

No. 67759-4-I
King County Superior Court No. 06-2-36124-5 SEA

In The
Court of Appeals of the State of Washington
Division One

PAUL H. KING,
Appellant,

v.

STEVE RICE and BARBARA RICE, husband and wife, and the marital
community comprised thereof, dba SUNLIGHT CONSTRUCTION
Respondents.

**On Appeal from the Superior Court of Washington
County of King**

BRIEF OF APPELLANT

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2012 JUN 11 PM 2:45
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

Table of Contents

	Table of Contents	i
	Table of Authorities	ii
I.	Introduction	1
II.	Assignments of Error and Issues Pertaining Thereto.	6
III.	Statement of the Case	11
IV.	Summary and Legal Argument	15
	A. Summary of the Facts	15
	B. Civil Rule 41(b)(1)	20
	1. The Rule	20
	2. Case Noted for Trial When Filed, Etc.	21
	3. Rices Caused Delay	22
	4. King Attempted Renote	23
	5. King Moved to Set New Trial Schedule, to Enter Judgment on Remand	24
	C. King’s Right to Due Process	25
	1. King’s Right to be Heard on Remand	25
	2. King’s Right to Respond to Motion to Dismiss	25
	D. Civil Rule 11 Signature Requirement	26
	1. The Rule	26
	2. King’s Right to Cure Deficiency	27
	3. Power of Attorney	29
	4. Amanuensis Signatures	31
	5. Rubber Stamped Signatures	33
	6. Practical Reasons	36
	E. Bankruptcy Stay	36
	1. King’s Bankruptcy	36
	2. Supplemental Proceedings Barred By Stay	37
	3. Counsel Mised Superior Court	38
	4. Resistance to Supplemental Proceedings Prevented Payment Toward Reversed Judgment	42
	5. Appropriate Procedure is to Seek Relief From Stay in Bankruptcy Court	43
	F. 1 Year Clock for CR 41(b)(1), Bankruptcy Stay	43
V.	Conclusion	44

Table of Authorities

Table of Cases

Arcweld Mfg. Co. v. Burney, (1942)
12 Wash. 2d. 212, 121 P. 2d. 350 30

Biggs v. Vail, (1994) 124 Wash. 2d 193, 198, 876 P.2d 448 28

Bryant v. Bryant, (1994) 125 Wash. 2d. 113, 882 P. 2d. 169 30

Business Services of America II, Inc. v. Wafertech, LLC,
(2011) 159 Wash. App. 591, 245 P. 3d. 257 20, 23

Business Services of America II, Inc. v. Wafertech, LLC,
(April 19, 2012) _____ Wash. 2d. _____ 21, 23

Gott v. Woody, (1974) 11 Wash. App. 504, 524 P. 2d. 452 20, 23

Griffith v. City of Bellevue, (1996) 130 Wn. 2d 189, 922 P. 2d. 83 . . 27, 28

In re Estate of Springer, (1917) 97 Wash. 546, 166 P. 1134 30

In re King, Bankr. Nev. No. 10-11601 . . 12, 13, 14, 16, 17, 36, 37, 38, 43

Irving v. Goodimate Co, (1946) 320 Mass. 454,
171 ALR 326, 70 NE 2d. 414 35

Jones v. Halvorson-Berg, (1993) 69 Wash. App. 117,
847 P. 2d. 945 31

Kadota Fig Assoc. of Producers v. Case-Swayne Co.,
(1946) 73 Cal. App. 2d. 815, 167 P. 2d. 523 31, 32

King v. Rice, (2008) 146 Wash. App. 662,
101 P. 3d. 946 *passim*

Likowski v. Catlett, (1928) 130 Okla. 71,
57 ALR 517, 265 P. 117 32

Metropolitan Discount Co. v. Davis, (1928) 69 Okla. 111,
7 ALR 670, 170 P. 707 34

Sternberg v. Johnson, (9th Cir. 2009) 582 F. 3d. 1114 38

Thomle v. Soundview Pulp Co., (1935) 181 Wash. 1, 42 P. 2d. 19 30

Table of Laws

Constitution of the United States

Fourteenth Amendment 25

Laws of the United States

11 U.S.C. §362 8, 9, 36, 37, 43
11 U.S.C. §1301 et seq., Chapter 13 *passim*

Constitution of the State of Washington

Article I Section 3 25

Laws of the State of Washington

RCW 4.04.010 5, 8, 34
RCW 6.32.010 13, 17, 38

Rules of Court

Civil Rule 11 *passim*
Civil Rule 41 *passim*
Civil Rule 56 25, 26
Civil Rule 59 18
King County Superior Court Local Civil Rule 7 26
King County Superior Court Local Civil Rule 56 26
Rules of Professional Conduct 3.3 10, 16, 39, 40, 41

Other Authorities

Annotated Article 7 ALR 672 26, 34
Annotated Article 37 ALR 87 34, 35
Annotated Article 57 ALR 525 32
Annotated Article 171 ALR 334 35

I. INTRODUCTION

This is a new appeal involving a case returning from the Court appeals in *King v. Rice*, (2008) 146 Wash. App. 662, 665, 191 P. 3d. 946. The original case involved the Rice's complete destruction of Appellant's house, a brand new modular house with dimensions of 14 feet by 40 feet, by taking his backhoe and demolishing it. This Court found for the Appellant (King) and reversed the judgment and attorney fees while awarding costs for King. The matter was subsequently appealed to the Supreme Court by Respondent Rice's and the Washington State Supreme Court which did not hear the case. The case was subsequently sent back to the Superior Court. The respondent had counterclaims which were dismissed and not appealed.

During the pendency of the case counsel for the Rices engaged in supplemental proceedings based upon an attorney fee judgment. The Rices had obtained an ex parte Order Re Supplemental Proceeding, Sub No. 227B. Notice of the hearing was never personally served King, but posted upon his door. Declaration of Service, Sub No. 227C. Respondent subsequently obtained an Order Directing Issuance of Bench Warrant, Sub

No. 267A.

After the subsequent reversal and remand counsel for the Rices on at least two separate occasions deliberately misled the Superior Court judge's handling the case that the judgment for full \$41,689.00 was still in effect and actively represented that to superior court, to secure a legal advantage in the supplemental proceedings action. Counsel and his law firm knew that the full judgment had been reversed by this Court. They persisted in trying to enforce the judgment after the Mandate had been issued.

King was forced to file for Chapter 13 bankruptcy repayment plan to pay for the any amounts that may be due and to obtain the benefit of the stay against such supplemental proceedings because of the false allegations that he owed the full \$41,689.00. The notices of the bankruptcy stay were personally served on counsel for the Rices counsel Greg McBroom and on the superior court.

