

Court of Appeals No. 64101-8-I

Court of Appeals, Division I
of the State of Washington

In Re:

James Row, Respondent

and

Tye Barringer, Jennifer Barringer, and all other tenants,
Appellants

BRIEF OF APPELLANTS

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Assignments of Error

1. The trial court erred in finding that a “Judgment . . . was entered in this unlawful detainer action on January 14, 2008” for a monetary judgment, costs, and attorney’s fees. CP 6, 51.
2. That the trial court erred in determining that a Reply to Plaintiff’s Response constitutes a motion to set aside process server fees. CP 51.
3. The trial court erred in finding that “the plaintiff’s counsel agreed to reduce the judgment as a result, but defendant’s counsel failed to follow through with providing a proper agreed order to plaintiff’s counsel to resolve the matter.” CP 52.

4. The trial court erred in finding that the defendant's counsel provided no facts to support the claim that judgment in this matter was based upon fraud or misrepresentation. CP 52.
5. That the trial court erred in finding that the Defendants "put forth a bare allegation of fraud." CP 52.
6. That the trial court erred in finding that defense counsel "repeatedly referred to an "error" and/or "mistake" in oral argument. CP 52.
7. The trial court erred in concluding that the judgment entered in this matter was entered in error; and that the "prior order was based upon error, not fraud, and was clearly time barred by CR 60 (b)(1)." CP 52.
8. The trial court erred in finding that alleged fraud in the motion to set aside process server fees and attorney's fees was unsupported by any facts. CP 52.
9. The trial court erred in finding that the Barringers' counsel "repeatedly referred to "errors" in the January, 2008, order and did not argue fraud." CP 7.
10. The trial court erred in determining that the "Defendants alleged no facts unknown to the parties in May and June of 2008. CP 7.

11. The trial court erred in finding that “Plaintiff was required to respond to this motion and the time spent by plaintiff’s counsel was reasonable.” CP 7.
12. The trial court erred in concluding that the motion to set aside the process server fees and attorney’s fees judgment to be “frivolous.” CP 7.

A. Summary of Argument

This dispute involves an unlawful detainer (eviction) action under RCW 59.18. It illustrates the difficulties that tenants have before Snohomish County Court Commissioners when seeking to have the Courts adhere to the applicable civil rules and statutes.

Here, legal uncertainty was created when the Landlord brought a motion for entry of default, the court ordered a default judgment based upon that motion, and the clerk entered a monetary judgment in the execution docket as shown in the judgment summary that did not properly reflect the relief granted in the actual court order.

In this confused state, the judgment summary reflects costs for an unregistered process server; and costs, attorney's fees, and a monetary judgment not ordered by the Court.

Later, after denying the Tenant's motion to set aside portions of the judgment under CR 60, the Court Commissioner awarded the Landlord's attorney's fees for time spent on issues that misrepresented and wrongly analyzed CR 60 and CR 5.

The Barringers request that this Court's opinion be published. This case illustrates the difficulties that tenants have in receiving adequate judicial review. Both parties are represented by

counsel with extensive landlord-tenant experience. Landlord's counsel practices "primarily in the field of landlord-tenant law" and notes that "I am recognized in the legal community as one of the experts on landlord tenant law," having written the Washington Lawyers Practice Manual chapter on residential landlord-tenant law. CP 38. An attorney in the Landlord's other law firm wrote *Attorney Fees in Washington*. The Tenants' counsel also has extensive appellate experience on landlord-tenant matters.

B. Statement of the Case – Factual Background and Trial Court Proceedings.

On January 4, 2009, unregistered process server Angelo Ortiz served the Barringers a Summons and Complaint.¹ CP 184, 190-94.

A copy of the actual summons was not attached to either the return of service on Tye or Jennifer as required under CR 4(g)(2). CP 184-85.

The response deadline on the Summons was 5:00 p.m. on January 12, 2009, according to Tye. CP 144-45. Tye later

¹ For clarity, the term "Barringers" is used to refer to the Barringers collectively; Tye is used to refer solely to actions related to Tye Barringer; and, Jennifer is used to refer solely to actions related to Jennifer Barringer.

discovered that the Summons filed with the Court was different than the summons served upon him. CP 145.

A motion for entry of default was brought on January 14, 2010. Appendix 1. CP 186-89. A Judgment and Order of Default was ordered on January 14, 2010 by Court Commissioner Jacalyn D. Brudvik. Appendix 2. CP 181-83.

On March 11, 2009, Tye brought a motion to set aside the default judgment and he filed three supporting declarations. CP 142-43, CP 144-155, CP 156-57, CP 158-80. This motion was based upon: (1) fraud by Row filing a summons with a different response deadline than the summons actually served on the Barringers (CP 160); (2) the summons being modified by a non-attorney (CP 162); (3) the default judgment being obtained before the response deadline (CP 163); (4) the default was obtained without proper proof of service (CP 163); and, (5) a Law Clerk presented the default order in violation of the Snohomish County Local Rules (SCLR) and the Admission to Practice Rules (APR) (CP 165).

On May 8, 2008, Commissioner Brudvik denied Tye's motion. CP 115, 116.

On June 13, 2008, Barringer's counsel requested that Row vacate the costs judgment for a unregistered process server. CP 70. This request was agreed to by Row, if Barringer prepared the appropriate paperwork. CP 71.

On July 5, 2008, Barringer's counsel prepared a proposed order and judgment to amend the January 14, 2008 judgment, as previously requested by Loeffler, only changing the costs in the judgment summary from \$314.00 to \$144.00. CP 74, 181. This change reflected a sheriff refund of \$121 and the wrongful \$49 process server cost (\$121 plus \$49 equals \$170, which was subtracted from original costs judgment of \$314, resulting in remaining costs of \$144). CP 72-76. No other changes were made to this proposed order that amended the January 14, 2008 order.

On July 8, 2008, Row's counsel changed his demand, and requested different paperwork. CP 82. At this point, the Barringer's costs to obtain a correct judgment were becoming greater than the change in the costs judgment.² After this ever moving "target" for settlement, no further discussions occurred.

² The Court is asked to take judicial notice that there is a cost to Barringer for preparing paperwork and going to court, especially given the lengthy "give and take" between counsel.

On July 6, 2009, the Barringers brought a motion “to set aside the process server costs, and attorney fees, entered in the judgment summary in this matter on January 14, 2008.” CP 113, lines 32-35.

On July 13, 2009, Barringer served Row the motion to set aside the judgment. CP 54. The hearing date was set for eight (8) calendar days later, or six (6) court days later, on July 21, 2009 in compliance with SCLR 7(b)(2)(B).^{3 4} Appendix 5. CP 102.

As of noon Friday July 17, 2009,⁵ Row did not respond to the motion. CP 36. July 17, 2009 is two court days prior to the July 21, 2009 hearing.⁶ As of 9:00 a.m. on Monday, July 20, 2009, Row did not respond to the motion. CP 36. On July 20, 2009, one day before the hearing, at 10:20 a.m., Row’s responsive documents were served upon the Barringers. CP 55.

After the hearing on July 21, 2009, Commissioner Gaer denied the motion to reduce the attorneys fees, costs, or to

³ It is requested that this Court take judicial notice that July 21 is eight days after July 13, and that July 21, 2009 was six court days after July 13, 2009.

⁴ A copy of former SCLR 7(b)(2) (A) and (B) is attached because the local rule was revised and the numbering scheme has changed. Appendix 5.

⁵ The deadline for Row’s response under SCLR 7(b)(2)(N).

⁶ It is requested that this Court take judicial notice that Friday, July 17, 2009 was two court days prior to Tuesday, July 21, 2009.

determine that there never was an order of judgment in this matter. CP 101. Commissioner Gaer concluded that CR 60(b)(1) requires that motions regarding errors in judgments must be brought within one year under CR 60(b)(1). CP 52.

On August 5, 2009, Row brought a motion for attorney's fees and terms. CP 42-50. Row also sought a finding that the motion to set aside under CR 60 was frivolous, and for specific sanctions that will be detailed later in this brief. CP 48.

On September 14, 2009, Commissioner Gaer found that Row's motion was frivolous. RP 32, lines 5-6. Commissioner Gaer granted \$1,500.00 in attorney's fees. CP 7.

The July 27, 2009 Order by Commissioner Gaer was timely appealed thirty days later on August 26, 2009. CP 8-13. Commissioner Gaer filed her written order on attorney's fees on September 14, 2009 (CP 6-7), and an amended notice of appeal was filed on October 1, 2009 (CP 1-3).

C. Standard of Review

When the record consists entirely of written material, an appellate court stands in the same position as the trial court and reviews the record de novo. *Housing Auth. v. Pleasant*, 126 Wn.

App. 382, 387, 109 P.3d 422 (2005); *Laffranchi v. Lim*, 146 Wn.App. 376, 190 P.3d 97 (2008).

Issues of statutory interpretation are reviewed de novo. *Hartson P'ship v. Goodwin*, 99 Wn. App. 227, 231, 991 P.2d 1211 (2000). The meaning of a statute is a question of law reviewed de novo. *State v. Ammons*, 136 Wn.2d 453, 456, 963 P.2d 812 (1998).

Findings of fact are reviewed under the substantial evidence rule. A finding of fact will not be overturned if it is supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

A trial court's conclusions of law are reviewed de novo. *City of Seattle v. Megrey*, 93 Wn. App. 391, 393, 968 P.2d 900 (1998).

D. Argument

1. A judgment summary for monetary amounts should not be included absent a specific order for those amounts.

The trial court never ordered entry of a monetary judgment or an award for attorney's fees and costs, thus the judgment summary was improper and the trial court should be directed to amend the judgment summary and direct the clerk to remove all judgment amounts from the execution docket under CR 60(a).

This issue was raised to the court in Barringer's motion that requested that this court "set aside and remove the process server fees and costs, and attorney fees, entered in the judgment summary in this matter on January 14, 2008." CP 113.

The question presented concerns matters of statutory construction and the legal effect of actions taken by the parties. These are questions of law and should be reviewed de novo.

Under RCW 4.64.030(1), the clerk shall enter all judgments in the execution docket, subject to the direction of the court and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action."

