptly." *Carlson*, 66 Wash.App. at 916.

Neither Rogers nor his attorneys acted promptly to request recusal. Instead, two and one-half years passed before trial during which time recusal could have been sought. Then another ten months elapsed while Rogers pursued his appeal on the merits of the court's decision, forcing Tatham to expend additional funds to respond to that appeal. It appears evident that Rogers deliberately delayed filing his motion to vacate the trial court's order until one week after having filed his Reply Brief. It is unlikely that Rogers acquired the alleged disqualifying information and provided it to his counsel who then drafted the motion to vacate in a mere week. Rogers and his appellate counsel were clearly aware of the alleged disqualifying factors long before the motion was filed but intentionally delayed filing the motion for unfathomable strategic purposes.

The trial court's decision denying the motion to vacate final judgment on the basis that it was not timely filed should be upheld.

B. The trial court's denial of Rogers' motion to vacate pursuant to CR 60(b)(5) was not a manifest abuse of its discretion.

1. A trial court's decision denying a motion to vacate a judgment under CR 60(b)(5) will be upheld on appeal unless the court manifestly abused its discretion.

CR 60(b)(5) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(5) The judgment is void.

Kennedy v. Sundown Speed Marine, Inc., 97 Wash.2d 544, 647 P.2d 30 (1982), *cert. denied*, 459 U.S. 1037, 103 S.Ct. 449, 74 L.Ed.2d 603 (1982) arose from a trial court's denial of a motion to vacate under CR 60(b)(5). Appellant argued that the judgment was void because it had not been properly served with summons and complaint. Despite disagreeing with the trial court's conclusion that proper service had been made, the Court of Appeals nevertheless upheld the trial court's decision to deny the motion. In doing so, the *Kennedy* Court stated:

Although in the view of the Court of Appeals, Mr. Machupa lacked the requisite authority to be served with process for

Volvo Penta, the real question is whether the trial court acted properly in denying the motion to vacate the judgment. A motion to vacate a judgment under CR 60(b) is to be decided by the trial court in the exercise of its judgment and that decision will be overturned on appeal only when it plainly appears the court has abused its discretion.

Kennedy, 97 Wash.2d at 548.

Rogers correctly states that when a court determines that a judgment is void, the court has a non-discretionary duty to vacate the judgment. The cases cited by Rogers, however, stand for the proposition that when a court finds that the underlying facts support the conclusion that the judgment is void, the court has no discretion about whether to vacate the judgment. They do not stand for the proposition that a court lacks discretion in deciding a CR 60(b)(5) motion. The court retains discretion to determine whether the evidence presented supports the conclusion that the judgment is void and the court's determination will be overturned on appeal only if the court manifestly abused its discretion.

In this case, the trial court denied Rogers' motion to vacate on two grounds. First, the court found that Rogers waived any due process claim by failing to assert the claim in a timely fashion. Second, the trial court concluded that the judgment was not void because Rogers' due process claim was without merit. The issue

before this Court is whether the trial court manifestly abused its discretion when it concluded (1) that the due process clause of the Fourteenth Amendment to the United States Constitution had not been violated by the trial court's failure to disqualify its *sua sponte* because of its prior professional associations with Tatham's counsel; and (2) that Rogers had waived any due process claim by not acting promptly upon learning of a possible basis for the claim.

2. The Due Process Clause is violated in judicial disqualification cases where the probability of actual bias on the part of the trial court is too high to be constitutionally tolerable.

Throughout his brief, Rogers repeatedly insists that "due process is violated whenever an objectively reasonable person would have doubts about the impartiality of the judge and the judge fails to disqualify himself." (Brief of Appellant, p. 21, et seq) This, however, is not the objective standard identified and applied in an unbroken line of United States Supreme Court cases involving due process concerns in judicial disqualification cases.

In ***Caperton v. A.T. Massey Coal Co.***, --- U.S. ---, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (U.S.W.Va.2009), the United States Supreme Court reviewed and discussed the circumstances giving rise to a valid due process claim in a judicial disqualification case.

