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**No. 36545-0**

**IN THE COURT OF APPEALS**
**DIVISION III**
**OF THE STATE OF WASHINGTON**

**Chelan County Superior Court Cause No.17-2-00943-6**

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BRITTANY FULLER,

Plaintiff/Respondent

v.

EDWARD HART

Defendant/Appellant

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# RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

I. RESTATEMENT OF THE ISSUES ..... 1

1. Did the Superior Court error in denying Appellant's Motion to Set Aside the Default Order? ..... 1

2. Did the Superior Court error in striking Appellant's summary judgment and various other pleadings filed October 24, 2018? ..... 1

II. STATEMENT OF THE CASE ..... 1

A. Original Complaint for Quiet Title. ..... 1

B. Amended Complaint for Quiet Title. ..... 3

C. Motion for Order of Default. ..... 4

D. Motion to Set Aside Default Order and Motion to Strike. ..... 5

E. Notice of Appeal. ..... 6

III. ARGUMENT ..... 7

A. The Superior Court Did Not Error in Denying Appellant's Motion to Set Aside Default Order Because Appellant Failed to Show Good Cause. ..... 7

1. The Standard of Review on a Motion to Set Aside a Default Order is Abuse of Discretion. ..... 7

2. CR 55(c) Requires Good Cause to Set Aside a Default Order. . 8

B. The Superior Court Did Not Error in Striking Appellant's Summary Judgment Pleadings Because Appellant's Pleadings Did Not Comply with CR 5 and CR 12(f). ..... 11

C. The Superior Court Did Not Improperly Fail to Apply the Rule of Lenity in This Case Because the Rule of Lenity is Only Applicable in Criminal Cases. ..... 14

D. Appellant Has No Standing to Argue Nathan Hart Was Not Properly Served with the Amended Summons and Complaint..... 15

E. Any Arguments Made by Appellant That Are Not Supported by Legal Authority and That Were Not Raised at the Superior Court Level Should Be Disregarded. ..... 17

IV. CONCLUSION..... 18

TABLE OF AUTHORITIES

**CASES**

*Brooks v. University City, Inc.*
154 Wn. App 474, 225 P.3d 489 (Div. 3 2010) . . . . . 7

*Brownfield v. City of Yakima*
178 Wn. App. 850, 316 P.3d 520 (Div. 2 2014) . . . . . .17

*In re Connick*
144 Wn.2d 442, 28 P.3d 729 (2001) . . . . . .15

*In re Estate of Marks*
91 Wn. App. 325, 957 P.2d 235 (Div. 3 1998) . . . . . 15

*In re the Estate of Stevens*
94 Wn. App. 20, 971 P.2d 58 (Div. 2 1999) . . . . . 7, 8, 11

*King County Fire Prot. Dist. No. 16 v. Housing Auth.*
123 Wn.2d 819, 872 P.2d 516 (1994) . . . . . 12

*Lindgren v. Lindgren*
58 Wn. App. 588, 794 P.2d 526 (Div. 1 1990) . . . 8, 11, 12

*Sheets v. Benevolent and Protective Order of Keglers*
34 Wn.2d 851, 210 P.2d 690 (1949) . . . . . 16

*Smith v. Shannon*
100 Wn.2d 26, 666 P.2d 351 (1983) . . . . . 18

*State v. Van Woerden*
93 Wn. App. 110, 116, 967 P.2d 14 (Div. 2 1998) . . . . . 15

*Washington State Bar Ass'n v. Great Western Union Federal Sav. And Loan Ass'n*
91 Wn.2d 48, 586 P.2d 870 (1978) . . . . . 17