Under RCW 4.64.030(2), there shall be a succinct summary on the first page of a judgment of the "amount of the judgment . . . taxable costs and attorney fees, if known at the time of the entry of the judgment . . ."

Under CR 55(a)(1), "[w]hen a party against whom a judgment for affirmative relief is sought has failed to appear, plead . . . a motion for default may be made."

In the present matter, Row set up a "hearing on the motion of Plaintiff . . . for an order of default," apparently under CR 55(a)(1). CP 182, lines 0-2. Then, Row sought relief greater than

requested in the motion for an order of default. Specifically, the relief sought and ordered was as follows:

IT IS HEREBY ORDERED ADJUDGED AND DECREED that the Defendants is adjudged to be in default herein, and that in accord with RCW 59.18.370 et seq., **a Writ of Restitution shall be immediately issued forthwith by the clerk of this Court . . .**

(emphasis in original) CP 182.

But, the judgment summary went beyond the Court Commissioner's order. First, the "clerk shall enter all judgments in the execution docket, subject to the direction of the court . . ." RCW 4.64.030(1). While the clerk must enter all judgment in the execution docket, "[t]he clerk is not liable for an incorrect summary." RCW 4.64.030(3). To analyze whether the judgment summary reflects what happened before the Court, we must look at the direction of the Court as provided in the "Ordered Adjudged and Decreed" portion of the judgment.

Here, the Court merely adjudged the defendants to be in default as requested in the motion, and ordered the clerk of the court to immediately issue a Writ of Restitution. CP 182.⁷ There was no order for attorney's fees. There was no order for an award

⁷ The Court also authorized the Sheriff to break and enter, extended the Writ ten days automatically if necessary, and noted that the Landlord need not post a restitution bond.

of costs. There was no order for a monetary judgment. But, “[t]he clerk is not liable for an incorrect summary.” RCW 4.64.030(3).

Who is responsible? Mr. Row, the party preparing the judgment summary is responsible for an incorrect summary. What was wrong with this summary?

First, a principal judgment amount of \$2,716.50 was entered on line C of the judgment summary without the Court ordering a principal judgment in that amount. CP 181. Second, attorney’s fees of \$400.00 were entered on line E of the judgment summary without the Court ordering that amount of attorney’s fees. CP 181. Third, costs of \$314.00 were entered on line F of the judgment summary without the Court ordering that amount of costs. CP 181.

In other words, the judgment summary reflected monetary judgment amounts that were not ordered by the Court.

Finally, this Court should consider the holding in *Marchel v. Bunger*, 13 Wash. App. 81, 83-84, 533 P.2d 406 (1975) which states that CR 60(a) permits clerical mistakes in a judgment to be corrected at any time, and that a clerical mistake is one involving mere mechanical error rather than a matter of substance, i.e., one which prevents the judgment from embodying the court’s

intentions. This Court should hold that it is a clerical error when a judgment summary is entered on the execution docket that does not reflect the Court's order. Commissioner Brudvik did not intend to grant default relief greater than requested in the motion, to allow a judgment summary more expansive than contained in the Order, and relief (costs judgment for process server costs) which Row was not entitled to under RCW 4.84.030.

In conclusion, while the clerk is not liable for the incorrect judgment summary that reflects amounts not ordered by the court, this Court should remand this matter to the trial court to have the clerk remove from the execution docket the monetary relief that was included in the judgment summary, but which was not actually ordered by the Court Commissioner.

2. When an attorney misrepresents to the trial court an entitlement to process server fees, this misrepresentation should be analyzed under CR 60(b)(4); not as an error or mistake to be analyzed under CR 60(b)(1).

Commissioner Gaer wrongfully determined that Barringer's argument involved error or mistake, and that an "[e]rror in judgments must be brought within one year under CR 60(b)(1)."

The Barringers argued fraud or misrepresentation under CR

60(b)(4); thus, this memorandum now addresses whether the judgment summary entered was an “error” or “mistake.”

Under Commissioner Gaer’s analysis that the judgment was entered in error, and because there was no court order directing judgment for process server costs, the clerk’s error can be corrected under CR 60(a) at any time. The Court Commissioner should not have imposed a time limit for correction of the judgment summary.

There are two types of mistakes or errors under CR 60.

First, there are clerical mistakes under CR 60(a).

Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

Second, under CR 60(b)(1) there are “mistakes . . . in obtaining a judgment or order.”

Clerical errors under CR 60(a)

An asserted error in a judgment is a clerical error if the judgment does not accurately reflect the court’s intent as expressed in the record at trial. *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 324, 917 P2d 100 (1996).

“Corrections under CR 60(a) are not subject to the one-year time limit found in other portions of CR 60.” 4 Karl B. Teglund, *Washington Practice: Rules Practice CR 60*, at 549 (5th ed. 2006). “Clerical mistakes can be corrected at any time.” *Id.*

If the court signs a decree, through misplaced confidence in the attorney who presents it, or otherwise, which does not represent the court’s intentions in the premises, an error contained therein may be corrected under CR 60. *In re Kramer’s Estate*, 49 Wn.2d 829, 830-31, 307 P.2d 274 (1957). *Kramer* cites *Rules of Pleading, Practice and Procedure* 7, 34A. Wn.2d 73, which provided that “[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.” *Kramer* at 830.

Under RCW 4.64.030, the clerk “shall enter all judgments in the execution docket, subject to the direction of the court” RCW 4.64.030(1). “The clerk is not liable for an incorrect summary.” RCW 4.64.030(3).

In the present matter, the motion and order for default were not presented to the court by Row’s counsel, but instead by a “Law

Clerk on behalf of the Law Office of Evan Loeffler PLLC.” CP 183. Under SCLR 0.02(f)(1), only a party pro se, attorney, or A.P.R. 9 intern may appear before the court. Under SCLR 0.02(f)(3), a clerk may not present an order in open court, but may present it “in chambers, provided further, that such matters would not require testimony.” Thus, the entire record considered by Commissioner Brudvik must by necessity be the written record in this matter: there could be no oral testimony taken in chambers under SCLR 0.02(f)(3).

Row moved for “an order adjudging the Defendants to be in default herein.” Appendix 2, CP 186. The court determined that the Barringers were in default (CP 182), but the order went beyond the requested determination of mere “default” and the court granted an order directing issuance of a writ of restitution. CP 182. No other relief is ordered, adjudged or decreed. CP 181-83. Yet, in the judgment summary of the Judgment and Order of Default and Order for Writ of Restitution, a monetary judgment summary appears for costs, attorney fees, and a principal judgment. CP 181.

This judgment summary was prepared by Row’s counsel (see footer and attorney’s signature on motion (CP 186-89, 181-83) and judgment) and under RCW 4.64.030, “[t]he clerk is not liable

for an incorrect summary.” But, here is where the clerk’s duties are contradictory. On one hand the clerk must enter the judgment summary if it complies with RCW 4.64.030. RCW 4.64.030(3). On the other hand, the clerk is not liable if the summary is incorrect. The judgment summary (CP 181) included relief not included in Commissioner Brudvik’s order, judgment, and decree (CP 182); thus, the clerk entered amounts that were not at the “direction of the court” under RCW 4.64.030(1). It was a mistake for the clerk of the court to enter a judgment summary that included “amount[s] to be recovered, the relief granted, or other determination of the action” that was in excess of what the Commissioner Brudvik actually ordered.

Thus, the clerk made a mistake in entering relief not in the order; and while she⁸ is not liable for that incorrect summary, she can correct the clerical mistake under CR 60(a) “at any time . . . as the court orders.” When Commissioner Gaer determined that amounts entered in the judgment summary were entered by “error” or “mistake,” she wrongfully failed to order that the judgment summary be corrected under CR 60(a).

⁸ “She” is a reference to Snohomish County Clerk of the Court Sonya Kraski.

In conclusion, if Commissioner Gaer was correct in determining that a mistake led to inclusive of a monetary judgment in the judgment summary, then that clerical error can be corrected at any time, and this matter should be remanded to the trial court to enter an order correcting the judgment summary to reflect the order entered on January 14, 2008.

Mistakes or errors under CR 60(b)(1)

Under CR 60(b)(1), the court may relieve a party from final judgment based upon “[m]istakes . . . in obtaining a judgment or order.” This “motion shall be made within a reasonable time and . . . not more than 1 year after the judgment” if based upon mistake. CR 60(b)(1).

“Under Washington law, mistakes of law are not correctable in a motion brought under CR 60.” Washington Court Rules Annotated Second Edition, page 827 (2009). *See Haley v. Highland*, 142 Wn.2d 135, 158, 12 P.3d 119 (2000); *Bjurstrom v. Campbell*, 27 Wn. App. 449, 451, 618 P.2d 533 (1980). “Mistakes of fact have been recognized as grounds for vacating judgment in ‘unusual circumstances,’ but under Rule 60(b)(11), not Rule 60(b)(1). Washington Court Rules Annotated Second Edition,

page 827 (2009). See *In re Adoption of Henderson*, 97 Wn.2d 356, 360, 644 P.2d 1178 (1982).

Because the Court Commissioner never specifically stated what the “error” or “mistake” actually was, this Court must speculate. If the mistake was by the clerk, it can be corrected at any time. If the “error” or “mistake” was by the court in granting relief greater than requested in the motion (e.g. ordering issuance of a writ of restitution), this court must determine if it should grant relief never requested (or argued) by Row. If the “error” or “mistake” was the misrepresentation of Row’s counsel in signing a motion that merely seeks an order of default, but then represents in the judgment summary an entitlement to costs when using an unregistered process server without obtaining an order of that court for an award of costs; then this Court must determine whether this was a “mistake” or a misrepresentation by counsel.

Under CR 11, “[e]very pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record . . .” Here, the motion and declaration contained the digital signature of Row’s counsel.⁹

⁹ The issue of whether a digital signature complies with CR 11, or is allowed under the civil rules, was not raised by either party.

This signature of counsel “constitutes a certificate by the . . . attorney . . . that the . . . attorney has read the pleading, motion, or legal memorandum, and that to the best of the . . . attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact . . . (2) it is warranted by existing law . . . (3) it is not imposed for any improper purpose, such as to . . . increase the cost of litigation . . . “ CR 11(a).