Counsel Greg McBroom, after the Chapter 13 Bankruptcy repayment plan was filed, suggested that the repayment plan of the Bankruptcy was either invalid or inapplicable and misled Judge Hilyer into

granting a arrest warrant for appellant.

King was subsequently was arrested and hearing was held. Thomas Windus, WSBA #7779, represented the Rices. Mr. Windus is in the same law firm as Greg McBroom. Windus represented to court at the hearing before Judge Kallas that the law firm knew nothing of the Bankruptcy or the stay. Mr. Windus was present with the file of Greg McBroom, but chose not review the file when asked.

Judge Kallas at that hearing ordered counsel (Windus) for the Rices to confirm that the Chapter 13 repayment plan was in place and that Counsel for the Rice's report back within several days of the hearing and dismiss the case. King was released. It was only after prompting from Kallas clerk was the matter confirmed and the court dismissed the supplemental proceedings initiated by Greg McBroom.

This is the second time that oral misrepresentations have been made to the Superior Court by Mr. McBroom, in the first appeal of this case it was noted and CP'ed that Mr. McBroom had actively represented to the court that no documents existed that confirmed the move of the modular house. Those documents were found and were in fact in the

possession of Mr. McBroom who had knowledge of them. A WSBA bar complaint is still actively pending against him for misleading the court.

Eight months after the discharge from Chapter 13 Bankruptcy repayment plan respondent Rice moved to dismiss this case under CR 41(b)(1). Appellant King contacted the arbitration department to reset the matter for arbitration and was told that the matter had to be re-set for trial. A motion was then made to set the matter was noted for trial. Such an action defeats a motion to dismiss under CR 41 (b)(1).

King tried to get the matter set back into arbitration which he had paid for and had been set before the summary judgment and the Arbitration Department indicated that it had to be set for trial first.

Appellant was unavailable to sign personally the Motion to Note Trial and enter the Mandate so he directed his General Power of Attorney, Mr. Knight to stamp his signature at his direction to meet the requirements of CR 11. King indicated he was unavailable to attend the hearing and accordingly was not present for the oral argument.

The matter of the signature was only brought up in oral argument at the day of hearing, no briefing or written material had been submitted

prior to the hearing giving notice to King that it was an issue. King could not be present for the argument and was not there. He had submitted his response to the issues in the written motion. The court adopted the new argument of the signature as the basis of the signature. King did not find out for three or four days later.

The superior court order found the (amanuensis) signature to be contrary to CR 11 and sua sponte granted the motion to dismiss without affording Mr. King any opportunity to respond or file an original signature.

King subsequently authored his original signature and tendered such to the court.

Generally signatures by others are authorized in this state pursuant common law as adopted by RCW 4.04.010. Numerous ALR articles confirm the validity of such signatures, Washington is in accord. Also noted was the fact that Writs of Garnishment and Writs of Executions are most commonly stamped by clerks with rubber stamped facsimiles of Chief judge's signature in both District and Superior Court.

It was also noted to the court that neither side had entered the mandate upon case being returned to Superior Court and the Rice's had

counterclaims. The case had not been properly “joined” for trial given that there were issues as to entry of a judgment for King, the decision whether it should go back to arbitration or to Superior Court trial as contemplated by CR 41(b)(1) and the amount of any remaining costs left due and owing after the reversal if any. Further hearings had to be held in order to determine the matter was ready for trial and on what terms.

The implications of the case may be large. As pointed out above a rubberstamped signature is in common use by the courts, perhaps even the Court of Appeals a finding that such is invalid even in a unpublished decision may throw into doubt dozens of Writs of garnishment and Writs of execution dating back for a number of years and other documents where signatures are authorized by a mark.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING

ASSIGNMENT OF ERROR A: Superior court erred in granting dismissal and denying reconsideration of the issues under CR 41(b)(1).

Issues Pertaining to Assignment of Error A:

Should the case be dismissed when (a) the mandate had not been acted upon by either party, (b) neither party had filed to set a new the trial

date, (c) the issues of the case not been properly “joined” as contemplated by CR 41, (d) the respondent by falsifying statements to the court caused the delay (e) a year had not gone by since the matter was eligible to be noted, (f) when an issue (CR 11) that is raised on first impression in oral argument be briefed and responses allowed before a decision is made and (g) when Appellant has noted a motion to set new trial schedule and moved also to enter judgment on remand prior to the hearing the Motion to dismiss as contemplated by CR 41?

ASSIGNMENT OF ERROR B: Superior court erred in granting dismissal and denying reconsideration on the grounds that an amanuensis signature was not valid for purposes of CR 11.

Issues Pertaining to Assignment of Error B:

Should CR 11’s signature requirement be met with an amanuensis signature? Amanuensis signature’s are found on many court pleadings superior court judges routinely authorize their signatures for writs of garnishment or executions to be placed by rubber stamp by the court clerk. The same holds for district court judges. No local or state rule prevents this. It is done presumably by oral agreement with the clerk. Precluding

rubber stamped signatures would throw a whole array of garnishments and execution Writs through out the State of Washington into question.

If a rubberstamped signature is found to be insufficient, then King has right to an opportunity to cure such deficiency by signing the documents in question as propounded in CR 11 the rule itself.

A power of attorney granted a person, gives the authority to sign his name on his behalf. Such amanuensis signatures are not prohibited by CR 11 and are therefore valid and binding upon the party. CR 11 does not prohibit rubberstamped signatures, and are authorized under the common law and RCW 4.04.010, therefore they are valid and binding upon the party and the judicial process.

There are many practical reasons for allowing such amanuensis and rubberstamped signatures in the case of parties who are incapacitated or imprisoned.

ASSIGNMENT OF ERROR C: Superior court erred by dismissing the case when (a) proceeding after notice of a bankruptcy imposing the stay mandated by 11 U.S.C. §362(a) prevented action on the case for a number of months and when false statements to the court

precipitated the Bankruptcy repayment and caused further delay.

Issues Pertaining to Assignment of Error C:

Should a party have the benefit of using false statements to the Court to prevent a case from being moved forward after a remand?

A bankruptcy Chapter 13 (a repayment plan) was filed by Appellant to deal with any amounts that may come due for the Superior Court action. Appellant was therefore limited by the bankruptcy action in what he could do to move this case along. Counsel for the Respondent continued to make false representations as to (a) Whether there was a bankruptcy action present and (b) the amounts that were due if any to the Respondent after the remand to the Court.

Should respondent be rewarded for making false statements to the Tribunal when he knew or should have known they were untrue?