The Court began its opinion by stating that “[u]nder our precedents there are objective standards that require recusal when ‘the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’” **Caperton**, 129 S.Ct. at 2257. The Court acknowledged, moreover, that most matters involving judicial disqualification are unlikely to implicate constitutional concerns, including those involving, for example, bias or personal prejudice. **Caperton**, 129 S.Ct. at 2259. The **Caperton** Court cited **Tumey v. Ohio**, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), in which the Court had previously observed:

All questions of judicial disqualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion.

Tumey, 273 U.S. at 523.

The **Tumey** Court held that the due process clause requires a judge to recuse himself when he has a “direct, personal, substantial, pecuniary interest in reach a conclusion against [the defendant] in his case.” **Tumey**, 273 U.S. at 523. In that case, the village mayor presided as judge over those accused of violating the prohibition act and received a salary supplement for performing those duties. The funds for the salary supplement were raised by

the fines imposed on those found to have violated the Act. The *Tumey* Court held that any procedure which “would offer a temptation to the average man as a judge to forget the burden of proof required to convict the defendant” violates the due process clause. *Tumey*, 273 U.S. at 532. The focus of the *Tumey* Court was not, as Rogers suggests, on whether the average person might harbor doubts about the judge’s impartiality, but on whether the average judge would be tempted to decide the case one way or the other – i.e., whether he had anything to gain by rendering one verdict rather than another.

The *Caperton* Court discussed a second circumstance in which recusal is constitutionally required, citing its decision in *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The *Murchison* Court held that an accused is denied due process when the same judge who charged the accused with contempt subsequently presides over the contempt trial, acknowledging that it would be difficult, if not impossible, for the judge “to free himself from the influence of what took place in his ‘grand-jury’ secret session.” *Murchison*, 349 U.S. at 138. The *Caperton* Court noted that the *Murchison* Court was “very careful to distinguish the

circumstances and relationship from those where the Constitution would not require recusal.” *Caperton*, 129 S.Ct. at 2261-62.

The *Caperton* Court then turned its attention to the facts before it. Appellant Caperton had obtained a \$50 million jury verdict against the Respondent A.T. Massey Coal Co., Inc. While the matter was on review and appeal to the West Virginia Supreme Court was imminent, the Respondent’s chairman, chief executive officer, and president, Don Blankenship, contributed \$3 million to the election campaign of a candidate for Supreme Court justice. Blankenship’s contributions were more than all other contributors to the candidate’s campaign combined and three times that spent by the candidate’s own campaign committee.

The judicial candidate won the election and shortly thereafter participated in the decision to reverse the \$50 million jury, despite repeated requests that he recuse himself from hearing the matter. Caperton appealed to the United States Supreme Court, arguing that due process had been violated by the justice’s participation.

The *Caperton* Court agreed, stating:

We conclude that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s

election campaign when the case was pending or imminent.

Id. at 2263-64.

The Court emphasized that “the temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case” was of critical importance in reaching its decision. *Id.* at 2264.

The **Caperton** Court analyzed the situation as follows:

Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship’s extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – without the consent of the other parties – a man chooses the judge in his own cause.

Id. at 2265. The **Caperton** Court went to great lengths to emphasize that the case presented “extreme facts,” characterizing the situation as “extraordinary.” In fact, the **Caperton** Court used the word “extreme” no less than six times in the final paragraphs of its opinion. In concluding its opinion, the **Caperton** Court stated:

Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Applications of the constitutional standard implicated in this case will thus be confined to rare instances.

Id. at 2267.

In order to prevail on his due process claim, Rogers must demonstrate facts that present “a serious, objective risk of actual bias.” He must also overcome the presumption that judges discharge their duties impartially and without prejudice. ***Faghih v. Wash. State Dept. of Health, Dental Qual. Assur. Commission***, 148 Wash.App. 836, 843, 202 P.3d 962, 966 (2009); ***Jones v. Halvorson-Berg***, 69 Wash.App. 117, 127, 847 P.2d 945 (1993); ***In re Swenson***, 158 Wash.App. 812, 818, 244 P.3d 959 (2010).