In bringing the “Motion and Declaration for Order of Default”¹⁰ under CR 55(a), Row’s counsel certified under CR 11(a), the right to the relief requested, which was merely an “order adjudging the Defendants to be in default herein.” Instead, Row misrepresented to Commissioner Brudvik in the Judgment and Order of Default that the motion was actually for a Default Judgment under CR 55(b). Row’s counsel’s then misrepresented a right to process server costs in the judgment summary. It was false and misleading for Row to seek a default judgment when only a motion for entry of default was brought. It was false and misleading for Row to seek to costs for unregistered process

¹⁰ CR 55(a) governs Defaults. “Entry of Default” can be obtained when the defendant fails to appear, plead, or otherwise defend. CR 55(b) governs “Entry of Default Judgment.”

servers under RCW 4.84.030. It was false and misleading for Row to include amounts in the judgment summary that were not awarded in the Court's Order.

While there were extensive misrepresentations by Row, this section merely analyses Commissioner Gaer's faulty analysis based upon the Barringer's counsel allegedly referring to the conduct of Row or the court clerk as an "error" or "mistake." CP 52.

The problem with the Commissioner's position is that throughout the hearing, all references to "error" or "mistake" referred to Court's conduct in regards to process server fees. A few examples are as follows:

- a. THE COURT: Counsel, I'm asking why if there was an error in the judgment . . . RP 7, lines 4-5.
- b. MR. PETERSON: I'm asking that this Court correct a mistake that was previously made in awarding process server fees that are not allowed . . . RP 9, lines 3-5.

Further, the Barringers repeatedly referred to a mistake by the Court, and to Row's having deceived the Court, e.g. "[t]he court was deceived by – when the plaintiff stated that we've incurred these fees, we're entitled to those fees . . . and the Court relied upon that in awarding those fees." RP 12.

It is important to note that the parties and the Commissioner Gaer repeatedly refer to entry of a judgment for monetary amounts, when in fact there was no order for a monetary judgment.

In conclusion, this Court should hold that the act of the clerk in entering a judgment summary on the execution docket, not ordered by Commissioner Brudvik, is clerical error under CR 60(a), and that this Court need not address error or mistake under CR 60(b)(1). If this Court determines that there was no “clerical mistake,” it should analyze the issue of whether the claims for a monetary judgment, costs, and unregistered process server costs, was obtained through fraud or misrepresentations to Commissioner Brudvik and the Barringers, as discussed in the next section.

3. The monetary judgment should be set aside under CR 60(b)(4)

The monetary judgment for process server costs that ended up in the judgment summary should be vacated under CR 60(b)(4) as it was obtained through misrepresentation to Commissioner Brudvik related to the availability of costs for unregistered process servers.

There are two ways to prove fraud or misrepresentation: (1) prove the nine elements of fraud; or, (2) show that the nonmoving

party breached the affirmative duty to disclose a material fact.

Baddley v. Seek, 138 Wn. App. 333, 338-39, 156 P.3d 959 (2007) (citing *Baertschi v. Jordan*, 68 Wn.2d 478, 482, 413 P.2d 657 (1966)).

“To satisfy the CR 60(b)(4) requirements, [the moving party] need not have established the nine elements of common law fraud – although findings and conclusions for all nine elements would satisfy the rule, ‘misrepresentation or other misconduct’ would also justify vacation of the judgment under CR 60(b)(4).” *In re Marriage of Maddix*, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985).

The nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) knowledge of its falsity or ignorance of its truth; (5) intent of the speaker that it should be acted upon; (6) plaintiff’s ignorance of its falsity; (7) plaintiff’s reliance on the truth of the representation; (8) plaintiff’s right to rely upon the representation; and (9) damages suffered by the plaintiff. *Carilile v. Harbour Homes, Inc.* 147 Wn. App. 193, 204-205, 194 P.3d 280 (2008); *Baddley v. Seek*, 138 Wn. App. 333, 339, 156 P.3d 959 (2007).

While showing all the elements of fraud is not necessary under CR 60(b)(4), under *In re Marriage of Maddix*, the Barringers showed that all the elements of fraud in seeking to have the costs judgment set aside. Alternatively, under *Baddley*, the Barringers can show that Row breached the affirmative duty to disclose the material fact that the process servers were not registered. Mere disclosure by Row of the process server declaration, despite the declaration's clear lack of compliance with RCW 18.180.010(1); 035(2), is not enough. Row had an affirmative duty to tell the Court Commissioner that the process server was not registered, and Row should not have requested process server costs.

These misrepresentations were not only made to the Barringers, but also against the Commissioners, as shown below.

A. Representation of an existing fact

In the present matter, Row made three representations concerning process server fees. First, Row represented to the Barringers that he would not seek a costs judgment. Appendix 3, CP 193. Second, Row represent that he would seek "such other and further relief as the court may deem just and equitable." CP 193. Third, Row represented to the court an entitlement to process server costs (\$49.00 service fee). Appendix 1, CP 186.

B. Materiality

The three representations are material because Row later sought costs in the “judgment summary” that were not originally requested in the complaint; sought unregistered process server costs that were not “just and equitable” under the RCW 4.84.010; and, sought relief that was not requested in the motion for order of default.

C. Falsity

Statements concerning process server fees were false. First, Row requested unregistered process server costs that were not requested in the complaint’s request for relief. Second, Row requested a judgment in the judgment summary that was not requested in the Motion for Order of Default, or in the court’s order. Third, Row was not entitled to costs for an unregistered process server under RCW 4.84.010.

D. Knowledge of falsity

Row, through counsel, either falsely claimed to Commissioner Brudvik an entitlement to process server costs knowing that the request was improper, or he falsely certified the Motion and Declaration for Order of Default.

Under CR 11, every motion signed by an attorney certifies that the attorney has read the motion and that “it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.” Here, Row sought relief (costs judgment for unregistered process server fees) not allowed under RCW 4.84.010. Thus, the statement under CR 11 was either known to be false, or Row’s counsel intentionally did not review the statutes before certifying the motion under CR 11.

E. Intent

Normally the intent of the party bringing a motion (motion for an order of default) is obvious from the face of the document. Had there been a “Motion for Entry of Default and Default Judgment” brought, the Barringers could have easily pointed to the motion where Row sought something like “entry of default and default judgment for past due rent, attorney’s fees and statutory costs.”

However, in this matter Row brought a motion for an order of default (presumably under CR 55(a)), but then sought more relief than afforded by a mere order of default under CR 55(a). Specifically, Row was granted the requested order of default plus a

judgment directing issuance of a Writ of Restitution: “that the Defendants is [sic] adjudged to be in default herein, and that in accordance with RCW 59.18.370 et seq., **a Writ of Restitution shall be immediately issued forthwith by the clerk of this Court.**” CP 182 (emphasis in original).

Here the intent of Row must be shown by the judgment summary. Why is it that Row’s intent is not shown by the motion or the order? Because the motion doesn’t request a cost judgment and the Order does not grant a costs judgment. But, Row’s intent is shown stating that “costs are calculated as follows . . . \$49.00 service fee.” CP 181.

Thus, while an order awarding those costs, attorney’s fees, or a monetary judgment was never granted; those costs, attorney’s fees, and a monetary judgment were included in the judgment summary.

F. Barringers’ ignorance of the falsity

Here, the Barringers never appeared or answered in this matter prior to the entry of default. Thus, the Barringers were entitled to rely upon the relief requested in the complaint. The complaint never requested unregistered process server costs. Further, while the complaint requested “such other and further

relief as the court may deem just and equitable,” it certainly cannot be argued that relief for unregistered process server costs, to which Row is not entitled to under RCW 4.84.010, is just and equitable.

G. Reliance

Here, the Barringer’s relied upon Row not seeking more relief than he had requested in the complaint. It is also likely that Commissioner Brudvik relied upon Row’s assertions in believing that he was not seeking more relief than was requested, or more relief than Row was entitled to by law. The basis for the Court Commissioner’s reliance would be RPC 3.3(f) which states that “[I]n an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.” Here, the fact that RCW 4.84.010 only allows assessment of costs for registered process server costs, and that the process server was not registered, were never disclosed to Commissioner Brudvik.

H. Right to reliance

Based upon the requested relief, the Barringers were right to rely upon Row not seeking judgment for costs or in only seeking “just and equitable” relief as prayed for in the complaint. Further,

the Court Commissioner was entitled to rely upon Row not seeking relief to which he was not entitled.

I. Damages

Damages to the Barringers are shown by an award of \$49.00 in the judgment summary for costs, along with a monetary award and attorney's fees, and the fact that the Barringers needed to retain an attorney to fight these costs.

In conclusion, contrary to the Commissioner Gaer's finding that there were no facts supporting fraud or misrepresentation, merely an allegation of fraud or misrepresentation; the record shows a pattern of acts by Row supporting fraud. Barringer need not prove all elements of fraud under *Baddley*; however, Commissioner Gaer did fail in her duty to review the facts supporting each element of fraud, and to make specific findings. Finally, since fraud or misrepresentation can be shown by the affirmative duty to disclose a material fact, under *Baddley*, Barringer has shown that Row failed to disclose that he sought costs under RCW 4.84.010 for an unregistered process server.

4. The trial court awarded process server fees without competent evidence to support award of that cost.

Row never presented evidence to support the award of process server fees, thus, those fees should be removed from the judgment.

“A person who serves legal process for a fee in the state of Washington shall register as a process server with the auditor of the county in which the process server resides or operates his or her principal place of business.” RCW 18.180.010(1).

“Any fees allowable under this section, and actually charged by a process server, shall be a reasonable cost awarded to, and recoverably by, the party incurring same if that party prevails in an action.” RCW 18.180.035(2).

“A process server required to register under RCW 18.180.010 shall indicate the process server’s registration number and the process server’s county of registration on any proof of service the process server signs.” RCW 49.18.030(1).

Under RCW 4.84.010, Costs Allowed to Prevailing Party, the prevailing party upon the judgment is entitled to fees for the service of process by a registered process server.

In the present matter, the Judgment Summary includes process server costs as part of costs.

Neither affidavit of Angelo Ortiz shows the process's registration number or county of registration on the affidavit of service. CP 184-85. Thus, the Plaintiff did not show that the process server is registered.