## RULES AND STATUTES

Chelan County Superior Court LR 7 . . . . . 10

CR 5 . . . . . 6, 11, 12, 14

CR 12(f) . . . . . 11, 12

CR 15 . . . . . 4, 10

CR 55(c) . . . . . 6, 8

CR 56 . . . . . 11

GR 24 . . . . . .16

RAP 2.5 . . . . . 14, 18

RAP 3.1. . . . . 16

RAP 10.3(a)(5) . . . . . 13, 14

RAP 10.3(a)(6) . . . . . 17

RCW 2.48.170 . . . . . 16

Rule of Lenity . . . . . .14, 15, 18

## I. RESTATEMENT OF THE ISSUES

Appellant's Brief in Support presents several issues for review on appeal. However, Respondent/Plaintiff contends that only the following issues are relevant and appealable:

1. Did the Superior Court error in denying Appellant's Motion to Set Aside the Default Order?

2. Did the Superior Court error in striking Appellant's summary judgment and various other pleadings filed October 24, 2018?

*Please note that neither Appellant nor Respondent/Plaintiff include an issue regarding the Default Judgment entered against Appellant by the Superior Court on October 4, 2018. This is because Appellant did not move to set aside, vacate, or appeal the Default Judgment. Respondent's/ Plaintiff's brief does not further discuss or address this issue, but if the Court would like briefing on the Default Judgment issue, Respondent/Plaintiff will provide such briefing and reserves the right to supplement her brief.

## II. STATEMENT OF THE CASE

### A. Original Complaint for Quiet Title.

On November 16, 2017 Respondent/Plaintiff filed the original Complaint for Quiet Title in this action. CP 1-10. This Complaint named only Edward Hart as a Defendant (hereinafter "Appellant"). *Id.* The Complaint alleged that Brittany Fuller (hereinafter "Respondent/Plaintiff") owned in fee simple property located at 204 Pear Lane in Wenatchee, Washington, and that Appellant was improperly withholding title of said

property from her. *Id.* The allegations were based on the fact that Respondent/Plaintiff was gifted the property under the Washington Uniform Transfer to Minors Act by her father, and Appellant was designated the custodian of the property on the deed transferring said property until such time as Respondent/Plaintiff was no longer a minor. *Id.* When Respondent/Plaintiff reached the age of maturity, Appellant refused to transfer title of the property to her, forcing Respondent/Plaintiff to bring the Quiet Title action. *Id.*

On December 27, 2017, Appellant filed an answer to the Complaint for Quiet Title through his then-attorney, Julie Anderson, which alleged Respondent/Plaintiff and Appellant entered into a contract whereby they agreed Appellant could keep title to the property until the back taxes on the property were paid off. CP 11-12. Respondent/Plaintiff denied any such contract was entered into and no evidence of the alleged contract was ever produced by Appellant. On August 6, 2018, Appellant, pro-se and without leave of the Superior Court, filed an additional answer to the original Complaint which alleged that Appellant entered into an agreement with Respondent's/Plaintiff's father (and Appellant's brother) that Appellant would be the "custodian" of Respondent/Plaintiff and allow her to use the property until she turned twenty-one rather than give her the property. CP

33-34. No evidence of such an agreement was ever produced.

On August 2, 2018, Respondent/Plaintiff filed a Motion for Summary Judgment based pleadings, discovery, and other information received up until that date. CP 90-112, CP 24-32. A hearing on the Motion for Summary Judgment was set for September 5, 2018. CP 113-114.

However, after learning that Appellant had attempted to transfer the property in question in the case to his son, Nathan Hart, via a quit claim deed, Respondent/Plaintiff filed a Motion for Leave to Amend Complaint on August 16, 2018. CP 36-51, CP 115-119. Respondent/Plaintiff requested leave to amend the Complaint to add Appellant's son as a defendant and some additional causes of action. *Id.* The Superior Court granted this motion on August 28, 2018. CP 126-128. After Respondent's/Plaintiff's Motion for Leave to Amend Complaint was granted, the hearing on Plaintiff's Motion for Summary Judgment was stricken since the motion did not include the new defendant.