Upon service of the first page of the bankruptcy action before the hearing scheduled 1:30 pm February 3, 2010, 11 U.S.C. §362(a) mandates that all collection actions against the debtor are stayed and no process may continue during the time such stay is in effect. Therefore all supplemental proceedings, orders and judgments during the stay are null and void.

The supplemental judgment for attorney fees entered on February 3, 2010, Sub No. 290, CP 111-113, for \$657.00 should be vacated or reversed because it was entered during the bankruptcy stay after counsel for the Rices and the superior court were served notice of the bankruptcy.

On February 3, 2010 at the hearing, counsel for the Rices listed the full judgment for \$41,689.00 plus some other amounts but failed to mention that this judgment was reversed by this Court in *King v. Rice*, (2008) 146 Wash. App. 662, 665, 191 P. 3d. 946 and such opinion was attached to the Mandate, Sub No. 285, CP 79-100. By such misleading statement, counsel for the Rices obtained a bench warrant amount of \$40,000.00. Such misleading of a court is a violation of RPC 3.3.

Supplemental proceedings during pendency of previous appeal and subsequent to this Court's decision forced Mr. King to engage in bankruptcy action in order determine and repay what amounts may or may not be due.

The appropriate procedure for a creditor faced with a bankruptcy stay is to seek payment of the debt in the bankruptcy court or to move for a relief from stay. At no time during the bankruptcy case did any counsel

representing the Rices file such a motion or appearance. Therefore the stay was in effect until the bankruptcy case was dismissed as to Paul King debtor on December 13, 2010. Described in the Declaration of Paul King in Response to Defendant's Motion to Dismiss for Want of Prosecution (King Declaration Response), Sub No. 307, on page 2, CP 27.

ASSIGNMENT OF ERROR D: Superior Court erred by dismissing the case under CR 41(b)(1) less than one year after the bankruptcy stay was lifted.

Issues Pertaining to Assignment of Error D:

Until December 13, 2010, the bankruptcy effectively precluded action in the superior court on remand. Only then were the issues in the superior court "joined" for the purposes of CR 41(b)(1). As July, August, and September 2011 are less than 1 year after December 13, 2010, CR 41(b)(1) prohibits a dismissal for want of prosecution.

III. STATEMENT OF THE CASE

On September 8, 2008, this Court entered a published opinion in No. 60461-9 reversing the summary judgment of the superior court. *King v. Rice*, (2008) 146 Wash. App. 662, 665, 191 P. 3d. 946. This

determination reversed the superior court's judgments against Mr. King.

On April 19, 2009, the Supreme Court of Washington in No. 82390-1 denied the Rice's Petition for Review.

On July 22, 2009, the superior court received the Mandate, Sub No. 285, CP 79-100, from this Court.

On January 13, 2010, Mr. King appeared in the superior court on a civil bench warrant. Motion Hearing Clerk's Minutes, Sub No. 287, CP 105. RP 1-3. An Order Compelling Paul H. King to Appear for Supplemental Proceedings and Produce Information, Sub No. 287A, CP 106-108, was entered that day. It required him to appear at 1:30 pm on February 3, 2010.

On February 2, 2010, Mr. King filed for Chapter 13 bankruptcy, *In re King*, Bankruptcy District of Nevada, No. 10-11601, Declaration of Roger W. Knight re Bankruptcy Filing (Knight Declaration Bankruptcy), Sub No. 291, attached Exhibit, CP 104.

On February 3, 2010, before the 1:30 pm hearings, Mr. Knight served upon the bailiff for the Chief Civil Judge, Bruce Hilyer, and upon counsel for the Rices the first page of the Voluntary Petition for Chapter

13 Bankruptcy, *In re King*, Bankruptcy District of Nevada, No. 10-11601.
Knight Declaration Bankruptcy, Sub No. 291, CP 101-104.

Also on February 3, 2010, just after 2:00 pm, the hearing was held before Chief Civil Judge Bruce Hilyer with Greg McBroom, WSBA #33133, representing the Rices and Mr. King not present. At the motion hearing Greg McBroom failed to inform that the award for attorney fees had been reversed by this Court and misled the judge as to the status of the stay in order to receive a warrant of arrest. See Motion Hearing Supplemental Proceedings, Sub No. 294, CP 117. RP 4-7. The superior court entered an Order for Warrant for Contempt of Court and for Supplemental Judgment Pursuant to RCW 6.32.010, Sub No. 290, CP 111-113, with a bail amount of \$40,000.00 and included a judgment for attorney fees of \$657.00.

On May 25, 2010, Mr. King appeared in the superior court after arrest on a civil bench warrant. Motion Hearing Clerk's Minutes, Sub No. 296, CP 119. RP 8-12. Thomas Windus, WSBA #7779, represented the Rices. Windus represented to the Judge Kallas that the he knew nothing of the Bankruptcy or the stay. RP 10. The resulting Order for Release,

Sub No. 295, CP 118, required counsel for the Rices to confirm the status of the bankruptcy case and to strike the hearing it scheduled for June 2, 2010 if the bankruptcy is confirmed.

On June 1, 2010, the superior court received Correspondence, Sub No. 298, CP 120-121, from counsel for the Rices acknowledging that bankruptcy was still in effect and striking the supplemental proceeding.

On December 13, 2010, *In re King*, Bankruptcy District of Nevada, No. 10-11601 was dismissed. This can be verified by PACER.

On July 29, 2011, the Rices brought their Defendants' Motion to Dismiss for Want of Prosecution, Sub No. 301, CP 12-14.

On August 15, 2011, King filed his Response in Opposition to Defendants' Motion to Dismiss for Want of Prosecution, Sub No. 305, CP 19-22; his Motion to Enter Judgment on Remand, Sub No. 303, CP 15-16; and his Motion to Set a New Trial Schedule, Sub No. 304, CP 17-18.

On August 17, 2011, the superior court entered the Order Granting Defendants' Motion to Dismiss for Want of Prosecution based upon violation of CR 11, Sub No. 311, CP 30-31.

On August 31, 2011, the superior court denied King's Motion and

entered the Order Striking Motion to Enter Judgment on Remand and Motion to Set a New Trial Date, Sub No. 320, CP 77.

On September 9, 2011, the superior court entered the Order Denying Motion for Reconsideration of Order Granting Defendants' Motion to Dismiss for Want of Prosecution, Sub No. 321, CP 78

On September 30, 2011, King filed his Notice of Appeal to the Court of Appeals, Division One, Sub No. 322, CP 1-11.