Because the process server is not registered, the Plaintiff is not entitled to process server costs under RCW 4.84.010. Commissioner Brudvik improperly allowed process server fees to be included in the costs judgment.

5. The trial court improperly awarded Row attorneys' fees without competent evidence to support that award.

Attorneys' fees for a frivolous motion by Barringer should not have awarded to Row, or should have been reduced based upon the record before the trial court. This is very important because not only was Barringer's claim of fraud or misrepresentation supported by the record, but Row's counsel spent much time on improper theories regarding civil rule assertions (CR 60 and SCLR 7) while defending the motion, and in seeking attorney's fees.

Nearly ten years ago the Washington Supreme Court made clear a trial court's duty in regards to attorneys' fees. In *Mahler v. Szucs*, 135 Wn.2d 398, 434-435, 957 P.2d 632 (1998) the court instructed trial courts:

Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.

Consistent with such an admonition is the need for an adequate record on fee award decisions. Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. *[citations omitted]*.

Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.

Mahler v. Szucs, 135 Wn.2d 398, 434-435, 957 P.2d 632 (1998).

“Counsel must provide contemporaneous records of documenting the hours worked . . . [a]s we said in *Bowers v. Transamerica Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983), such documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work . . .” *Id.* at 433-34.

Further, if fees are recoverable only for some of the claims, the award must reflect segregation of the time spent on issues for which fees are authorized from time spent on other issues. *MP Medical Inc. v. Wegman*, 151 Wash. App. 409, 426, 213 P.3d 931

(2009), citing *Mayer v. City of Seattle*, 102 Wn. App. 66, 79-80, 10 P.3d 408 (2000).

Even RCW 59.18.030 addresses the definition of “reasonable” attorneys’ fees, stating:

Reasonable attorney's fees", where authorized in this chapter, means an amount to be determined including the following factors: The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the fee customarily charged in the locality for similar legal services, the amount involved and the results obtained, and the experience, reputation and ability of the lawyer or lawyers performing the services.

Also, the “court reviewing the award needs to know if the attorney’s services were reasonable or essential to the successful outcome. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.3d 632 (966 P.2d 305 (1998).

In the present matter, Row requested \$1,550 in attorney’s fees plus sanctions. The trial court awarded Row \$1,500 in attorney’s fees, reducing Row’s requested amount by \$50.00 in the following transaction:

THE COURT: . . . So I will order the attorney’s fees of \$1,550. But just because it is not worth the continuing – the continuing difficulties in this case, because of that, I will reduce them by \$50. So I’ll order \$1,500 in attorney’s fees.

MR. PETERSON: What is the basis of – which claim is the \$50 reduction based upon?

THE COURT: In – well, I won't reduce it. Simply in the interest of addressing your concerns, I'll reduce it by \$50, even though the Court is quite clear that CR 60 – this claim is time barred. Nonetheless, I will reduce it by \$50.

RP page 31

Here, the Commissioner wrongfully rejected every argument presented by the Barringers: most importantly, argument concerning interpretation of CR 60 service requirements, and SCLR 7 time requirements for service and filing of the response and reply. But, the Court Commissioner only reduced total fees awarded by \$50, without explanation as to the basis of that minimal reduction.

But, review of the pleadings and transcripts reflects much briefing and argument on two issues raised by Row that were frivolous and for which Commissioner Gaer should not have allowed an award of attorney's fees: (1) failure of Barringer to serve the CR 60 motion on Row's counsel; and, (2) failure of Row to timely file and serve a response under SCLR 7. Given the volume of argument and pages of briefing of these issues, it is

unlikely that these two issues that were improperly analyzed by Row and the Court only came to \$50 of the legal fees incurred by Row. Further, there is a complete lack of findings of fact to support the award of attorney's fees or adjustments for failed theories – especially since the trial court wrongly agreed with Row on the two frivolous procedural arguments.

This memorandum now analyzes the two procedural issues that were wrongly analyzed by Row and the Court, but for which attorney's fees were awarded to Row.

Service of a CR 60 motion-

Row wrongfully asserted improper service under CR 60(e)(3) in the memorandums opposing the Barringers' CR 60 motion, and Row later requested attorney's fees for briefing and arguing that flawed argument in his attorney's fees motion.

These arguments by Row were frivolous as Row was properly served in a timely manner under CR 60(e)(3) and SCLR 7(b)(2)(B).

Under CR 60(e)(3), “the motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action . . .” Under RCW 4.28.080 (15), the statute governing service of a summons in

a civil matter, a summons may be served “to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.”

Row never argued that his daughter did not live at his usual place of abode, that his daughter was not of suitable age and discretion, or that his daughter did not receive “the motion package.”¹¹ Instead, Row argues that “the motion package” should have been served on his attorney and that “Counsel deliberately did not give notice to counsel.” CP 44. Row also asserts that his counsel only received notice of the hearing four days prior to that hearing: Row never asserts that notice of the motion was not served in a timely manner upon him through his daughter, only that when he relayed the notice of hearing to his attorney it was four days prior to the hearing. This same argument was made orally before the Court Commissioner on July 21, 2009.

To support Row’s position, Row deceptively paraphrased CR 60(e)(3). Attachment 4. A side by side comparison of CR

¹¹ For clarity sake, the documents that were filed on July 6, 2009 (Sub docs 40-44), and served on July 13, 2009, are collectively referred to as “the motion package.”

60(e)(3) as paraphrased and per the full statute follows, bold faced italics show text removed by Row when paraphrasing the statute:

Section paraphrased by Row	Actual Statute
<p>The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action</p> <p>. . . .</p> <p>and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing the court may direct.</p>	<p>The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action <i>at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address</i> and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing the court may direct.</p>

Unfortunately, by leaving out the complete text, Row distorts the text of the statute. This distortion was relied upon by the Commissioner Gaer during the July 21, 2009, hearing, and the Barringers were unable to reply to the late-filed memorandum opposing the Barringer’s motion.¹²

¹² The timing of service and filing of the opposition memorandum will be discussed *infra*.

The conversation between the parties and the court was as follows:

MR. LOEFFLER: I never received any notice of this hearing at all. It was not delivered to me as required by –

THE COURT: Was counsel served? I see no service document. Was counsel served with this?

MR. PETERSON: No. And if you notice, there's no citation to the rules when he says he wasn't served. The bottom line is – when I bring – bring a motion under CR 60 I'm required to serve it on the plaintiff in the manner consistent with service of a summons and complaint. Now I – I didn't –

MR. LOEFFLER: I didn't read CR 60 –

MR. PETERSON: Your Honor, I wasn't finished.

MR. LOEFFLER: -- out loud so that Mr. Peterson would be corrected on that.

THE COURT: I have CR 60 right here.

MR. LOEFFLER: And since any copy thereof served upon the attorneys of record in such action or proceeding prior to the hearing as the court may direct. There is no order that says counsel may decide not to serve counsel for the plaintiff of this motion. I have not received the motion. And – and what I hear

Mr. Peterson saying is I was under no obligation because my new and interesting reading of CR 60 that I don't have to. And I don't agree with that . . .

THE COURT: All right. I'm – I'm going to go ahead and proceed. And am accepting the plaintiff's response. And counsel, I can't imagine why you wouldn't have served counsel because you very well knew that Mr. Loeffler was representing these plaintiffs. Isn't that correct?

MR. PETERSON: I will review the rule again on that. My belief was that I needed to serve the plaintiff only, which is why that's what was done. The plaintiff was much more difficult to serve than would have been Mr. Loeffler. And so perhaps I misread the rule. I will – I will look at that in the future.

RP 3, line 20 to RP 5, line 9.

Row's counsel and the Commissioner Gaer are wrong because Row's paraphrasing of CR 60 deceived the Court.

CR 60(e)(3) should be read as alternate procedures. The first procedure includes everything prior to the semi-colon, and it can be summarized as requiring that all parties must be served the motion package in the same manner as a summons in a civil action,

and within the time deadlines for a motion before the Court. CR 60(e)(3). Thus, the Barringers complied with service requirements of “the motion package” for the first alternate procedure. The second alternate procedure includes everything after the semi-colon, and it can be summarized as requiring that if the moving party cannot serve the other parties they must: (1) seek a court order for publication; (2) mail a copy to the other parties’ last known address; and, (3) serve a copy on the other parties’ attorney of record in the action.

In the present matter, the Barringers did not need to seek Court approval to use the alternate procedure because service upon the Plaintiff was obtained through substituted service by delivery of “the motion package” to the Plaintiff’s daughter.

Row also wrongly paraphrased CR 5(b)(1) by stating that service must be upon a represented party’s attorney unless otherwise ordered by the Court. CP 44. But, Row ignores the last sentence CR 5(b)(1) which states that “[s]ervice on an attorney is subject to the restrictions in subsections (b)(4) and (5) of this rule. CR 5(b)(4) and (6) state as follows:

(4) Service on Attorney Restricted After Final Judgment. A party, rather than the party’s attorney, must be served if the final judgment or decree has

been entered and the time for filing an appeal has expired, or if an appeal has been taken (i) after the final judgment or decree upon remand has been entered or (ii) after the mandate has been issued affirming the judgment or decree or disposing of the case in a manner calling for no further action by the trial court. This rule is subject to the exceptions defined in subsection (b)(6)

...

(6) Exceptions. An attorney may be served notwithstanding subsection (b)(4) of this rule if (i) fewer than 63 days have elapsed since the filing of any paper or the issuance of any process in the action or proceeding or (ii) if the attorney has filed a notice of continuing representation.

In this matter, the final judgment was entered January 14, 2008. CP 181-83. The time for appeal (30 days) also expired. Thus, under CR 5(b)(4), service on Row's attorney was restricted unless one of the exceptions from CR 5(b)(6) applies.

The CR 60 motion was filed in 2009. CP 113-14. Every day in 2009 is more than 63 days after January 14, 2008. Thus, under CR 5(b)(4), since 63 days or more had expired, the attorney could not be served. Alternatively, if the attorney filed a notice of continuing representation, then notice would be required to Row's attorney. There is no notice of continuing representation.