**B. Amended Complaint for Quiet Title.**

On August 31, 2018, Respondent/Plaintiff filed an Amended Summons and Complaint for Quiet Title. CP 129-130. The Amended Complaint for Quiet Title added an additional Defendant, Nathan Hart, and some additional causes of action. *Id.* Nathan Hart was personally served

with the Amended Summons and Amended Complaint for Quiet Title on August 30, 2018. An affidavit of service certifying such service was filed September 11, 2018. CP 69. The Amended Summons informed Nathan Hart of his obligation to respond to the Amended Complaint for Quiet Title within twenty days. CP 129-130.

Appellant was served with the Amended Complaint for Quiet Title via mail on September 4, 2018. An amended certificate of service certifying such service was filed on September 25, 2018. CP 162-163. In addition to the Amended Complaint for Quiet Title, Respondent's/Plaintiff's attorney also sent a letter to Appellant informing him of his obligation under CR 15 to respond to the Amended Compliant for Quiet Title within ten days and his right to obtain legal advice from an attorney if he found that to be necessary. CP 212.

**C. Motion for Order of Default.**

Since neither Nathan Hart nor Appellant responded to the Amended Complaint for Quiet Title, Respondent/Plaintiff filed a Motion for Order of Default against each Nathan Hart and Appellant and a proposed Default Judgment on September 24, 2018. CP 146-159. Respondent/Plaintiff served Appellant via mail with the Motions for Order of Default, proposed Default Judgment, and accompanying documents on September 24, 2018. An

amended certificate of service certifying such service was filed on September 25, 2018. CP 164-165.

On October 4, 2018, the Superior Court granted Respondent's/Plaintiff's Motions for Order of Default and Default Judgment against Nathan Hart and Appellant because each had failed to respond to the Amended Complaint. CP 166-174. Appellant filed an Objection to Respondent's/Plaintiff's Motion for Default on October 4, 2018, which was the date of the hearing on the Motion for Default, however, this filing was unknown to and not served on Respondent's/Plaintiff's attorney. CP 70-79. The Superior Court found evidence in the record that both Nathan Hart and Appellant had been properly served with the Amended Complaint, and that each had failed to answer said Amended Complaint after more than sufficient time had lapsed. CP 174.

**D. Motion to Set Aside Default Order and Motion to Strike.**

On October 24, 2018, Appellant filed a Motion to Set Aside Default, Motion for Summary Judgment, and various other pleadings. CP 80-89. The Motion to Set Aside Default was set for a hearing date on December 17, 2018 by the Superior Court Clerk's office, as Appellant had failed to file a Note for Motion on any of his motions filed October 24, 2018. CP 175-176. Based on the fact that Appellant never served his October 24, 2018

pleadings upon Respondent/Plaintiff pursuant to CR 5 and some of the pleadings were immaterial, Respondent/Plaintiff filed a Motion to Strike those pleadings and noted it for a hearing on December 17, 2018. CP 177-185.

On December 17, 2018 the Superior Court heard Respondent's/Plaintiff's Motion to Strike Appellant's October 24, 2018 Pleadings and Appellant's Motion to Set Aside Default. The Superior Court granted Respondent's/Plaintiff's Motion to Strike in part, striking Appellant's Motion for Summary Judgment and other pleadings because they were not properly served and because there was already a judgment in the case, so motions such as one for summary judgment were not properly before the court. CP 217-218; Transcript of Proceedings at 15, 37-39 (December 17, 2018). In the interest of judicial economy, since the parties were prepared to argue the Motion to Set Aside the Default Order, the Superior Court considered Appellant's Motion, but ultimately denied it because he failed to show good cause under CR 55(c) for why the default order should be set aside. CP 217-218; Transcript of Proceedings at 29 (December 17, 2018).

**E. Notice of Appeal.**

Appellant filed a Notice of Appel on January 9, 2019, appealing the

Superior Court's decision denying Appellant's Motion to Set Aside Default. CP 219. Appellant's son, Nathan Hart, did not sign the January 9, 2019 Notice of Appeal or otherwise file an appeal of any Superior Court decision to which he was a party.