Rogers argues that the due process clause of the United States Constitution was violated because Tatham’s counsel had been the trial court’s law partner for a seventeen-month period, while acknowledging that the partnership was dissolved more than five years prior to trial. He argues further that, during the course of the partnership, Tatham’s attorney was present when the trial court – then a private attorney – was arrested for DUI and Tatham’s counsel posted her law partner’s \$500 bail. Rogers acknowledges that this unfortunate incident occurred over six years before his trial. He adds that Tatham’s counsel managed and contributed to the trial court’s election campaign some five years before trial. He points out that in early 2005, some four years before his trial, Tatham’s counsel nominated the trial court as her alternate Durable

Power of Attorney in connection with an isolated real estate transaction, conceding, however, that no evidence exists suggesting that the trial court ever acted in a fiduciary capacity. Finally, Rogers protests the fact that Tatham's counsel has served since December 2008 as one of three very part-time Superior Court Commissioners in Jefferson County.

These facts, Rogers argues, would lead a reasonable person to have doubts about the trial court's impartiality. That, however, is not the standard applicable to a constitutional challenge. Rogers is required to demonstrate that the facts present a "serious, objective risk of actual bias."

Rogers offers the tortured argument that the trial court is likely to abrogate its judicial duties of impartiality and neutrality in gratitude for Tatham's counsel having posted his \$500 bail some six years before trial. He speculates that Tatham's counsel might have embarrassing details about the night the trial court was arrested and might at any moment ruin the trial court's career by disclosing those details to the press, the bar, and the electorate, thereby causing the trial court to rule in her favor to ensure her silence. Rogers leaves it to the Court's imagination as to what embarrassing details Tatham's counsel might have and how those

details might impact the career of a judge who has been elected twice despite general knowledge of the DUI.

Most disingenuously, Rogers argues to this Court that the trial court “lobbied for withdrawal of an ethics opinion so as to remove a ban on [Tatham’s counsel] appearing before him.” Rogers refers to Ethics Opinion 03-14 (withdrawn) which prohibited a part-time superior court commissioner from appearing before the bench on which they sit “**when they are representing clients in the same types of matters over which they preside.**” Rogers offers no evidence that Tatham’s counsel, predominantly a family law practitioner, ever presided over family law matters at any time before, during, or after his matter was heard. Yet Rogers represents to this Court that Tatham’s counsel was “categorically banned” from appearing before the trial court, a patently false statement. And Rogers fails explain to the Court why being appointed a part-time Superior Court Commissioner conferred a “benefit” upon Tatham’s counsel. As the trial court explained, serving as a part-time Superior Court Commissioner is a sacrifice on the part of the three practicing lawyers who agree to perform that function. None of the Commissioners derive financial benefit from their service.

In summary, Rogers has failed to demonstrate how any of these facts, individually or collectively, present a “serious, objective risk of actual bias” on the part of the trial court. He has failed to provide even one legal authority supporting his contention that the due process clause is violated when counsel appears before her former law partner five years after he assumed the bench. He has failed to provide even one legal authority supporting his contention that the due process clause is violated when counsel appears before a judge in whose judicial campaign she actively participated and supported five years before trial. He has failed to provide even one legal authority supporting his contention that the due process clause is violated by the fact that the trial court might have served, but did not serve, as the attorney-in-fact for opposing counsel. And he has failed to provide even one legal authority supporting his contention that the due process clause was violated by opposing counsel’s service as a part-time Superior Court Commissioner. Thus, his due process arguments must fail as he is asking this Court to assign a multiple of zero to zero and obtain a different result than zero.

3. The “appearance of impropriety” is not applicable to a motion to vacate final judgment under CR

60(b)(5). Instead, a litigant must demonstrate that he was in fact treated unfairly.

There appears to be no Washington State case in which CR 60(b)(5) has been applied in a judicial disqualification case. Rogers has not cited any cases and Tatham's research has not uncovered any cases directly on point. But this issue was addressed by the Seventh Circuit Court of Appeals in *Margoles v. Johns*, 660 F.2d 291, 32 Fed.R.Serv.2d 1017 (1981). Appellant Margoles brought a motion under Fed.R.Civ.P. 60(b) (the equivalent of CR 60(b)(5)), contending that the trial court's refusal to recuse itself for alleged partiality, bias, "or the appearance thereof," violated his right to due process of law and thereby rendered any judgment of the trial court void. *Id.* at 292.