In conclusion, Barringer properly served Row, through Row's daughter who resided with Row, and service upon Row's

counsel was not only unnecessary, but it would have been improper under CR 5(b)(4) and (6).

SCLR 7: Row's reply on the CR 60 was untimely and denied Barringer an opportunity to respond

Row also sought attorney's fees for arguing another flawed position orally before the Commissioner Gaer. Not only did Row seek attorney's fees for preparing the Opposition Memorandum that was not filed the day after the hearing, but Row also sought attorney's fees for preparing and arguing for sanctions based upon this improper understanding of CR 5. The trial Court perpetuated its error of considering the late-filed opposition memorandum (which did not allow the Barringers adequate time to respond)¹³, based upon the Court Commissioner accepting Row's flawed analysis of CR 60 and CR 5, and it awarded Row further attorney's fees for preparing this argument that is not only improper under the civil rules, but is based upon the Plaintiff misleading this Court as to the text of CR 60(e)(3).

¹³ Under Snohomish County Local Rule 7(b)(2)(G), "Late Filing; Terms. Any material offered at a time later than required by this rule may be stricken by the court and not considered. If the court decides to allow the late filing and consider the materials, the court may continue the matter or impose other appropriate remedies including terms, or both." Under SCLR 7(b)(2)(N), responding documents must be filed with the clerk and copies served on all parties no later than noon two (2) days prior to the hearing; and the reply must be filed and served no later than noon the court day prior to the hearing.

Mahler analysis

Nowhere do the findings of fact or conclusions of law for Row's attorney's fees address: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the fee customarily charged in the locality for similar legal services; (5) the amount involved and the results obtained; or, (6) the experience, reputation and ability of the lawyer or lawyers performing the services. Barringer does not claim that the trial court must make findings of fact or conclusions of law regarding all six factors: Barringer does believe that the utter lack of addressing even one of the six factors indicates that the trial court did not take an active role in assessing the reasonableness of fee awards, especially in light of the mis-paraphrasing and wrongful analysis of CR 5 and 60 by Row's counsel.

In conclusion, because the trial court did not make adequate findings of fact or conclusions of law concerning attorneys' fees, the record is inadequate for review of the amount awarded.

"[A]bsence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record." *Mahler*, 135 Wn.2d at 435, 957 P.2d 632;

Just Dirt, Inc. v. Knight Excavating, Inc., 138 Wn. App. 409, 416, 157 P.3d 431, 435 (Div. 2, 2007).

6. Barringer's CR 60 motion was not frivolous.

Barringers' CR 60 motion was not frivolous; and, the positions on CR 5 and CR 60 taken by Row, and adopted by the Court Commissioner were not grounded in law or fact.

On September 14, 2010, in an Order Granting Motion for Attorney's Fees, Court Commissioner Susan Gaer made findings and conclusions related to attorney's fees on Barringer's motion to set aside attorney's fees and costs. CP 6-7. Commissioner Gaer stated that there no "facts" to support an allegation of fraud. CP 7. She found that Barringer repeatedly referred to "errors" in the January, 2008 order and did not argue fraud. CP 7. She concluded that the Barringer's "motion to vacate the prior order was based upon error, not fraud, and was clearly time barred by CR 60(b)(1). She then found the Barringers' motion to be frivolous.

For purposes of an award of attorney's fees, a motion is "frivolous" if, considering the entire record there are no debatable issues upon which reasonable minds might differ, and it is so devoid of merit that there was no reasonable possibility of success.

In re Recall Charges Against Feetham, 72 P.3d 741, 149 Wash. 2d 860.

As discussed in the previous sections, Commissioner Gaer determined that it was clear that the motion under CR 60(b)(4) was filed too late. But, the motion was filed under CR 60(b)(4), and there is no time limitation under CR 60(b)(4). Instead, Commissioner Gaer determined that there was an “error” or “mistake” by an unnamed party¹⁴ that allowed a wrongful judgment/judgment amounts to be entered. But, even some “mistakes” can be set aside after one year under CR 60(a). Without naming the party making the mistake, Commissioner Gaer found that the “mistake” was under CR 60(b)(1), and that CR60(b)(1) imposed a one year time limitation to bring the motion.

This section will go over the frivolous legal positions of Row that were ultimately partially adopted by the Court. Row requested: (1) \$250.00 for willfully not giving notice to counsel of the hearing; (2) \$250.00 for falsely representing he had not received responsive pleadings; (3) \$250.00 for violation of CR 11(a)(2) for filing a frivolous motion counsel knew to be past the one-year deadline; (4) \$250.00 for willfully withholding material

¹⁴ If the unknown party was the clerk of the court CR 60(a) would apply without time limitation.

information relating to Federal litigation and the fact he was aware of the error in the pleadings for well over a year; and, (5) \$1,000.00 for violation of CR 11(a)(3) for filing this motion to harass the plaintiff and plaintiff's counsel.

a. Willfully not giving notice.

This issue is discussed in section 5, *supra*. The Barringers fully complied with CR 60.

b. Falsely representing non-receipt of responsive pleadings

As discussed in the previous section, Row misrepresented the content of CR 60(e)(3) to the Court, and through strategic deletion of a semi-colon, got the trial court to believe that the Barringers had not given notice of the hearing to Row. Based upon that wrongful interpretation of CR 60(e)(3), Commissioner Gaer considered Row's response despite being delivered to the Barringers at 10:20 the day before the hearing, which only gave the Barringers' 1 hour and 40 minutes to write, serve, and file the reply. RP 3, lines 1-2. SCLR 7(b)(2)(N) which requires the non-moving party to respond and serve the moving party by noon two court days before the hearing.

Barringers' counsel explained this to Commissioner Gaer in his response as to why counsel stated that he had not received a response from Row:

I contacted the office and they – they did not confirm whether or not they received it. But I let them know what was stated, trying to find out why I had not received them.

However, I had checked with the office on Friday at shortly after noon to see if any documents had arrived in this matter. And procedurally I – I believe under the local Rules that you have to note a motion six days out. And then any response is due two court days ahead of time, which would have been – at noon – which would have been noon – on Friday. And then my response would have been noon yesterday.

RP 3, lines 7-17. This statement by Peterson was corroborated by the Declaration of Gerald F. Robison who stated that

[o]n Friday, July 17, 2009, I received a call from Scott Peterson . . . I believe that it was between noon and 1 p.m.. . . Mr. Peterson called to see if a response brief had been filed in the Row v. Barringer matter, or if he had received any other important pleadings. I advised that no such pleadings have been received.

CP 36, lines 1-9. Robison added that:

[o]n Monday, July 20, 2009, I came into the office early, leaving before 9:00 a.m. and did not notice any documents for Scott Peterson. . . [o]n Tuesday, July 21, 2009, I returned to the office, noted receipt of a response brief in the Row v. Barringer matter and directed that it be scanned or faxed to Scott Peterson.

RP 36, lines 15-19. After Peterson's assertion to the Court Commissioner, Row's counsel then replied: "Well it is ironic that

we're having this discussion because as the Court is aware from the docket and from my brief, I never received any notice of this hearing at all. RP 3, lines 18-21.

In conclusion, the Court Commissioner and Loeffler wrongly interpreted CR 60, and they bullied Barringers' counsel into believing that he wrongly interpreted the statute. The response was untimely, and while counsel's information was not "up to the minute current", the Barringers' counsel had not received the response in a timely manner – 10:20 a.m. was 1 hour and 40 minutes prior to the time Barringer's response had to be filed and served under SCLR SCLR 7(b)(2)(N)(1).

c. Knowingly filing motion after one year deadline

This statement by Loeffler is as difficult to prove as is the element of fraud where the Barringers must show that Loeffler made a false statement to obtain a judgment for process server fees. The only difference is that RCW 4.84.010 is clear that to obtain a cost judgment for process server fees the server must be registered. That issue is clear, and under CR 11, Loeffler certified that he conducted a reasonable investigation as to existing law. RCW 4.84.010 has not recently changed.

A one year deadline for “error” or “mistake” is not so clear, especially when the motion was brought under “fraud” or misrepresentation under CR 60(b)(4), which does not impose a one year time limit; and because “clerical mistakes” are also not subject to the one year limitation.

Second, Commissioner Gaer never clarified if the “error” or “mistake” was that of the clerk or that of another party. If the “error” or “mistake” was that of the clerk in entering a judgment summary that was not authorized by the Court’s order of January 14, 2009, then the one year time limit to set aside the judgment summary does not apply.

d. Withholding information relating to federal litigation

Row asserted that it was wrong to not include information concerning federal litigation. Court Commissioner Gaer disagreed.

As stated *supra*, Row’s response was untimely. The Barringers counsel only received a copy of Row’s response during the hearing, and he orally responded to Row’s allegations. This forced the Barringer’s counsel to respond to the federal matter orally. RP 7, lines 7-14. The Court Commissioner acknowledged this information was not relevant, stating, “[what has the federal court motion got to do with a CR 60 motion as to whether or not

it's timely filed? RP 7, lines 17-18. Later, the Court Commissioner noted that “[y]ou did not even tell the Court that there was a federal case.” RP 11, lines 16-17. Peterson responded, “[I]t does not matter in this . . .” RP 11, line 18. The Court Commissioner responded, “So if it doesn’t matter, why are you talking about it?” Peterson responded, “[b]ecause it was brought up in the plaintiff’s memorandum. I have a right to respond to what they put in.” RP 11, lines 22-24.

In conclusion, the Court Commissioner never felt the federal matter was relevant, Barringer only discussed that federal matter orally after Row mentioned it in his untimely response. The Court Commissioner was correct, the federal matter was not appropriately before her, and Barringers’ counsel did nothing wrong in not bringing that information before the Court Commissioner.

e. Filing motion to harass the defendant and defendants counsel

Given the extensive legal errors made by Row throughout this process, Row’s counsel should actually welcome the opportunity to review faulty procedures and requests. It is not harassment to expect an attorney to forego requesting relief to which his client is not entitled (unregistered process server fees).

It is not harassment to expect an attorney to paraphrase a statute in a manner that distorts that statute's true meaning and in a manner that even convinces a Court Commissioner to believe that Row provided a fair paraphrase (CR 60 and CR 5).