## III. ARGUMENT

Although Respondent/Plaintiff believes the only issues on appeal are those identified in her Restatement of Issues, this Response Brief addresses all issues presented for review identified by Appellant's Brief in Support.

### A. The Superior Court Did Not Error in Denying Appellant's Motion to Set Aside Default Order Because Appellant Failed to Show Good Cause.

#### *1. The Standard of Review on a Motion to Set Aside a Default Order is Abuse of Discretion.*

Although not specifically addressed in Appellant's Brief, Appellant has appealed the Superior Court's Order Denying his Motion to Set Aside Default Order entered December 17, 2018. The standard of review for a decision to set aside or vacate a default order is abuse of discretion. See *Brooks v. University City, Inc*, 154 Wn. App 474, 478, 225 P.3d 489, 491 (Div. 3 2010). The court in *In re Estate of Stevens* clearly articulated the standard of review:

> The decision on a motion to vacate an order of default or a default judgment is within the sound discretion of the trial court. *Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wash.App. 266, 271, 818 P.2d 618 (1991); *Lindgren v. Lindgren*, 58 Wash.App. 588, 595, 794 P.2d 526 (1990), review denied, 116 Wash.2d 1009, 805 P.2d 813 (1991). That decision will not be reversed on appeal unless it plainly appears that the trial court abused its discretion. *Lindgren*, 58 Wash.App. at 595, 794 P.2d 526. Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. *Lindgren*, 58 Wash.App. at 595, 794 P.2d 526. "[T]he discretionary judgment of a trial court of whether to vacate [an order] is a decision upon which reasonable minds can sometimes differ." *Lindgren*, 58 Wash.App. at 595, 794 P.2d 526. Thus, if the decision "is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld." *Lindgren*, 58 Wash.App. at 595, 794 P.2d 526.
>
> 94 Wn. App. 20, 29-30, 971 P.2d 58, 62-63 (Div. 2 1999).

*2. CR 55(c) Requires Good Cause to Set Aside a Default Order.*

Appellant filed his Motion to Set Aside Default pursuant to CR 55(c), and as such needed to show good cause as to why the default order should be set aside. See CR 55(c). Washington state case law generally translates "good cause" as requiring a demonstration of excusable neglect and due diligence. See *Stevens*, 94 Wn. App. at 30. Thus, a motion to vacate an order of default must be supported by evidence demonstrating the existence of excusable neglect or reasonable explanation for a defendant's failure to respond in a timely manner to the summons and complaint.

In his Motion to Set Aside Default, Appellant did not argue any good cause for why the default order should be set aside. Appellant simply argued that he was not subject to a default order because he responded to the original Complaint for Quiet Title and to Respondent's/Plaintiff's Motion for Order of Default. CP 82-84. However, those arguments were flawed and ultimately not found to be persuasive by the Superior Court.

First, Appellant was defaulted for failure to respond to the Amended Complaint for Quiet Title, not the original Complaint for Quiet Title. Appellant did in fact file an answer to the original Complaint on December 27, 2017 and August 6, 2018, without leave of court. CP 11-12, CP 33-34. However, no answer was filed to the Amended Complaint for Quiet Title after it was filed on August 31, 2018.

Second, Appellant argued he responded to Respondent's/Plaintiff's Motion for Order of Default in a timely manner on August 28, 2018 and September 21, 2018. CP 82-84. However, Respondent/Plaintiff did not even file her Motions for Order of Default until September 24, 2018, and as such, Appellant could not have timely responded to those motions on August 28, 2018 or September 21, 2018. CP 146-161. Appellant did file a response to the Motion for Order of Default on October 4, 2018, the day of the hearing, however, that response was not timely, because Chelan County Superior

Court LR 7 requires responses to motions to be filed and served no later than two days before the hearing. As such, Appellant failed to show that he should not have been subject to the Superior Court order of default.