IV. SUMMARY AND LEGAL ARGUMENT

A. Summary Statement of the Facts

On September 8, 2008, this Court entered a published opinion in No. 60461-9 reversing the judgments of the superior court against Mr. King. *King v. Rice*, (2008) 146 Wash. App. 662, 665, 191 P. 3d. 946. On April 19, 2009, the Supreme Court of Washington in No. 82390-1 denied the Rice's Petition for Review. On July 22, 2009, the superior court received the Mandate, Sub No. 285, CP 79-100, from this Court "reversing and remanding" the decisions of the superior court, CP 91.

Counsel for the Rices continued to represent to the superior court that the judgment was valid and to conduct supplemental proceedings,

even after this Court reversed the judgment they had against Mr. King. Mr. King was forced to file for chapter 13 bankruptcy, *In re King*, Bankruptcy District of Nevada No. 10-11601. On February 3, 2010, before the 1:30 pm hearings, Mr. Knight served upon the superior court, bailiff for the Chief Civil Judge, Bruce Hilyer, and upon counsel for the Rices the notice of the Voluntary Petition for Chapter 13 Bankruptcy. Knight Declaration Bankruptcy, Sub No. 291, CP 101-104. Just after 2:00 pm, the hearing was held before Chief Civil Judge Bruce Hilyer with Greg McBroom, WSBA #33133, representing the Rices and Mr. King not present. Motion Hearing Supplemental Proceedings, Sub No. 294, CP 117. RP 4-7. Mr. McBroom misled the superior court as to the applicability of the bankruptcy stay while acknowledging the existence of the bankruptcy, and then misled the superior court into believing that all of the judgment of \$41,689.00 was still in effect. RP 7. Mr. McBroom did not disclose that this judgment was reversed by this Court in *King v. Rice*, (2008) 146 Wash. App. 662, 665, 191 P. 3d. 946 and such opinion was attached to the Mandate, Sub No. 285, CP 79-100. By such RPC 3.3 violation, Mr. McBroom obtained the Order for Warrant for Contempt of

Court and for Supplemental Judgment Pursuant to RCW 6.32.010, Sub No. 290, CP 111-113, with a bail amount of \$40,000.00 and included a judgment for attorney fees of \$657.00.

On May 25, 2010, Mr. King appeared in the superior court on a civil bench warrant. Motion Hearing Clerk's Minutes, Sub No. 296, CP 119. RP 8-12. Thomas Windus, WSBA #7779, represented the Rices before Judge Kallas. RP 9-10 He indicated that the firm knew nothing of the Bankruptcy. The resulting Order for Release, Sub No. 295, CP 118, required counsel for the Rices to confirm the status of the bankruptcy case and to strike the hearing it scheduled for June 2, 2010 if the Chapter 13 repayment plan bankruptcy was still in effect within several days.

Upon prompting of the Court Clerk for Judge Kallas, on June 1, 2010, the superior court received Correspondence, Sub No. 298, CP 120-121, from counsel for the Rices acknowledging that bankruptcy was still in effect and striking the supplemental proceeding.

On December 13, 2010, *In re King*, Bankruptcy District of Nevada, No. 10-11601 was dismissed. On July 29, 2011, eight months later the Rices brought their Defendants' Motion to Dismiss for Want of

Prosecution, Sub No. 301, CP 12-14.

During July, August, and September 2011, King was detained on a matter unrelated to this case. As a result, he was unable to quickly respond to the motion practice initiated by the Rices without granting Roger Knight, who is not a party to this matter, power of attorney and directing him to draft and stamp sign pleadings. King had an e-mail account and used this to send and receive the pleading drafts while preparing them with Mr. Knight. Motion for Reconsideration of Order Granting Defendants' Motion to Dismiss for Want of Prosecution, CR 59, Sub No. 315, pp. 2-3, CP 67-68; Declaration of Roger Knight in Support of Motion for Reconsideration of Order Granting Defendants' Motion to Dismiss for Want of Prosecution (Knight Declaration Recon), Sub No. 313, CP 32-34; Declaration of Paul King in Support of Motion for Reconsideration of Order Granting Defendants' Motion to Dismiss for Want of Prosecution (King Declaration Recon), Sub No. 314, pp. 1-3, signed p. 3, CP 35-38.

On August 15, 2011, Mr. King filed his Response in Opposition to Defendants' Motion to Dismiss for Want of Prosecution, Sub No. 305, CP

19-22; his Motion to Enter Judgment on Remand, Sub No. 303, CP 15-16; and his Motion to Set a New Trial Schedule, Sub Nos. 304, CP 17-18.

The superior court did not accept the pleadings as stamped signed by Mr. Knight upon authorization from Mr. King. On August 17, 2011, the superior court entered the Order Granting Defendants' Motion to Dismiss for Want of Prosecution, Sub No. 311, CP 30-31. This dismissal was based upon the premise that a power of attorney cannot affix a party's signature with his direction and that such signature violates CR 11.

On August 15, 2011, King filed his original signatures with the superior court on the Motion to Enter Judgment on Remand and Motion to Set a New Trial Date, Sub No. 303, CP 15-16. On August 31, 2011, the superior court entered the Order Striking Motion to Enter Judgment on Remand and Motion to Set a New Trial Date, Sub No. 320, CP 77.

On September 9, 2011, the superior court entered the Order Denying Motion for Reconsideration of Order Granting Defendants' Motion to Dismiss for Want of Prosecution, Sub No. 321, CP 78.

On September 30, 2011, Mr. King filed his Notice of Appeal to the Court of Appeals, Division One, Sub No. 322, CP 1-11.

B. Civil Rule 41(b)(1)

1. The Rule

The Rices relied on CR 41(b)(1) to move to dismiss for want of prosecution of a case remanded from this Court. CR 41(b)(1) reads:

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

(1) Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

Gott v. Woody, (1974) 11 Wash App. 504, 505-508, 524 P. 2d. 452 found that the inherent power of a court to dismiss a case is limited by CR 41(b)(1). If the case is noted for trial before the hearing, on such a motion to dismiss, it shall not be dismissed. If a year had not passed when such a motion is filed, again, it shall not be dismissed.

Business Services of America II, Inc. v. Wafertech, LLC, (2011) 159 Wash. App. 591, 596-599, 245 P. 3d. 257 found that CR 41(b)(1)

applies to a remanded case. The mechanic's lien claim was "joined" when this Court issued the mandate on February 8, 2005. Over four years later, BSAIL noted the matter for trial in June 2009. Wafertech itself had three years to move for dismissal for want of prosecution. But with the case noted for trial, CR 41(b)(1) barred dismissal.