The *Margoles* Court set forth the applicable standard as follows:

A litigant is denied the fundamental fairness to which he is constitutionally entitled if the judge of his case is unfairly biased against him. However, a litigant is not denied due process by either the "appearance" of impartiality or by circumstances which might lead one to speculate as to as judge's impartiality. ***A litigant is denied due process when he is in fact treated unfairly.***

Margoles, 660 F.2d at 296.

The *Margoles* Court also discussed the applicability of 28 U.S.C. §455 (the equivalent of Canon 3D) to a due process claim, concluding that the requirement under §455 that a judge avoid “the appearance of impropriety” is not relevant to a due process claim. Instead, the “appearance of impropriety” standard is based on “considerations over and above constitutional standards.” *Id.*

The same issue was subsequently discussed in even more detail in *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363 (1994). The *Del Vecchio* Court acknowledged that the appearance of justice is important and that “the due process clause sometimes requires a judge to recuse himself without a showing of actual bias, **where a sufficient motive to be biased exists.**” *Del Vecchio*, 31 F.3d at 1371. But the *Del Vecchio* Court reasoned that a due process claim cannot be answered by concluding that it “may have looked bad” for the trial court to have heard a matter. Instead, the Court stated that:

When the Supreme Court talks about the “appearance of justice,” it is not saying that bad appearances alone require disqualification; rather, it is saying that when a judge is faced with circumstances that present “some [actual] incentive to find one way or the other” or “a real possibility of bias,” a court need not examine whether the judge was actually biased. (citations omitted) Absent the incentive for bias, however, disqualification is not required despite bad appearances.

Del Vecchio, 31 F.3d at 1372.

Rogers has not identified any reason why the trial court would have an “actual incentive” to decide his matter in favor or against him or Tatham. There is no question that the trial court had no financial or personal interest in the outcome of the case, nor has Rogers alleged any such interest. Instead, Rogers speculates that the prior professional relationships between the trial court and Tatham’s counsel might create a current incentive for the trial court to decide in Tatham’s favor.

4. Rogers’ “appearance of fairness” claim fails because he has not presented evidence of the trial court’s actual or potential bias.

Even if Rogers had timely filed a motion for recusal which the trial court had denied, his “appearance of fairness” would still fail as Rogers has not alleged any actual bias other than having obtained what he perceives to be an adverse ruling. In ***State v. Post***, 118 Wash.2d 596, 826 P.2d 172 (1992), the Washington Supreme Court re-formulated “the threshold that must be met before [the appearance of fairness] doctrine will be applied.” ***State v. Post***, 118 Wash.2d at 619. The ***Post*** Court held that while “[p]ast decisions of this court have applied the appearance of

fairness doctrine when decision-making procedures have created an appearance of unfairness,” the re-formulated threshold requires evidence of a judge’s “actual or potential bias.” *Id.* See also **State v. Chamberlin**, 161 Wash.2d 30, 37, 162 P.3d 389 (2007) (evidence of judge’s ‘actual or potential bias must be shown before an appearance of fairness claim will succeed); **State v. Gamble**, 168 Wash. 2d 161, 187-88, 225 P.3d 973 (2010) (evidence of actual or potential bias required); **State v. Dominguez**, 81 Wash.App. 325, 329, 914 P.2d 141 (1996) (party claiming bias or prejudice must support claim); **State v. Carter**, 77 Wash.App. 8, 11, 888 P.2d 1230 (1995) (evidence of actual or potential bias required).

The test in determining whether a judicial officer is actually or potentially biased is “if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.” *In re Marriage of Meredith*, 148 Wash.App. 887, 903, 201 P.3d 1056 (2009). Rogers has not identified any portion of the record, other than an adverse ruling, which would lead a “reasonably prudent and disinterested person” that he did not receive a fair, impartial and neutral hearing. Instead, Rogers speculates that the trial court might feel beholden to Tatham’s

counsel for events and circumstances, none of which occurred most recently than four years before his trial.

A party asserting a violation of the [appearance of fairness] doctrine must produce sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of the decision-maker; mere speculation is not enough.

In re Haynes, 100 Wash.App. 366, 377, fn. 23, 996 P.2d 637 (2000).

C. The trial court did not abuse its discretion by refusing to disqualify itself from hearing Rogers' motion to vacate pursuant to CR 60(b)(5).