Additionally, in her Response to Appellant's Motion to Set Aside Default, Respondent/Plaintiff argued that Appellant failed to demonstrate that his failure to respond to the Amended Complaint or that his untimely response to the Motion for Order of Default were due to excusable neglect, reasonable explanation, or other good cause. CP 195-204. Moreover, Respondent/Plaintiff argued that Appellant's failure to respond and untimely response was a consequence of his own inattention and willful disregard of the process of the Superior Court because when Appellant was served with the Amended Complaint, Respondent's/Plaintiff's attorney sent a letter informing Appellant of his obligation under CR 15, to answer the Amended Complaint. CP 212. Appellant willfully disregarded that information and did not answer the Amended Complaint.

Based on Appellant's Motion to Set Aside Default, Respondent's/Plaintiff's Response to the Motion, and oral argument held on December 17, 2018, the Superior Court ruled that Appellant failed to show good cause to set aside the default order and denied his Motion stating:

> You, I mean you just responded...saying I've already answered the initial complaint, but that's not the issue....the issue, sir, is that there still isn't an explanation as to why you have not answered -- why you didn't respond timely to the motion for default and why you didn't answer the amended complaint and I -- the Court cannot vacate the default, the order of default, without that explanation and it has to be good cause shown to vacate that. And, the record in front of the Court does not support vacating that order of default.
>
> Transcript of Proceedings at 29 (December 17, 2018).

The Superior Court did not abuse its discretion in denying Appellant's Motion to set Aside Default, because the decision was based upon tenable grounds and was within the bounds of reasonableness; as such, it must be upheld. See *Lindgren v. Lindgren*, 58 Wn.App. 588, 595, 794 P.2d 526, 531 (1990); *Stevens*, 94 Wn. App. at 29-30.

**B. The Superior Court Did Not Error in Striking Appellant's Summary Judgment Pleadings Because Appellant's Pleadings Did Not Comply with CR 5 and CR 12(f).**

Appellant's Brief claims that the Superior Court violated CR 56 by striking Appellant's summary judgment pleadings and refusing to hold a summary judgment hearing. Appellant's Brief in Support at 5. Respondent/Plaintiff filed a Motion to Strike Appellant's Pleadings filed on October 24, 2018, which included summary judgment pleadings, because such pleadings were not properly served on Respondent/Plaintiff and because they were immaterial and impertinent pursuant to CR 12(f). CP

177-188. The standard of review for a decision on a motion to strike is abuse of discretion. *King County Fire Prot. Dist. No. 16 v. Housing Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516, 519 (1994). As discussed above, a court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Lindgren*, 58 Wn. App. at 595.

The Superior Court reviewed Respondent's/Plaintiff's Motion to Strike and considered oral argument from the parties, including Appellant, on December 17, 2018 before entering an order. CP 217-218. The Superior Court found that the pleadings, including the summary judgment pleadings, were not properly served on the Respondent/Plaintiff pursuant to CR 5, nor were they properly noted before the court as motions to be considered that day. Transcript of Proceedings at 15, 37-39. (December 17, 2018). Moreover, the Superior Court found that a final default judgment had already been entered in the matter; as such, any motion for summary judgment would have been moot and immaterial. *Id.* The Superior Court struck Appellant's summary judgment pleadings pursuant to CR 5 and CR 12(f). *Id.* Its decision was not based on untenable grounds or reasons, and as such it did not abuse it discretion and error in striking the pleadings. See *Lindgren*, 58 Wn. App. at 595.

Appellant takes further issue with the striking of a summary

judgment hearing set initially by Respondent/Plaintiff for September 5, 2018. Appellant's Brief in Support at 5. This summary judgment hearing was stricken because Respondent/Plaintiff was granted leave to amend the original Complaint to add an additional defendant and additional causes of action after Appellant attempted to transfer the property at issue in the action to his son via a quit claim deed. Respondent/Plaintiff did not think it was prudent to move forward with the summary judgment hearing that did not address the new defendant or causes of action, so that hearing was stricken after the leave to amend the Complaint was granted. Appellant has cited to no law or rule which would prevent Respondent/Plaintiff from striking her own summary judgment hearing.