Review of *BSAIL* has been accepted by the Supreme Court of Washington, (2011) 171 Wash. 2d. 1024, 257 P. 3d. 664, Supreme Court No. 85654-1. The Supreme Court's decision in *BSAIL* on April 19, 2011 affirmed this Court's finding.

2. Case Was Noted for Trial When Originally Filed, Sent Over to Arbitration, Dismissed on Summary Judgment, then Dismissal Reversed on Appeal, and Remanded With Mandate

This case was noted for trial when it was filed on November 13, 2006. The original trial date was to be May 5, 2008, Sub No. 2. Then this matter was sent over for arbitration, Sub No. 31. Before the arbitration process could be completed, the defendants moved for summary judgment, Sub No. 38, and obtained dismissal of the case, Sub No. 105, and a large award for attorney's fees, Sub Nos. 104 and 170. However, the award for attorney's fees and the summary judgment were reversed in *King v. Rice*,

(2008) 146 Wash. App. 662, 665, 191 P. 3d. 946 and the case remanded, Mandate, Sub No. 285, CP 79-100.

3. Rices Caused Delay

While the Rices did not act in bad faith or bring a frivolous Motion for Summary Judgment, Sub No. 38, as it was granted, Sub No. 105, they nevertheless are responsible for the matter being delayed due to their actions prior to the motion and its subsequent reversal on appeal. Part of CR 41(b)(1) reads:

unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss

The moving parties caused further delay by engaging in collection procedures by subterfuge, Sub No. 287, CP 105, Sub. No. 287A, CP 106-108, Sub No. 289, CP 109-110, Sub No. 290, CP 111-113, Sub No. 292, CP 114-116, Sub No. 294, CP 117, Sub No. 295, CP 118, Sub No. 296, CP 119, and Sub No. 298, CP 120-121 against King, by not informing the court that the matter had been reversed and alleging amounts due well knowing that the matter had been remanded with the fees dismissed. The bail on the civil bench warrant entered on February 3, 2010 was set at \$40,000.00, Sub No. 290, CP 111-113, after counsel for the Rices, Greg

McBroom, WSBA #33133, listed the judgment for \$41,689.00 as current and active, RP 7. Mr. McBroom did not mention that this Court in *King v. Rice*, (2008) 146 Wash. App. 662, 665, 191 P. 3d. 946 and such opinion was attached to the Mandate, Sub No. 285, CP 79-100 reversed this judgment, CP 91, and added a judgment in favor of Mr. King, CP 80.

This process forced Mr. King to use bankruptcy proceedings to protect himself with a repayment plan to the Rice's in a Chapter 13 proceeding. Had the Respondent's counsel been truthful to the superior court and allowed the arbitration process to be proceed, this case would have been completed long ago.

4. King Attempted to Note the Case for Arbitration Before Hearing on the Motion to Dismiss to Preserve the Case

CR 41(b)(1) also reads:

If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

And as enforced by *Gott, supra* and *BSAII, supra*.

King contacted the Clerk's Office to reset on trial track and to get the arbitration department to work on it. As this case was originally found to be arbitrable, and an arbitrator was appointed, logic dictates that it

should be sent back to arbitration, which should meet the purpose if not the exact letter of CR 41(b)(1).

The King Declaration Response, Sub No. 307, CP 26-28 details some of the problems he has dealt with respect to this case on remand. The Rices continued their attempts to enforce the judgments even after this Court reversed them. Mr. King contacted the superior court's clerk's office trying to get a new case schedule and to get it set over for arbitration. The Declaration of Roger W. Knight in Response to Defendants' Motion to Dismiss for Want of Prosecution, Sub No. 206, CP 23-25 sets forth his communications with the superior court's Arbitration Office to inform them of Mr. King's wish that this matter be set for arbitration. It was finally determined from such communications that the matter should be set for trial.

5. King Moved to Set New Trial Schedule and Moved to Enter Judgment on Remand also prior to the Motion to Dismiss

Before the hearing to dismiss King filed a Motion to Set a New Trial Schedule, Sub No. 304, CP 17-18 and a Motion to Enter Judgment on Remand, Sub No. 303, CP 15-16 with Judge Erlick, (the assigned judge) subsequently the motion to dismiss was transferred to Inveen. Had

these motions been granted it would have triggered the last sentence of CR 41(b)(1) which states;

“If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.”

C. King’s Right to Due Process

1. King Has the Right to be Heard on Remand

King v. Rice, (2008) 146 Wash. App. 662, 665, 191 P. 3d. 946 and the Mandate from this Court, Sub No. 285, CP 79-100 provide that Mr. King has some claims that can be heard and determined by the superior court, either by its judges or by arbitration. This Court reversed the judgments against Mr. King, added a judgment for appeal costs in his favor, and restored Mr. King’s claim for damages for a new modular home that was destroyed by the Rices and their Sunlight Construction Company.

2. King Has the Right to Respond to the Motion to Dismiss

Little argument needs to be made to establish that Mr. King has the right to respond in opposition to the Motion to Dismiss Sub No. 301, CP 12-14. It is a basic right of due process of law secured by Article I Section 3 of the Washington Constitution and by the Fourteenth Amendment. CR 56(c) provides that a party adverse to a summary judgment motion shall

have an opportunity to respond in writing. Local Rules in all of the trial courts provide that parties adverse to motion have an opportunity to respond in writing. King County Superior Court Local Civil Rule 7(b)(4)(D) provides for written pleadings in opposition to motions and LCR 7(b)(5) provides for the form of such motions and responsive pleadings. LCR 56(c) follows the statewide CR 56 and allows for oppositions to motions.

D. Civil Rule 11 Signature Requirement

1. The Rule

Washington's CR 11 in significant part reads:

(a) . . . A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address.

Mr. King was unavailable for a personal signature so he delegated to his power of attorney a mark by rubber stamp to authenticate his signature. A party generally meets this requirement with a date, his handwritten signature, and his address and telephone number stated at the bottom right corner of each page of the pleading. Any mark written by the hand of the party can constitute his signature. 7 ALR 672, attached to

King Declaration Recon, Sub No. 314, CP 42. However, another person can sign the name of the party, upon said other person's authorization, and have that be considered "signing" the document within the meaning of CR 11. The above quoted language in CR 11 does not rule that out. In this present case, Mr. King has granted Mr. Knight power of attorney, which among other powers, grants Mr. Knight the authority to sign on Mr. King's behalf. King Declaration Recon, Sub No. 314, pp. 1-3 signed p. 3, CP 35-39. Knight Declaration Recon, Sub No. 313, CP 32-34. Mr. King can communicate to Mr. Knight his specific authorization to sign a specific document at a specific time. At which point Mr. Knight can make a mark, including by means of a rubber stamp, to complete the signing.