A recusal decision lies within the sound discretion of the trial court whose decision will be upheld absent a clear showing of abuse of that discretion. *In re Marriage of Farr*, 87 Wash.App. 177, 188, 940 P.2d 679 (1997). A court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wash.App. 836, 840, 14 P.3d 877 (2000).

Rogers argues that the trial court should not have heard his CR 60(b)(5) motion because the question before the court was whether the trial court had violated Judicial Canon 3D. The issue before the court, however, was not whether Judicial Canon 3D had been violated, but whether Rogers had been denied due process

by the trial court's failure to recuse itself *sua sponte*. As noted in ***City of Bellevue v. King County Boundary Rev. Bd.***, 90 Wash.2d 856, 586 P.2d 470 (1978), the appearance of fairness doctrine, embodied in Judicial Canon 3D, "is not constitutionally based." ***City of Bellevue***, 90 Wash.2d at 863. Rogers continues to equate an alleged violation of Judicial Canon 3D with a due process violation. But, as carefully explained by both the ***Caperton*** Court as well as the ***Margoles*** Court, the due process clause imposes a much higher threshold than does the "appearance of impartiality" requirement imposed by judicial conduct codes.

Notably, Rogers cites no legal authority supporting his contention that a judge cannot review its decision denying a timely motion for recusal. Rogers ignores the fact that in many of the case on which he relies heavily, the court considered a post-judgment motion to recuse. In ***State v. Carlson***, for example, Judge Agrid participated as a member of three-judge panel that concluded that she had not acted improperly in failing to recuse herself. ***State v. Carlson***, 66 Wash.App. 909, 833 P.2d 462 (1992), *rev. denied*, 120 Wash.2d 1022, 944 P.2d 1017 (1993).

Rather than citing legal authority for his proposition that the trial court should not have heard the post-trial motion, Rogers includes errant quotes from cases addressing unrelated issues.

D. **Rogers' reliance on *Caleffe v. Vitale* and *Diimmel v. Campbell* is misplaced as neither case stands for the proposition for which it is cited. Furthermore, Rogers' attempts to distinguish *State v. Carlson* are erroneous.**

Rogers argues that a Florida case, *State v. Caleffe*, 488 So.2d 627 (1986), is "directly on point." (Brief of Appellant, p. 31) In the *Caleffe* case, the attorney representing the wife in a dissolution was serving as co-chairman of the trial court's election campaign **while the case was being tried. *Caleffe***, 488 So.2d at 628. Under those circumstances, the Florida District Court of Appeals held that disqualification was required. *Id.* at 629. Rogers ignores the fact that Tatham's attorney was not managing the trial court's campaign at any time while his matter was pending. In fact, the trial court's election campaign had been successfully concluded in 2004 -- five years prior to Rogers' trial. Rogers apparently contends that *Caleffe* stands for the proposition that an attorney is forever barred from appearing before a trial court if the attorney managed or actively participated in the trial court's campaign. It

does not and Rogers has provided no other legal authority for his contention.

Rogers cites *Diimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966) as support for his argument that “[d]ue process is violated whenever a objectively reasonable person would have doubts about the impartiality of the judge and the judge fails to recuse himself.” (Brief of Appellant, p. 21-23) In *Diimmel*, the trial court granted the respondents’ request for a new trial because some years earlier the trial court’s former law partner had written a letter about the issue being litigated. The Washington Supreme Court held that the trial court did not abuse its discretion by granting a new trial. *Diimmel*, 68 Wash.2d at 699. It is important to note, however, that the *Diimmel* Court did not hold that it would have been an abuse of discretion for the trial court to have denied the recusal request. The holding was limited to whether granting the request was an abuse of discretion. “Significantly, the [*Diimmel*] opinion does not hold that it would have been an abuse of discretion *not* to grant the motion, and thus the case does not support [the appellant’s] contentions.” *Carlson*, 66 Wash.2d at 909.