Row's counsel inappropriately obtained a default judgment (under CR 55(b)) after moving for entry of default (under CR 55(a)). Row's counsel inappropriately requested costs for an unregistered process server.

The issue is about accountability to the Courts, and the litigants in court proceedings. The Courts and litigants should be able to rely upon counsel not misrepresenting entitlement to costs, and in fairly representing the relief requested in a motion for entry of default.

E. Conclusion

This entire matter is marked by imprecise use of legal terms and wrong legal decisions. Starting with entry of a default judgment under CR 60 (b) after the Landlord only requests entry of default under CR 60(a); through not ordering, but including in the judgment summary, costs for an unregistered process server; through the Court falling into the deception weaved by the Landlord to change the meaning of CR 60; through blaming the

Tenants' counsel for a late response under the Snohomish County Local Rules and late filing in response to the CR 60 motion. But, the only mistake of the Tenants was to rely upon the judicial system to limit the award to what was requested and to follow the court rules and statutes. With hindsight, the Tenants were naïve.

But, the naiveté of the Tenants should not stop this Court from reversing the trial court decision, and remanding this matter back to the trial court to remove the \$49.00 unregistered process server fee under CR 60(b)(4) or CR 60(a), to vacate the attorney's fees and costs awarded on September 14, 2009, and to reverse the finding that the Tenants' motion was frivolous.

Respectfully submitted March 10, 2010



Scott Peterson, WSBA #22923
Attorney for Appellant

APPENDIX

1. Motion for Entry of Default (CP 186-89)	51
2. Judgment and Order of Default (CP 181-83)	55
3. Complaint (CP 192-94)	58
4. CR 60.	61
5. SCLR 7 (2008)	63



CL12385299

FILED

2008 JAN 14 PM 3:57

SONYA J. KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH**

JAMES ROW,
Plaintiff,

vs.

TYE BARRINGER,
JENNIFER BARRINGER,
and all other tenants,
Defendants.

4454

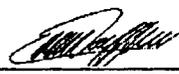
NO. **08 2 01799 9**

**MOTION AND
DECLARATION FOR
ORDER OF DEFAULT**

COMES NOW the plaintiff and moves this Court for an order adjudging the Defendants to be in default herein. This motion is based upon the records and files herein and upon the Declaration of Evan L. Loeffler.

Venue is properly laid in Snohomish County because that is the location of the real property that is the subject matter of this action and it is the location of defendant's residence.

DATED THIS 14th day of January, 2008.


Digitally signed by Evan L. Loeffler
DN: cn=Evan L. Loeffler,
o=Law Office of Evan L. Loeffler PLLC, ou=Law Office of
Evan L. Loeffler, email=Evan.L.Loeffler@wsba.com, c=US
Reason: I am approving this document.
Date: 2008.01.14 19:24:28 -0800

Evan L. Loeffler, WSBA #24105
Attorney for Plaintiff

ORIGINAL

MOTION AND DECLARATION FOR ORDER OF DEFAULT
Page 1

Law Office of Evan L. Loeffler PLLC
Attorney at Law
3801 Colby Avenue
Everett, WA 98201
425-303-8000 Fax 425-339-8806

Ex 7

DECLARATION OF EVAN L. LOEFFLER

Evan L. Loeffler, being first duly sworn on oath, deposes and says:

1. I am the attorney of record for the Plaintiff herein and make this affidavit on plaintiff's behalf.

2. Service of summons and complaint was duly made upon the defendant as is more particularly shown in the Return of Service on file herein.

3. No answer or other pleading or paper whatsoever has been served or filed herein by Defendants since the date of service of the Summons and Complaint; Defendants is still residing at the premises; Defendants is in default for want thereof.

4. As the lawyer for the Plaintiff landlord, I, or someone on my behalf, or the plaintiff or an agent of plaintiff, have determined that the Defendants are not in active military service by doing an inquiry into the information provided by the Defendants to secure this tenancy, and/or by utilizing the web site available from the Department of Defense, a copy from the DOD is attached. Defendants are also not an infant or an incompetent person.

5. Costs total \$45.00 filing fee, \$20.00 clerk's Writ fee, \$200.00 sheriff's fee, and \$49.00 service fee, for a total of \$314.00.

6. That the judgment total is calculated based upon monthly rent of \$1,395.00, or a daily rate of \$46.50 times 45 days the rent has been unpaid since the date the Notice was prepared, which totals \$2,092.50 through today; late fees of \$279.00; and past due rent of \$345.00 is owed as detailed on the Notice. These amounts total \$2,716.50. Daily rent of \$46.50 per day is owed until the tenant vacates the premise.

7. Reasonable attorney fees for this action are \$400.00.

Signed in the City of Seattle this 14th day of January, 2008.

I declare, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

 Digitally signed by Evan L. Loeffler
DN: cn=Evan L. Loeffler,
o=Law Office of Evan L. Loeffler PLLC,
ou=Law Office of Evan L. Loeffler PLLC,
c=WA
Reason: I am approving this document
Date: 2008.01.14 15:21:30 -0800

Evan L. Loeffler

Law Office of Evan L. Loeffler PLLC
Attorney at Law
3801 Colby Avenue
Everett, WA 98201
425-303-8000 Fax 425-339-8806



Military Status Report
Pursuant to the Servicemembers Civil Relief Act

< Last Name	First/Middle	Begin Date	Active Duty Status	Service/Agency
BARRINGER	Tye	Based on the information you have furnished, the DMDC does not possess any information indicating that the individual is currently on active duty.		

Upon searching the information data banks of the Department of Defense Manpower Data Center, based on the information that you provided, the above is the current status of the individual as to all branches of the Military.

Mary M. Snavelly-Dixon

Mary M. Snavelly-Dixon, Director
Department of Defense - Manpower Data Center
1600 Wilson Blvd., Suite 400
Arlington, VA 22209-2593

The Defense Manpower Data Center (DMDC) is an organization of the Department of Defense that maintains the Defense Enrollment and Eligibility Reporting System (DEERS) database which is the official source of data on eligibility for military medical care and other eligibility systems.

The Department of Defense strongly supports the enforcement of the Servicemembers Civil Relief Act [50 USCS Appx. §§ 501 et seq] (SCRA) (formerly the Soldiers' and Sailors' Civil Relief Act of 1940). DMDC has issued hundreds of thousands of "does not possess any information indicating that the individual is currently on active duty" responses, and has experienced a small error rate. In the event the individual referenced above, or any family member, friend, or representative asserts in any manner that the individual is on active duty, or is otherwise entitled to the protections of the SCRA, you are strongly encouraged to obtain further verification of the person's active duty status by contacting that person's Military Service via the "defenselink.mil" URL provided below. If you have evidence the person is on active-duty and you fail to obtain this additional Military Service verification, provisions of the SCRA may be invoked against you.

If you obtain further information about the person (e.g., an SSN, improved accuracy of DOB, a middle name), you can submit your request again at this Web site and we will provide a new certificate for that query.

This response reflects current active duty status only. For historical information, please contact the Military Service SCRA points-of-contact.

See: <http://www.defenselink.mil/faq/pis/PC09SLDR.html>

WARNING: This certificate was provided based on a name and Social Security number (SSN) provided by the requester. Providing an erroneous name or SSN will cause an erroneous certificate to be provided.

Report ID: **KUCIZDIDHJ**



Military Status Report
Pursuant to the Servicemembers Civil Relief Act

< Last Name	First/Middle	Begin Date	Active Duty Status	Service/Agency
BARRINGER	Jennifer	Based on the information you have furnished, the DMDC does not possess any information indicating that the individual is currently on active duty.		

Upon searching the information data banks of the Department of Defense Manpower Data Center, based on the information that you provided, the above is the current status of the individual as to all branches of the Military.

Mary M. Snavelly-Dixon

Mary M. Snavelly-Dixon, Director
Department of Defense - Manpower Data Center
1600 Wilson Blvd., Suite 400
Arlington, VA 22209-2593

The Defense Manpower Data Center (DMDC) is an organization of the Department of Defense that maintains the Defense Enrollment and Eligibility Reporting System (DEERS) database which is the official source of data on eligibility for military medical care and other eligibility systems.

The Department of Defense strongly supports the enforcement of the Servicemembers Civil Relief Act [50 USCS Appx. §§ 501 et seq] (SCRA) (formerly the Soldiers' and Sailors' Civil Relief Act of 1940). DMDC has issued hundreds of thousands of "does not possess any information indicating that the individual is currently on active duty" responses, and has experienced a small error rate. In the event the individual referenced above, or any family member, friend, or representative asserts in any manner that the individual is on active duty, or is otherwise entitled to the protections of the SCRA, you are strongly encouraged to obtain further verification of the person's active duty status by contacting that person's Military Service via the "defenseink.mil" URL provided below. If you have evidence the person is on active-duty and you fail to obtain this additional Military Service verification, provisions of the SCRA may be invoked against you.

If you obtain further information about the person (e.g., an SSN, improved accuracy of DOB, a middle name), you can submit your request again at this Web site and we will provide a new certificate for that query.

This response reflects current active duty status only. For historical information, please contact the Military Service SCRA points-of-contact.

See: <http://www.defenselink.mil/faq/pis/PC09SLDR.html>

WARNING: This certificate was provided based on a name and Social Security number (SSN) provided by the requester. Providing an erroneous name or SSN will cause an erroneous certificate to be provided.

Report ID: KUCPDMSDGJ

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SONYA J. KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH**

JAMES ROW,

Plaintiff,

vs.

TYE BARRINGER,
JENNIFER BARRINGER,
and all other tenants,

Defendants.