2. As Rubberstamped Signature is Found to be "Not Signed" Mr. King Has the Right to an Opportunity to Cure the Deficiency by Signing the Documents in Question

The superior court found that the rubberstamped signatures that Mr. King authorized Mr. Knight to make on his behalf did not meet the requirement under CR 11 that he "sign" his pleadings, Order, Sub No. 311, CP 30-31. *Griffith v. City of Bellevue*, (1996) 130 Wash. 2d. 189, 194, 922 P. 2d. 83 found:

The Superior Court should have applied CR 11 and dismissed the

BRIEF OF APPELLANT

27

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application only if Griffith failed to sign the verification promptly after the omission was called to his attention.

On August 14, 2011, Mr. King authorized Mr. Knight to rubberstamp his pleadings as his signature. King Declaration Recon, Sub No. 314, p. 2, CP 36. Knight Declaration Recon, Sub No. 313, p. 2, CP 33. The next day, Mr. Knight filed and served these pleadings as per the local rules. The defendants Rice had an opportunity to prepare a written Reply wherein they could have pleaded this very issue in writing.¹

It is only during the hearing on the Motion to Dismiss that counsel for the Rices objected to the stamped signatures on the pleadings, and the superior court, after making inquiry to Mr. Knight, who answered the question by describing how he and Mr. King worked out their method of preparing the pleadings and authorizing rubberstamped signatures, found these rubberstamped signatures did not meet the requirements of CR 11. Order, Sub No. 311, CP 30-31.

Mr. King was thus not afforded the opportunity to promptly sign the documents upon being informed of the omission. As the superior court

¹ While the Rices did not request sanctions, they should have given notice regarding a potential violation of the rule, and an opportunity to amend the offending paper. *Biggs v. Vail*, 124 Wn.2d 193, 198, 876 P.2d 448 (1994).

knew that Mr. King was detained, a continuance for one or two weeks would have been appropriate to allow Mr. King an opportunity to sign the pleadings with his own hand.

King submitted the documents signed by his own hand several days later and prior to the reconsideration on the matter.

3. Power of Attorney Grants Knight the Authority to Sign Pleadings on Behalf of King

Attached as an Exhibit to Knight Declaration Recon, Sub No. 313, CP 32-34 is a General Power of Attorney With Durable Provision granted by Mr. King to Roger Knight of Seattle, Washington on November 14, 2008, CP 34. Its very broad language includes:

and in his name, place and stead and for his use and benefit to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities, and demands whatsoever, as are now or shall hereafter become due, owing payable or belonging to him and have, sue and take all lawful ways and means in his name or otherwise for the recovery thereof, by attachments, arrests, distress or otherwise, and to compromise and agree for the same, and acquittance or other sufficient discharges for the same, to make, seal and deliver, to bargain, contract, agree for, purchase, receive and take lands, tenements, hereditaments, and accept the seizing and possession of all lands, and all deeds and other assurances in the law therefore, and to lease, let, demise, bargain, sell, release, convey, mortgage and hypothecate lands, tenements and hereditaments, upon such terms and conditions, and under such covenants as he/she shall think fit.

Included in the authorized actions is “sue for”, which obviously means bring or defend civil lawsuits. While Mr. King has himself brought this lawsuit and the successful appeal that resulted in the remand and mandate, Mr. Knight has under this power and attorney the authority to step in and pursue Mr. King’s claims. One way this authority can be exercised is to prepare pleadings and declaration while in correspondence and telephone communication with Mr. King, and to sign such upon Mr. King’s specific authorization.

Bryant v. Bryant, (1994) 125 Wash. 2d. 113, 118, 882 P. 2d. 169

reaffirmed that:

Whether or not the power of attorney must contain specific authorization is answered by the general rules governing powers of attorney. A power of attorney is a written instrument by which one person, as principal, appoints another as agent and confers on the agent authority to act in the place and stead of the principal for the purposes set forth in the instrument. *Arcweld Mfg. Co. v. Burney*, 12 Wn.2d 212, 221, 121 P.2d 350 (1942). Powers of attorney are strictly construed. *In re Estate of Springer*, 97 Wash. 546, 551, 166 P. 1134 (1917). Accordingly, the instrument will be held to grant only those powers which are specified, and the agent may neither go beyond nor deviate from the express provisions. *Thomle v. Soundview Pulp Co.*, 181 Wash. 1, 24, 42 P.2d 19 (1935).

Mr. Knight has not gone beyond or deviated from the authority of the power of attorney, and he has acted under the additional specific authority

to sign the pleadings and declarations in question on Mr. King's behalf.

4. Amanuensis Signatures Are Not Prohibited by CR 11 and Therefore Valid and Binding Upon the Party Authorizing the Signature on His Behalf

What happened here is that Mr. King authorized Mr. Knight to sign for him. Mr. Knight could have written Mr. King's name in his handwriting, or otherwise made some kind of mark. In this case, he used a rubber stamp made with Mr. King's signature.

Jones v. Halvorson-Berg, (1993) 69 Wash. App. 117, 130, 847 P.

2d. 945 found:

Under agency principles the associate's signature as agent makes the partner a principal responsible for satisfying the CR 11 requirements. The partner signed the motion to strike, his name alone, not the partnership's, was typed on the memorandum, and the associate's signature was apparently a matter of convenience. A filing signed by an authorized agent of an attorney should be treated as if the principal signed it for purposes of CR 11.

As Mr. King authorized Mr. Knight to sign, on his behalf, then Mr. King is as bound by this authorization as he would be if he signed the pleadings himself. Equity would thus require that he enjoy the benefits as well as the liabilities that attach.

The amanuensis rule was applied in *Kadota Fig Association of*

Producers v. Case-Swayne Co., (1946) 73 Cal. App. 2d. 815, 167 P. 2d. 523. An authorized agent of a surety company forgot to sign a bond, and telephoned a judge. He directed the judge to sign his, the agent's name, for him, and this bond was subsequently ratified by the surety company. No improper action was taken, the judge merely acted as amanuensis for the agent. The validity of the bond was upheld. *Kadota Fig* at 167 P. 2d. 526. In this case "in his presence" clearly meant "in his electronic presence" as the principal and the agent were connected by telephone.