Rogers attempts to distinguish *State v. Carlson*, 66 Wash.2d 909, 833 P.2d 463 (1992), suggesting that appellate judges are subject to less stringent disqualification rules than are trial courts. Although the *Carlson* Court discussed the fact that the role of an appellate judge is vastly different than the role of a trial judge, its decision was based, not on that fact, but on the defendant's failure to raise the issue in a timely manner and its conclusion that "a reasonably prudent and disinterested person" would not have concerns as to the fairness of the appellate court's decision. *Id.* at 923. Notably, as in the *Caleffe* case, *Carlson* involved a lawyer's participation in the judge's election campaign ***while the matter was pending***. Any discussion in the *Carlson* opinion about whether the outcome might be different if the lawyer were directly trying the case presupposes the concurrent nature of the representation and the campaign participation. As indicated earlier, Tatham's counsel managed the trial court's election campaign five years before trial.

- E. The trial court did not err by refusing to place the burden on Tatham's counsel to correct Rogers' failure to comply with the Civil Rules of Procedure and local court rules.**

Jefferson County Local Court Rule 5.5(c) states:

Reply to Response Documents. All reply documents to the response documents as provided for in part B of this rule shall be filed **and served** not later than 12:00 noon one court day prior to the date set for argument No additional documents shall be filed, served, **or considered by the court after that date and time.**

CR 5(b)(7) authorizes service on opposing counsel by means other than by mail or personal service only when “consented to in writing by the person served.” Jefferson County Local Court Rule 7.4 requires all parties to provide bench copies of any documents which the parties want to the court to consider. Finally, Jefferson County Local Court Rule 7.5 provides:

If the moving party wishes to continue their matter, they must appear in person on the date and time noted and request such continuance, **or they may wish to strike the motion and renote it for another date and time.**

When Rogers submitted his reply materials to the trial court on June 17, 2010, he made no attempt to comply with any of these rules. He emailed his reply documents to Tatham’s counsel at 1:35 p.m. without ever having requested her written consent to this form of service and he failed to provide the court with bench copies. When Tatham’s counsel moved to strike the pleadings based on Rogers’ non-compliance, Rogers could have simply corrected his own error by requesting a continuance, or striking the hearing and re-noting it for another day. Rogers now argues that the trial court’s

failure to place the burden on Tatham's counsel to correct what he characterizes as his "technical noncompliance" with court rules is "further evidence of the trial court's bias." (Brief of Appellant, p. 47)

As the trial court noted in its Memorandum Opinion, [t]he duty to correct his own error was on Mr. Rogers, not Dr. Tatham." (CP 115, p. 4) Rogers' argument that he was denied a hearing on the merits is "like most of his other arguments, not supported by the record, the law, or the facts." (CP 115, p. 4)

F. Throughout his brief, Rogers characterizes incontrovertible facts as disputed; refers to the hearsay statements of unidentified individuals as fact; and includes facts that are unsupported by the record. In doing so, Rogers has violated RAP 10.3(a)(5) and RPC 8.2(a) and Tatham should be awarded her attorney's fees.

Rogers suggests that there is dispute over whether Tatham's counsel managed the trial court's campaign once or twice. (Brief of Appellant, p. 8 and 12-13) It is uncontroverted that Tatham's counsel managed the trial court's campaign only once, in 2004. Rogers further suggests that there is dispute over whether Tatham's counsel "always sat on the left side of the courtroom right next to the plaque," implying that Tatham's counsel deliberately prevented Rogers from viewing the plaque. (Brief of Appellant, p. 15) As noted by the trial court, the videotaped record of the

proceedings below conclusively establish the falsity of Rogers' assertion. In his Statement of the Case, Rogers reports to this Court that in October 2009 (six months after his trial), Tatham's attorney wrote a letter to a local newspaper stating that she would not be appearing before the court as a public defender. (Brief of Appellant, p. 8-9). Even a cursory review of the exhibit attached to the declaration of Rogers' private investigator would reveal that the letter was written on October 20, 2004, again five years earlier. (CP 92, Ex. H) Rogers steadfastly asserts that "Trooper Kinder got the impression that Bierbaum was acting as Verser's attorney and that he was her 'client.'" (Brief of Appellant, p. 26) There is nothing in Trooper Kinder's report that makes any reference to that effect (CP 92, Ex. C), and in fact the DUI arrest report specifically contradicts Rogers' assertion. (CP 92, Ex. B).