Additionally, Appellant's Brief claims that all of Appellant's filings have been "ignored by the clerks [sic] office and were not placed before the trial court in a timely manner…." Appellant's Brief in Support at 5. However, Appellant cites to no factual support in the record, as required by RAP 10.3(a)(5), for this assertion. To the contrary, the Superior Court before making its orders in this matter always considered any pleadings timely filed by Appellant, aside from those pleadings properly stricken as discussed above. For example, in Respondent's/Plaintiff's Motion for Leave to Amend Complaint, the Superior Court considered Appellant's

Motion in Request for Settlement Conference and Objection to Amended Complaint, even though Appellant did not appear at the hearing, before granting Respondent's/Plaintiff's Motion for Leave to Amend Complaint. CP 126-128, CP 52-55. Moreover, during the hearing at issue on the Motion to Set Aside the Default Order, the Superior Court considered Appellant's Motion, even though it was not properly served under CR 5, in interest of judicial economy. CP 217-218; Transcript of Proceedings at 18-19 (December 17, 2018). Appellant's assertion that the Clerk and Superior Court ignored his filings is unfounded and contrary to the facts in the record.

### C. The Superior Court Did Not Improperly Fail to Apply the Rule of Lenity in This Case Because the Rule of Lenity is Only Applicable in Criminal Cases.

Appellant's Brief contends that Appellant requested, and the Superior Court should have applied the Rule of Lenity to Appellant in this action. Appellant's Brief in Support at 5. However, Appellant cites to no factual support within the record, as required by RAP 10.3(a)(5), where he motioned or requested that the Superior Court apply the Rule of Lenity. Pursuant to RAP 2.5, this Court may refuse to review any claim of error which was not raised at the Superior Court level.

Moreover, Appellant cites to no legal authority which supports that the Rule of Lenity should be applied in this matter. The Rule of Lenity is

rooted in criminal law and does not apply in the context of civil cases. The Rule of Lenity is a rule of statutory construction. It is used to resolve ambiguities in criminal statutes in a defendant's favor. See *State v. Van Woerden*, 93 Wn. App. 110, 116, 967 P.2d 14, 18 (Div. 2 1998), *review denied*, 137 Wn.2d 1039, 980 P.2d 1286 (1999). It is not, as argued by Appellant, used as means to hold a pro-se litigant in a civil case to a lesser standard than an attorney with training in "the vocation of judicial procedure." Appellant's Brief in Support at 5. In fact, a litigant appearing pro-se is bound by the same rules of conduct and procedure as an attorney. See e.g., *In re Connick*, 144 Wn.2d 442, 455, 28 P.3d 729, 735 (2001); *In re Estate of Marks*, 91 Wn. App. 325, 335, 957 P.2d 235, 241 (Div. 3 1998).

**D. Appellant Has No Standing to Argue Nathan Hart Was Not Properly Served with the Amended Summons and Complaint.**

Appellant's Brief argues that his son, Nathan Hart, has not been properly served with pleadings in this matter. Appellant's Brief in Support at 5. However, such an argument is irrelevant because Nathan Hart lacks standing to appeal this matter and Appellant lacks the standing to make such an argument on Nathan Hart's behalf.

First, Nathan Hart is not a party to this appeal because he did not sign or file a Notice of Appeal of any Superior Court decision within the

required time period. The Notice of Appeal in this matter was only signed by Appellant, Edward Hart. CP 219.

Additionally, Nathan Hart cannot be a party to this appeal because this appeal relates to a decision made on December 17, 2018, denying Appellant's Motion to Set Aside Default. Nathan Hart was not a party to that Motion. RAP 3.1 states that only an aggrieved party may seek review of a decision. Moreover, not only must the person be aggrieved, but also, generally, the person must have been a party to the action below. See *Sheets v. Benevolent and Protective Order of Keglers*, 34 Wn.2d 851, 856, 210 P.2d 690, 692 (1949). As such, since Nathan Hart was not a party to Appellant's Motion to Set Aside Default, that decision cannot be appealed by Nathan Hart.