Likowski v. Catlett, (1928) 130 Okla. 71, 57 ALR 517², 265 P. 117, approved an amanuensis signature that was authorized by the principal. Immediately following is the annotated article in the American Law Review on the subject of "Formal acknowledgement of instrument by one whose name is signed thereto by another as an adoption of the signature", 57 ALR 525, attached to King Declaration Recon, Sub No. 314, CP 47-51. This annotated article lists appellate opinions from over 20 states and discusses some of these decisions, wherein the courts found that amanuensis signatures, or signatures by persons other than the principal at

² Portion of *Likowski* published on 57 ALR 522-523 attached to King Declaration Recon, Sub. No. 314, at CP 45-46.

the direction of the principal, and acknowledged or ratified by said principal, constitutes a valid signature by that principal. The exceptions where courts found differently were due to statutes passed in some states specifically requiring that principal sign or subscribe “with his own hand or mark”. In these cases a legislature made a change from the common law to require that a principal personally sign the document, wherein the document was of the type specified in the statute.

Therefore, Mr. King could electronically authorize Mr. Knight to sign on his behalf. Mr. King and Mr. Knight were in contact both by telephone and by Internet using e-mail, Knight Declaration Recon, Sub No. 313, CP 32-34. They were separated by the distance between his detention and the office Mr. Knight in Seattle. Mr. Knight also described some of this communication during the court hearing on August 17, as the superior court allowed him to answer factual questions. Order, Sub No. 311, CP 30-31.

5. Rubberstamped Signatures Are Not Prohibited by CR 11 and Therefore Valid and Binding Upon the Party Authorizing the Signature on His Behalf and Authorized by Common Law

Washington has authorized the common law as a basis for the

signatures per RCW 4.04.010 which states:

Extent to which common law prevails.

The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.

There are several annotated articles in the American Law Review on the use of rubberstamped signatures.

Metropolitan Discount Co. v. Davis, (1918) 69 Okla. 111, 7 ALR 670³, 170 P. 707 found that an indorsement of the name of the payee on a bill of acceptance by means of a rubberstamp is sufficient if such is made by authority of the payee. The annotated article at 7 ALR 672, attached to King Declaration Recon, Sub No. 314, CP 41-42, discusses that generally a stamped signature or indorsement where authorized by the principal is sufficient to bind the principal the same as his name written by his hand.

At the annotated article at 37 ALR 87, attached to King Declaration Recon, Sub No. 314, CP 44-45, we quote:

The general rule that a stamped, printed, or typewritten signature is a good signature appears to be subject to an exception,

³ *Metropolitan Discount Co.* attached to King Declaration Recon, Sub No. 314 at CP 39-41.

where the signature is required to be under the hand of the person making it.

At CP 44. There is no such language in Washington's Civil Rule 11.

Irving v. Goodimate Co., (1946) 320 Mass. 454, 171 ALR 326⁴, 332⁵, 70 NE 2d 414 found:

A memorandum is signed in accordance with the statute of frauds if it is signed by the person to be charged, in his own name, or by his initials, or by his Christian name alone, or by printed, stamped or typewritten signature, if in signing in any of these methods he intended to authenticate the paper as his act.

Following this decision is the excellent annotated article on "Printed, stamped, or typewritten name as satisfying requirement of statute of frauds as regards signature" at 171 ALR 334, attached to King Declaration Recon, Sub No. 314, CP 60-65. The finding is except where prohibited by statute or due to certain factual or other specific circumstances, a stamped signature authorized by a principal binds the principal to a contract the same as his name written by his hand.

Therefore, Mr. King could electronically authorize Mr. Knight to sign on his behalf by rubberstamping his handwritten name, because CR

⁴ *Irving* attached to King Declaration Recon, Sub No. 314 at CP 52-60.

⁵ CP 58.

11 does not prohibit such a signing.

6. Practical Reasons for Allowing Amanuensis and Rubberstamped Signatures

Every person has the right to submit written pleadings and written testimony to the courts. However, circumstances can interfere with this right. In Mr. King's case, he had only a short time to prepare responses to the Defendants' Motion to Dismiss, Sub No. 301, Sub No. 301, CP 12-14. Verisign and other e-signatures were not available to him in his circumstances. The amanuensis rule, like the legislation passed in most or all of the states and by Congress to allow unsworn declarations signed under penalty of perjury, facilitates the exercise of this basic right.

E. Bankruptcy Stay

1 King's Bankruptcy

King was in chapter 13 bankruptcy, *In re King*, Bankruptcy District of Nevada No. 10-11601, from February 2, 2010 through December 13, 2011 and the bankruptcy stay under 11 U.S.C. §362(a) was in effect. Notice was given to counsel for the Rices and to the superior court before the hearing on February 3, 2010, Knight Declaration Bankruptcy, Sub No. 291, CP 101-104. Federal law had stayed the matter.

2. Supplemental Proceedings Barred by Stay

Upon service of notice of the bankruptcy, effected by service of the first page of the Voluntary Petition for Chapter 13 Bankruptcy Mr. King filed in the United States Bankruptcy Court for the District of Nevada, *In re King*, No. 10-11601, Knight Declaration Bankruptcy, Sub No. 291, CP 101-104, the supplemental proceedings are stayed pursuant to 11 U.S.C. §362. 11 U.S.C. §362(a) reads in relevant part:

(a) Except as provided in subsection (b) of this section, a petition filed under 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 operates as a stay, applicable to all entities, of --

(1) the commencement or continuation, including the issuance of employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

While there are exceptions and grounds for relief from stay listed in subsection (b) of 11 U.S.C. §362, counsel for the Rices was not prepared to argue that they applied to this bankruptcy filing of Mr. King in Nevada at the hearing on May 25, 2010, Sub No. 296, CP 119 and RP 9-12. They

subsequently dismissed the supplemental proceeding on June 1, 2010, Correspondence, Sub No. 298, CP 120-121. Indeed, Thomas Windus, WSBA #7779, claimed to not know about the bankruptcy. RP 10. He filled in for Mr. McBroom, had the file and should have been so informed.

All supplemental proceedings that happened after 1:15 pm February 3, 2012 are void or voidable, including all orders and judgments obtained during the pendency of the stay.⁶ This Court can take judicial notice that *In re King*, Bankruptcy District of Nevada, No. 10-11601 was filed on February 2, 2012 and dismissed on December 13, 2012.

At no time did any counsel representing the Rices make any appearance or move for relief from stay in this action. Therefore, the Order for Warrant for Contempt of Court and for Supplemental Judgment Pursuant to RCW 6.32.010, Sub No. 290, CP 111-113, with its judgment for attorney fees of \$657.00 is void as barred by the bankruptcy stay.