4454

NO. **08 2 01799 9**

**JUDGMENT AND
ORDER OF DEFAULT AND
ORDER FOR WRIT OF
RESTITUTION**

Clerk's action required

- | | | |
|----|--|-----------------------------------|
| A. | Judgment Creditor | James Row |
| B. | Judgment Debtor | Tye Barringer, Jennifer Barringer |
| C. | Principal judgment amount | \$2,716.50. |
| | plus \$46.50 each day after January 14, 2008, until the premises are vacated. | |
| D. | Interest to date of judgment | zero |
| E. | Attorneys fees | \$400.00 |
| F. | Costs | \$314.00 |
| G. | Other recovery amount | none |
| H. | Principal judgment shall bear interest at 12% per annum. | |
| I. | Attorneys fees, costs and other recovery amounts shall bear interest at 12% per annum. | |
| J. | Attorney for Judgment Creditor | Evan L. Loeffler |
| K. | Attorney for Judgment Debtor | none |

ORIGINAL

JUDGMENT AND ORDER OF DEFAULT
AND ORDER FOR WRIT OF RESTITUTION
Page 1

Law Office of Evan L. Loeffler PLLC
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3801 Colby Avenue
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Ex 8

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THIS MATTER came on hearing on the motion of Plaintiff through his attorney, Evan L. Loeffler, for an order of default;

AND it appearing to the Court from the Declaration of Plaintiff's attorney in support of Plaintiff's motion for default that the Defendants is in default;

AND that service of Summons and Complaint was duly made upon the Defendants as is more particularly shown in the Return of Service on file herein;

AND that no answer or other pleading or paper whatsoever has been served or filed herein by Defendants since the date of service of Summons and Complaint and Defendants is in default for want thereof;

AND that the Defendants is not in the military service of the United States of America, nor is Defendants an infant or incompetent person;

AND that costs are calculated as follows: \$45.00 filing fee; \$20.00 clerk's Writ fee; \$200.00 sheriff's fee; and \$49.00 service fee; for a total of \$314.00;

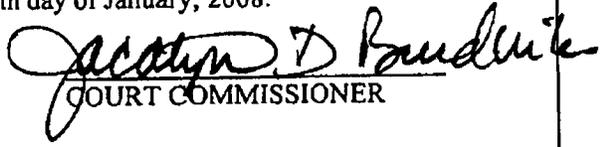
AND that the judgment total is calculated based upon monthly rent of \$1,395.00, or a daily rate of \$46.50 times 45 days the rent has been unpaid since the date the Notice was prepared, which totals \$2,092.50 through today; late fees of \$279.00; and past due rent of \$345.00 is owed as detailed on the Notice. These amounts total \$2,716.50;

AND it appearing to the Court from an examination of the files and records herein that the Plaintiff is entitled to have such a Writ of Restitution, and that it has jurisdiction to order the Writ issued; **NOW THEREFORE,**

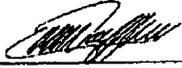
IT IS HEREBY ORDERED ADJUDGED AND DECREED that the Defendants is adjudged to be in default herein, and that in accord with RCW 59.18.370 et seq., **a Writ of Restitution shall be immediately issued forthwith by the clerk of this Court** in the form provided by law, restoring to plaintiff possession of said premises described as: **1027 103rd Drive SE, City of Lake Stevens, County of Snohomish, Washington.** This Writ shall authorize the Sheriff to break and enter the premises described in the Writ of Restitution for the purpose of executing the Writ. In the event that it is not possible to return the Writ within the required ten days there shall be an automatic extension for an additional ten days. Plaintiff shall not be required to post a restitution bond, as this is a residential eviction.

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DONE IN OPEN COURT this 14th day of January, 2008.

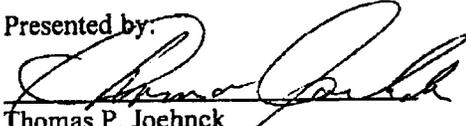

COURT COMMISSIONER

Presented by:


Digitally signed by Evan L. Loeffler
DN: cn=Evan L. Loeffler, o=Law Office of Evan L. Loeffler, ou=Law Office of
Evan L. Loeffler, email=evan@evanloeffler.com
Date: 2008.01.14 16:24:05 -0800

Evan L. Loeffler, WSBA #24105
Attorney for Plaintiff

Presented by:


Thomas P. Joehnck
Law Clerk on behalf of the Law Office of Evan Loeffler PLLC

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

JAMES ROW,

Plaintiff,

vs.

TYE BARRINGER,
JENNIFER BARRINGER,
and all other tenants,

Defendants.

4454

NO. 08 2 01799 9

COMPLAINT FOR
UNLAWFUL DETAINER

COMES NOW the Plaintiff and states:

I.

Plaintiff, as landlord, rented Defendants the premises located at 1027 103rd Drive SE, Lake Stevens. The real property that is the subject of this claim is located in the City of Lake Stevens, Snohomish County, Washington.

II.

Defendants did all acts complained of herein individually.

III.

Plaintiff and Defendants entered into an agreement for said Defendants' occupancy of the premises. The lease obligates the Defendants to pay rent, and to additional terms detailed below.

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IV.

The rent for the described premises is \$ 1,395.00 per month, or \$46.50 per day payable in advance, and Defendants are now in actual possession of said premises. The Defendant is in arrears for \$1,395.00 in rent for December 2007; \$345.00 in previously unpaid past due rent; and \$140.00 in late fees and shall continue to accrue. A true and accurate copy of the 3 Day Notice to Pay Rent or Vacate is attached hereto as Exhibit A.

V.

On December 13, 2007, a 3 Day Notice to Pay Rent or Vacate was served on the Defendants as detailed in the attached Notice.

VI.

More than the allotted time has elapsed since the service of said notice and the Defendants have neither paid said rental nor vacated and surrendered said premises and thus is unlawfully detaining the same.

WHEREFORE, Plaintiff prays for judgment as follows:

1. For restitution of the described premises;
2. For forfeiture of defendant's tenancy;
3. For judgment against Defendants for unlawful detainer in the amount of rent and other charges owing at the time of the judgment;
4. For award of all damages found to be due;
5. For Plaintiff's reasonable attorneys' fees in the sum of \$400.00 if no defenses are interposed, or a greater sum as the court deems reasonable if defenses are interposed;
6. For such other and further relief as the court may deem just and equitable.

DATED THIS 3rd day of January, 2008.


Digitally signed by Evan L. Loeffler
DN: cn=Evan L. Loeffler, o=Law
Office of Evan L. Loeffler, ou=Law
Office, email=E.L.Loeffler@att.net, c=US
Date: 2008.01.03 16:12:18 GMT

Evan L. Loeffler, WSBA #24105
Attorney for Plaintiff

THREE DAY NOTICE TO PAY RENT OR VACATE PREMISES

THIS NOTICE made this 13 day of December, 2007

TO: Iye Barringer
NAME OF TENANT
Jennifer Barringer
NAME OF TENANT
1027 103rd Dr. SE
ADDRESS
Lake Stevens WA 98258
CITY, STATE, ZIP

PREMISES described as follows: _____
Rental house at 1027 103rd
Dr SE Lake Stevens 98258
Amount delinquent \$ 1880.00

YOU ARE REQUIRED TO PAY the amount delinquent to the undersigned owner or his agent named below or vacate premises within 3 days from date of service of this notice upon you. If payment is not made or premises are not vacated, the Landlord will take appropriate legal action to recover possession of premises and all monies due, including attorney's fees as related to this action. If payment is not made or Tenant does not vacate premises, Washington State Statute provides that Tenant shall be guilty of unlawful detainer.

VACATION of premises shall not relieve Tenant of any responsibility to Landlord including all past due rents and those that are now attributable.

Issued in Snohomish county, Washington, this 13th

day of December, 2007. You may contact Landlord by calling 425-313-4268
All correspondence/payment may be brought to _____

[Signature]
OWNER
AGENT

Sandy's Row
7813 Lake St SE
Snohomish, WA 98290
hand delivered 12/13/07
mailed 12/13/07
METHOD OF DELIVERY
ACKNOWLEDGED OR WITNESSED

TO RECORDEE CALL (206) 821-7755
WASHINGTON REAL ESTATE FORMS
17025 NE 136TH, KIRKLAND, WA 98033

FORM 9070 Rev. 1/00 ©

THIS FORM MAY NOT BE REPRODUCED IN BLANK

RULE 60
RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. 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:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.



III. PLEADINGS AND MOTIONS (RULES 7-16)

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

(b) Motions and Other Papers.

(1) How Made.

(A) Reapplication on Same Facts. Except as stated below, when a motion has been ruled upon in whole or in part, the same motion may not be later presented to another judge. If the prior ruling was made without prejudice or when the prior motion has been granted conditionally, and the condition has not been met, any subsequent motion may be presented as set forth below. Reapplication shall be made in the same manner as a motion to reconsider.

NOTE: SEE SCLCR 59 FOR MOTIONS FOR RECONSIDERATION.

(B) Subsequent Motion; Different Facts. If a subsequent motion is made upon alleged different facts, the moving party must show by affidavit what motion was previously made, when and to which judge, what order or decision was made on it, and what new facts are claimed to be shown. For failure to comply with this requirement, the subsequent motion may be stricken, any order made upon such subsequent motion may be set aside, or provide such other relief as the court deems appropriate.

(2) Form.

(A) Motions to Be in Writing. Motions must be in writing, dated, and signed by the attorney or party pro se, except those mentioned in these rules as oral motions or those made in the course of trial.

(B) Notes for Civil Motion Calendar; Time for Filing. Any party desiring to bring any civil motion prior to trial, other than a motion for summary judgment, must file such motion documents with the clerk and serve all parties, and the court at least six (6) court days before the date fixed for such hearing. The motion documents must include an order to show cause or a note for motion calendar, the motion, and supporting documents. The note for motion calendar must be on the form approved by the court. The note for motion calendar must be signed by the attorney or party pro se filing the same, with the designation of the party represented. The note for motion calendar must identify the type or nature of the relief being sought. The note or other document shall provide a certificate of mailing of all documents

relating to the motion. The certificate shall state the person and address to whom such mailing was made, and who performed the mailing. Such mailing may not be by a party to the action.

(C) Notes for Family Law Motion Calendar. Any Party desiring to bring any family law motion, other than a motion to reconsider (governed by SCLCR 59), on the family law motion calendar must file such motion documents with the Clerk and serve all parties and the court at least twelve (12) days before the date fixed for such hearing. Responding documents and briefs must be filed with the clerk and copies served on all parties and the court no later than 12:00 noon five (5) days before the hearing. Copies of any additional responding or reply documents must be filed with the clerk and served on all parties and the Court not later than 12:00 noon three (3) court days before the hearing.