Rogers further reports to this Court that his private investigator "obtained a copy of the [trial court's] arrest report, (Brief of Appellant, p. 6) and that he was "unaware of the facts [she] discovered," until she so informed him. Again, Rogers' own submissions to the trial court demonstrate the patent falsity of this assertion. The District Court records clearly demonstrate that Rogers obtained the DUI arrest records before he hired the private

investigator and the investigator never sought to independently obtain them. (CP 92, Ex. E)

Rogers states that “[Tatham’s counsel] had a record of doing whatever she could to assist the judge, and the judge had a reciprocal record of doing what he could to assist her.” (Brief of Appellant, p. 41) The record, however, provides no support for this statement. Other than posting her law partner’s \$500 bail and managing his judicial election campaign, Tatham’s counsel has no record of doing “whatever she could to assist the judge” nor is there anything in the record to support the statement that the judge had a “reciprocal record.”

Most egregiously, Rogers states that “another litigant said he witnesses (sic) Bierbaum threaten to turn the judge into the bar association unless he did what she wanted him to do.” Not only is this factual assertion patently false, it is supported by nothing in the record except the hearsay upon hearsay upon hearsay statements of unidentified individuals. (Declaration of James E. Lobsenz, CP 100, p. 2).

Finally, Rogers has elected to adorn his pleadings with repeated references to an alleged “intimate/romantic relationship” between Tatham’s counsel and the trial court. (CP 91, p. 3, CP 92,

p. 1-2) In response to an objection by Tatham's counsel, Rogers' counsel demanded a written denial of the unsubstantiated allegations, threatening that "[w]ithout such a letter from [Tatham's counsel], I can only assume that what Mr. Rogers says he had heard is true." (CP 100, Appendix A, p. 3) Rogers' counsel subsequently submitted a declaration which included the hearsay upon hearsay upon hearsay statement of Rogers who reported that his private investigator had told him that two unidentified Port Townsend lawyers had told her that they had personal observations which provide "some circumstantial evidence support for Mr. Rogers' comments." (Declaration of James E. Lobsenz, CP 100, p. 2).

RAP 10.3(a)(5) requires citation to the record or to legal authority. ***Bartel v. Zuckriegel***, 112 Wash.App. 55, 61, 47 P.3d 581 (2002). RPC 8.2(a) provides:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications, integrity, or record of a judge

Rogers' statements regarding an alleged "intimate/romantic relationship" between Tatham's counsel and the trial court, his assertions that Tatham's counsel and the trial court have a

“reciprocal record” of doing whatever they could to assist each other, his characterization of the trial court’s request for reconsideration of an ethics opinion as a “lobbying” effort to benefit Tatham’s counsel, and his reckless inclusion of hearsay upon hearsay upon hearsay statements suggesting that Tatham’s counsel shouted at the trial court and threatened to turn him into the bar association “if he did not do what he wanted” are all violations of both RAP 10(a)(5) and RPC 8.2(a).

Arguably, Rogers’ counsel also violated RPC 8.4(g) by committing a discriminatory act based on sex. There is little question that this appeal was driven by Rogers’ belief that Tatham’s counsel and the trial court had an “intimate/romantic relationship.” Despite months and months of investigation, Rogers’ private investigator uncovered no evidence of the alleged relationship other than the hearsay statements of unidentified individuals who apparently offered “circumstantial evidence” of the alleged relationship. Rogers’ counsel nevertheless demanded a written denial of the unsubstantiated rumors from Tatham’s counsel. Tatham’s counsel refused, stating “I honestly don’t think that the day has come when women attorneys who prevail at trial have to

declare in writing that they have not had sexual relations with a judge to avoid a due process claim.”

The *Bartel* Court labeled far less egregious comments about the trial court as “attorney misconduct,” found that they violated RAP 10.3(a)(5) and RPC 8.2(a), and condemned them as “both unwarranted and regrettable.” *Bartel*, 112 Wash.App. at 61. Tatham is requesting that this Court do the same and award her the attorney’s fees she incurred in this appeal.

V. CONCLUSION

This Court should affirm the trial court’s denial of Rogers’ motion to vacate, affirm the trial court’s denial of Roger’s motion for recusal, and award Tatham her attorney’s fees on appeal.

Respectfully submitted this 2nd day of May, 2011.



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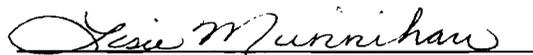
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 2, 2011, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Port Townsend, Washington this 2nd day of May, 2011.



Lisa Minnihan