3. Counsel Misled Superior Court

On January 13, 2010, Gregory McBroom, WSBA #33133, was

⁶ *Sternberg v. Johnson*, (9th Cir. 2009) 582 F. 3d. 1114, 1119-1121, contempt order in child support proceeding violated bankruptcy stay because it did not focus on debtor's non-estate property.

asked by Judge Paris Kallas if there was still a judgment for which he was seeking supplemental proceedings. The transcript at RP 2-3 reads:

King: Yeah but he should have been here. He was notified, Judge. Besides his case was overturned in the Court of Appeals. There is no basis for a contempt hearing.

Court: Mr. McBroom

King: I object to the order.

Court: Mr. McBroom, do you still have a judgment for which you are seeking supplemental proceedings?

McBroom: Yes, your Honor we do. The Court of Appeals did not overturn the sanctions against Mr. King as well too.

At this hearing Mr. McBroom is still asserting that there is still an outstanding full judgment. A key sentence in this Court's decision in *King v. Rice*, (2008) 146 Wash. App. 662, 665, 191 P. 3d. 946 such opinion attached to the Mandate, Sub No. 285, p. 11 CP 91, reads:

Reversed and remanded for further proceedings.

It was at the February 3, 2010 hearing that counsel violated RCP 3.3. At the beginning of the hearing, at about 2:02 pm, both Judge Bruce Hilyer and Mr. McBroom discuss the bankruptcy, RP 5-6. Mr. McBroom misleads the superior court in saying that the stay did not go into effect in the current case. However, the appropriate procedure for Mr. McBroom or any other counsel representing the Rices would have been to file an

appearance in the bankruptcy court and move for relief from stay. This was not done, and therefore the stay was in effect from notice of the bankruptcy until it was dismissed on December 13, 2010.

Both the superior court and Mr. McBroom ignored the stay and went on to the process of issuing a warrant and granting a judgment for attorney fees in the supplemental proceeding. RP 6. The transcript at RP 7 reads:

Court: What is your judgment?
McBroom: Well, there's been several since. There's the \$40,000 plus, I think there's several four, maybe three or four supplemental proceedings that he missed. That judgments had been entered on top of that....
Court: So how much is your total?
McBroom: Uh. I actually have a copy of all of the judgments here.
Court: I don't care how many.
McBroom: I'll tell you and. Right now, there's a judgment for \$41,689.00. ...

And at no time does Mr. McBroom mention that the full \$41,689.00 was part of the judgment reversed by this Court, nor does he cite the Mandate, Sub No. 285, CP 79-100. RPC 3.3 reads in relevant parts:

- (a) a lawyer will not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (3) fail to disclose to the tribunal legal authority in the

controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(f) In 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.

The listing of a judgment that has been reversed by this Court and failure to disclose this reversal on appeal to a judge who apparently was not aware of such reversal violates these provisions. Mr. King was absent because he was relying on the bankruptcy stay. Mr. Knight did not remain in the courtroom because he is not a lawyer and therefore would have no lawful ability to represent Mr. King's interests during the hearing. Therefore it was effectively an ex parte hearing and Mr. McBroom took advantage of the absence of anyone with knowledge of the reversal of the judgment⁷ to assert that the judgment is outstanding and to obtain a warrant amount of \$40,000. Such misleading of the superior court is a violation of the Rules

⁷ The electronic docket of King Co. Superior Court No. 06-2-36124-5 SEA, on-line at <http://dw.courts.wa.gov> and in the clerk's offices of the superior court, lists the Mandate as Sub. 285. It erroneously dates it as "7-22-2004". It erroneously lists its description as "Mandate/60461/affirmed".

of Professional Conduct and neither Mr. McBroom nor his clients should profit thereby.

Even If there were other amounts owing which is disputed the amounts were small and could have been paid per any Chapter 13 repayment plan, proposing a bail of \$40,000.00 and ignoring the Bankruptcy stay as a way to conduct litigation seems draconian.

4. Resistance to Supplemental Proceedings Prevented Payment Toward a Reversed Judgment.

Counsel for the Rices engaged in supplemental proceedings against Mr. King throughout the pendency of the previous appeal and even after this Court's decision on that appeal. That Mr. McBroom would mislead the superior court as to the amount of the judgments remaining intact, RP 7, to obtain a bench warrant for \$40,000, Sub No. 290, CP 111-113, justifies all of Mr. King's resistance to such enforcement of the judgment.⁸

It also effectively prevented King from restarting the arbitration proceedings during the remand.

⁸ WSBA Grievance File No. 07-01354 is a grievance brought against Mr. McBroom for failing to share relevant evidence and hiding such facts from the court and stating they were not there after claiming he had it. It is deferred and therefore still pending due to the continued litigation of this case.

5. Appropriate Procedure is to Seek Relief From Stay in the Bankruptcy Court

At the beginning of the hearing on February 3, 2010, after being served notice of the new bankruptcy filing, counsel for the Rices asserted that because of previous bankruptcy filings, the automatic stay of 11 U.S.C. §362(a) did not apply to stay the supplemental proceeding. RP 5-6.

However, the appropriate procedure for counsel for the Rices was to seek relief from stay in the Bankruptcy Court. 11 U.S.C. §362(d), (e), (f), (g), and (h) provide for exactly that. If the Rices had an argument that justified relief from stay, then they could move the Bankruptcy Court for such relief. If the Bankruptcy Court granted such a motion, then they could continue or restart supplemental proceedings. This was not done at any time during the pendency of the bankruptcy action.

F. One Year Clock for CR 41(b)(1), Bankruptcy Stay

This Court can take judicial notice that *In re King*, Bankruptcy District of Nevada No. 10-11601 was dismissed on December 13, 2010. At no time did any counsel representing the Rices file any appearance or motion in this case. Only when this bankruptcy action was dismissed upon Mr. King's motion, could the issues of this case on remand be

considered “joined” in the superior court for the purposes of CR 41(b)(1). July, August, and September 2011 is less than one year after December 13, 2010. CR 41(b)(1) prohibits the dismissal for want of prosecution.

V. CONCLUSION

For the reasons stated herein, the Order Denying Motion for Reconsideration of Order Granting Defendants’ Motion to Dismiss for Want of Prosecution, Sub No. 321, CP 78; Order Striking Motion to Enter Judgment on Remand and Motion to Set a New Trial Date, Sub No. 320, CP 77; and the Order Granting Defendants’ Motion to Dismiss for Want of Prosecution, Sub No. 311, CP 30-31 should be reversed; and the Order for Warrant for Contempt of Court and for Supplemental Judgment Pursuant to RCW 6.32.010, Sub No. 290, CP 111-113 should be reversed or vacated and attorney fees, fines or sanctions awarded to Appellant for the misleading statements propounded to the Courts.

Respectfully submitted this 11th day of June, 2012,



PAUL KING