[Amended effective September 1, 2002]

(D) **1. Filing.** A party filing a Land Use Petition Appeal (LUPA) shall note a motion and an initial hearing, pursuant to RCW 36.70C.080, within seven days after serving the LUPA petition on the parties identified in RCW 36.70C.040(2). The motion and initial hearing will be set no sooner than 35 days and no later than 50 days after service of the parties. At the same time, the party filing the petition shall deliver working copies for the Superior Court Presiding Judge to Court Administration for pre-assignment of a Judge for the initial hearing.

2. Motion. The Motion shall include the following:

- (1) Request for pre-assignment for initial LUPA Hearing
- (2) Specific relief and/or action sought at this time
- (3) List of the names, e-mail addresses (if known), telephone numbers and mailing addresses of all other attorneys in the case and/or all other parties requiring notification regarding this case
- (4) Proposed outline of hearing/filing deadlines based on the filing date as directed by statute.
- (5) Any other matters required by RCW 36.70C.080

3. Pre-assignment. The presiding judge will assign the case to a judge who will handle the initial hearing and all other hearings in the case. The assigned judge may reschedule the initial hearing, if necessary, based on the assigned judge's availability.

4. Other parties. The other parties shall note all matters required by RCW 36.70C.080 to be heard at the initial hearing

5. Working papers. All parties will provide working papers to the assigned judge at least 6 court days prior to the hearing.

[Amended effective September 1, 2007]

(E) The motion documents must include an order to show cause or a note for motion calendar, the motion, and supporting documents. The note for motion calendar must be on the form approved by the court. The note for motion calendar must be signed by the attorney or party prose filing the same, with the designation of the party represented. The note for motion calendar must identify the type or nature of relief being sought. The note or other document shall provide a certification of mailing of all documents related to the motion. The certificate shall state the person and address to who such mailing was made, and who performed the mailing. Such mailing may not be made by a party to the action. Absent prior approval of the court, materials will not include audio or video tape recordings.

[Adopted effective September 1, 2000]

(F) Working copies of the motion and all documents in support or opposition shall be delivered by the party filing such documents to the judicial officer who is to consider the motion no later than the day they are to be served on all other parties. All working copies shall state, in red ink in the upper right corner, the following: the date and time of such hearing, the jurist assigned, if any, and the Department or room number of the department where the motion is to be heard. NOTE: SEE SCLCR 56 FOR SUMMARY JUDGMENT MOTIONS.

(G) Late Filing; Terms. Any material offered at a time later than required by this rule may be stricken by the court and not considered. If the court decides to allow the late filing and consider the materials, the court may continue the matter or impose other appropriate remedies including terms, or both.

[Amended effective September 1, 2001]

(H) Motion; Contents Of. A motion must contain the following (motions shall comply with any applicable mandatory form requirements):

1. Relief Requested. The specific relief the court is requested to grant;
2. Statement of Grounds. A concise statement of the grounds upon which the motion is based;
3. Statement of Issues. A concise statement of the issue(s) of law upon which the court is requested to rule;
4. Evidence Relied Upon. The evidence on which the motion or reply is based, shall be identified with particularity. Absent prior court approval, this evidence shall not include audio or video tape recordings. Deposition testimony, discovery pleadings, and documentary evidence relied upon must be quoted verbatim, or a photocopy of relevant pages thereof must be attached to the motion. Deposition testimony in connection with a motion shall

not require publication thereof unless a challenge is made thereto and good cause is shown for such publication by an opposing party. Depositions used in this fashion shall remain unopened and not a part of the court file unless otherwise ordered by the court; and

5. Legal Authority. Any legal authority relied upon must be cited. Provided, that items 2. through 5. above may be contained in a memorandum of authority in support of the motion.

(I) Confirmation Process.

1: Manner of Confirming. In order that a motion, or an order to show cause, or matter be argued or ruled upon, a party pro se or attorney for the moving party must confirm before 12 noon two (2) court days prior to the hearing; otherwise the matter will be stricken. Only by stipulation of the parties and agreement of the court may an unconfirmed matter be heard. Confirmations shall be made electronically, in a format approved by the court, or by telephone. The case name, cause number, date and time of the motion, title or type of motion, calendar on which the motion appears, the name and telephone number of the person confirming, and E-mail address of the person confirming when confirmation is accomplished electronically, is information which must be provided to the person or recording taking the confirmation .

[Amended effective September 1, 2000]

2. Strikes or Continuances. The court must be notified immediately if any confirmed matter will be stricken or continued. No confirmed matter may be continued after 5:00 p.m. two court days before the hearing, except by leave of the court. Failure to notify of such continuance or strike of a confirmed motion may result in sanctions and/or terms.

(J) Time of Hearing.

1. Times, days, and locations of various motions shall be as set forth in an administrative order of the court. All Family Law/Domestic Motions shall be noted for hearing on a Court Commissioner's calendar. However, motions for summary judgment, except for motions to establish parentage, and motions to revise the ruling of a Court Commissioner shall be noted on the Judge's Civil Motion calendar (except for motions to revise a juvenile court commissioner's order which shall be specially set on a Juvenile Judge's calendar) and motions for preassignment, motions regarding trial settings, motions regarding the timeliness of the demand for jury and motions for trial continuance shall be noted before the Presiding Judge. Initial TEDRA hearings pursuant to RCW 11.96A.100(8) shall be noted on the Judge's Civil Motion calendar. The following are to be noted on the Court Commissioner Civil Calendar: Defaults,

Discovery Motions & enforcement thereof, Supplemental Proceedings, Unlawful Detainer or Eviction, Probate, Guardianship & Receiver actions, Motions to Amend Pleadings and Petitions for Restoration of the Right to Possess Firearms. Summary judgment motions in private parentage actions shall be noted on the Court Commissioner's family law motions calendar. All other civil motions shall be noted on the Judges Civil Motions Calendar.

[Amended September 1, 2007 and December 12, 2007]

2. Unopposed Matters. If no one appears in opposition to a motion at the time set for hearing, the court may enter the order sought, unless the court deems it inappropriate to do so. If no one appears in support of a motion, the court may strike the matter or deny the motion unless the court deems it inappropriate to do so.

3. Hearing Order. Motions will be heard in the order designated by the court. Upon stipulation of all parties, or as ordered by the court, a motion may be presented without oral argument.

4. Time of Argument; Special Setting. No more than five (5) minutes per side will be allowed for argument unless specially permitted by the court. If more than one-half (1/2) hour of judicial time, including preparation and in-court time, is required, the moving party shall at the earliest possible opportunity advise the confirmation clerk or law clerk/bailiff of the judge who will be hearing that calendar. The matter may then be preassigned, specially set, or placed on the trial calendar, at the discretion of the Presiding Judge or designee. If placed on the trial calendar, unless otherwise authorized by the court, the parties or their attorneys shall be present for the trial calendar call on the day of the setting.

5. Imposition of Sanctions or Terms. The court may impose sanctions or terms for any frivolous motion or in granting a continuance of any matter. Nonappearance on a confirmed calendar by a confirming party may result in the imposition of sanctions or terms by the court on counsel or on one or more of the parties as appropriate, in addition to other relief granted by the court.

6. Before taking any action on less notice than that required by this or any other rule, a party must present a motion and affidavit, and must obtain an order to shorten time. The documents may be presented ex parte if the motion contains a written certification that the other parties pro se or attorneys were notified of the time and place of requesting the order to shorten time.

[Amended effective September 1, and November 14, 2002; Amended effective September 1, 2006]

(K) Reconsideration. See SCLCR 59.

(L) Presentation of Order After Hearing. The parties shall comply with the provisions of SCLCR 52 for the presentation of any proposed order subsequent to a hearing on the motion. Except in complex matters, each party shall have a proposed order prepared at the time the motion is called for hearing. Unless specifically authorized by the court, the prevailing party shall present a proposed order before the conclusion of the calendar on which the matter was heard.

(M) Motions for Revision. A party seeking revision of a commissioner's ruling shall, within the time specified by statute, file and serve on all other parties a motion and completed calendar note. The filing of the written order of the commissioner shall commence the running of the time. Review of rulings shall be de novo on the pleadings submitted to the commissioner. A transcript or recording of proceedings held before the commissioner shall not be filed or considered by the Court, unless specifically authorized by the judge hearing a motion to revise. Any motion for revision shall state each particular finding of fact, conclusion of law, order or ruling for which revision is sought. Any such motion shall additionally contain a brief statement, for each such claimed error, which states the movant's claim of the correct finding, conclusion, order, or ruling. The Motion for Revision shall be filed timely and shall be scheduled by the movant to be heard not more than 14 days after the motion is filed. Working Copies of the motion and all papers which were before the commissioner in support or opposition shall be delivered as provided in SCLCR 7(2)(C).

[Amended effective September 1, 2000; amended effective September 1, 2005; amended effective September 1, 2007]

(N) Responsive Materials.

1. Responding documents and briefs must be filed with the clerk and copies served on all parties and the court no later than 12 noon two (2) court days prior to the hearing. Copies of any documents replying to the response must be filed with the clerk and served on all parties and the court not later than 12 noon of the court day prior to the hearing.

2. Absent prior approval of the court, responsive or reply materials will not include either audio or video tape recordings.

(O) Working Copies. All working copies shall state, in red ink in the upper right hand corner, the following: the date and time of such hearing, the jurist assigned, if any, and the department or room number of the department where the motion is to be heard.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JAMES ROW,

Respondent,

vs.

TYE BARRINGER AND JENNIFER
BARRINGER,

Appellant.

Trial Court No. 08-2-01799-9

Court of Appeals No. 64101-8-I

**PROOF OF MAILING OF BRIEF
OF APPELLANT**

I declare:

1. At the time of service I was at least eighteen years of age, and not a party to this cause.
2. On March 10, 2010, I mailed to the attorney listed below the following documents:
 - a. Brief of Appellant
 - b. Proof of Mailing of Brief of Appellant

Evan Loeffler
Law Office of Evan Loeffler
2033 6th Ave., Suite 1040
Seattle, WA 98121-2527

Sidney Charlotte Tribe
Talmadge/Fitzpatrick
18010 Southcenter Pkwy.
Tukwila, WA 98188-4630

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date: March 10, 2010, at Everett, Washington



Scott R. Peterson

ORIGINAL