Second, Appellant does not have the standing or authority to make legal arguments on Nathan Hart's behalf. Appellant has repeatedly attempted to claim that all his pleadings in this matter were filed on behalf of both himself and Nathan Hart. However, only an active member of the bar may practice law, which includes preparing legal instruments, performing services in a court of law, and providing legal counsel. See RCW 2.48.170; GR 24. While there is an exception to this general rule which allows a layperson to represent themselves in court without an

attorney, this exception only applies if the layperson is acting solely on his or her own behalf. See *Washington State Bar Ass'n v. Great Western Union Federal Sav. and Loan Ass'n*, 91 Wn.2d 48, 57, 586 P.2d 870, 876 (1978). Thus, Appellant can only represent himself and his own interests. He cannot file motions or briefs on behalf of Nathan Hart or otherwise represent Nathan Hart in this appeal because doing so amounts to the unauthorized practice of law. As such, any motion, brief, or Notice of Appeal signed and filed by Appellant can have no effect on Nathan Hart.

**E. Any Arguments Made by Appellant That Are Not Supported by Legal Authority and That Were Not Raised at the Superior Court Level Should Be Disregarded.**

RAP 10.3(a)(6) provides that the brief of an appellant should include an argument section consisting of, "[t]he argument in support of the issues presented for review, together with citations to legal authority and referenced to relevant parts of the record." Moreover, based on RAP 10.3(a)(6), this Court, Division III of the Court of Appeals, has ruled that it does not consider conclusory arguments that are unsupported by citation to authority. See *Brownfield v. City of Yakima*, 178 Wn.App. 850, 875-876 316 P.3d 520, 534 (Div. 3 2014). As such, to the extent that Appellant's Brief makes arguments that are not properly supported by citations to legal authority, the Court should disregard those arguments.

Additionally, Appellant's Brief raises several issues for review that were not addressed or raised below by Appellant at the Superior Court level. For example, Appellant has provided no citations to the record where he raised the issue of requesting the Superior Court apply the Rule of Lenity, nor has Appellant provided citations to record where he has moved for or requested a change of venue. RAP 2.5 provides: "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." The purpose of this rule is to promote judicial efficiency by allowing the lower court the opportunity first to consider all issues and arguments and correct any errors, thereby avoiding unnecessary appeals and retrials. See *Smith v. Shannon*, 100 Wn. 2d 26, 37, 666 P.2d 351, 358 (1983). As such, any assignments of error or request for relief regarding issues not previously brought before the Superior Court should be disregarded by this Court.

## IV. CONCLUSION

Based on the foregoing, Respondent/Plaintiff respectfully requests that this Court affirm the Superior Court's order denying Appellant's Motion to Set Aside Default in all respects, and deny Appellant's appeal,

including his requests that the proceedings be remanded for a summary judgment hearing and that the venue be changed.

Respectfully submitted this 13th day of March, 2020.

Krystal N. Frost, WSBA No. 51496
Attorney for Plaintiff/Respondent

## CERTIFICATE OF SERVICE

I, Megan Heimbigner, hereby declare as follows:

1. I am a citizen of the United States and of the State of Washington, living and residing in Douglas County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness.

2. On the 13th day of March, 2020, I mailed a copy of Respondent's Brief to Edward L. Hart, postage prepaid at:

Edward L. Hart #399600
Stafford Creek Corrections
191 Constantine Way GA-05L
Aberdeen WA 98520

I declare under the penalty of perjury under the laws of the State of Washington the forgoing is true and correct.

Dated this 13th day of March, 2020 at Wenatchee, Washington.

Megan Heimbigner

## DAVIS ARNEIL LAW FIRM, LLP

## March 13, 2020 - 9:40 AM

## Transmittal Information

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