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NO. 70831-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Appeal from Case No. 12 2 02451 9

STACEY A. KINCHEN,
Appellant,

v.

AMIN KORAYTEM,
Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
HONORABLE JUDGE GEORGE BOWDEN

RESPONSIVE BRIEF OF RESPONDENT

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I. INTRODUCTION.

Scope of Review. The scope of review by this Court should be limited as set out below.

A. Summary Judgment was granted against Appellant Stacey Kinchen on July 25, **2012** and in favor of Respondent Amin (George) Koryatem. Kinchen has never filed an appeal from that Order. Accordingly, Court of Appeals Commissioner Mary Neel entered an order on November 6, 2013 that the scope of this review was limited to the August 9 and August 29 [2013] orders.

B. <u>One year</u> after that Summary Judgment Order was entered, Kinchen filed a Motion to Vacate Judgment. After the superior court commissioner denied that motion on August 9, **2013**, Kinchen filed a Motion for Revision. The Superior Court Judge George Bowden heard the motion ***de novo***, and denied Kinchen's Motion for Revision on August 29, **2013**. This Appeal should <u>only</u> review the decision of Judge Bowden denying the Motion for Revision. For the reasons stated all issues and assignments of error raised by Kinchen should be denied except for those considered in the Motion for Revision.

C. None of the issues that were raised, or could have been raised on appeal of the Order on Summary Judgment are properly before this Court for review, and should be denied.

D. None of the alleged errors by the trial court of legal issues that could have been raised on an appeal from the final judgment are properly brought up in a CR 60 Motion to Vacate. An appeal from a CR 60 motion to vacate does not bring up the final judgment for review when it was not appealed, is not an appropriate vehicle for claiming errors of law, and is limited to whether or not the court hearing the Motion to Vacate abused its discretion in ruling on the motion, and such a Motion must be based on one of the grounds listed in CR 60.

II. RESPONSE TO ASSIGNMENTS OF ERROR / STATEMENT OF ISSUES

1. General Response: Applicable to each of the Assignments of Error and Statement of Issues cited by Kinchen is that his claimed errors are not appealable and should not be considered in this review as the errors and issues were each raised, or could have been raised, in the Motion For Summary Judgment, and should have been properly considered on appeal of the Order on Summary Judgment. Additionally, the errors and issues were a

ruling of law which can only be reviewed by a direct appeal. Further, the Errors and Issues which arose from the decision of the Superior Court Commissioner is not a final appealable decision as Review was made by Motion For Revision to the Superior Court Judge.

2. These arguments are a threshold determination that must be made before you can get to the merits of each stated issue and error. However, for brevity sake and to avoid duplicating the argument for each issue it is cited once, here, and not repeated for each issue.

2.1. Issue 2.1A (Pertaining to Error 2.1). Restated Issue: After an unlawful detainer is concluded with an agreed order and the issue of possession is no longer at issue and is moot, if the action is amended to convert it to an ordinary civil action, is a landlord required to serve a three day notice to pay or vacate prior to obtaining summary judgment for moneys owed under the lease contract?

Issue 2.1B (Pertaining to Error 2.1). Restated Issue: Was Koryatem, as landlord of the demised premises, prohibited by CR 4(g) from personally serving a three day notice to pay or vacate on Kinchen, his tenant?

Issue 2.1C (Pertaining to Error 2.1). Restated Issue:. Amin Koraytem served Stacy Kinchen with a Notice of Hearing on his Motion to Convert Unlawful Detainer to a civil action by sending to the only address of record for Kinchen.

2.2. **Issue 2.2 (Pertaining to Error 2.2)**. Restated Issue: Stacey Kinchen was afforded due process and responded and participate at every step of proceedings.

2.3. **Issue 2.3A (Pertaining to Error 2.3)**. Restated Issue: Amin Koryatem's three-Day Notice is not Defective, was properly served, and met all the requirements of RCW 59.12.030(3).

Issue 2.3B (Pertaining to Error 2.3). Restated Issue: Amin Koraytem satisfied the service of notice requirement regarding his Motion pursuant to CR Rule 5(b)(1).

2.4. **Issue 2.4 (Pertaining to Error 2.4)**. Restated Issue: Snohomish County Superior Court had subject matter and personal jurisdiction to grant Motion to Convert Case to a Civil Action, grant Summary Judgment, impose attorney fees and awards.

2.5. **Issue 2.5 (Pertaining to Error 2.5)**. Restated Issue: Commissioner Tracy Waggoner did not abuse her discretion in rendering her ruling.

2.6. **Issue 2.6 (Pertaining to Error 2.6).** Restated Issue: Stacey Kinchen's case has no showing of a Prima Facie Case.

2.7. **Issue 2.7 (Pertaining to Error 2.7)**. Restated Issue: Amin Koryatem is not a contractor under RCW18.27.010(1), and was entitled to be reimbursed for the cost to repair damages to the property.

2.8. **Issue 2.8 (Pertaining to Error 2.8)**. Restated Issue: Amin Koryatem excused from providing a damage withholding report due to the pending litigation which put the matter with the court for determination.

2.9. **Issue 2.9 (Pertaining to Error 2.9)**. Attorney James Hawes committed no fraudulent acts and did not grossly misled the Snohomish County Superior court with his representations, interpretations and statements.

III STATEMENT OF THE CASE

1. IDENTITY OF PARTIES.

A **Appellant. Stacey Kinchen** occupied the duplex owned by Respondent under a written lease. That lease is attached to the Motion for Summary Judgment. CP 33. Kinchen admitted that he was withholding rent from Koryatem: "Stacey Kinchen decided that he would withhold January's rent because George wasn't communicating with him." CP 16, P. 325, Line 6-7 (Response To Plaintiff's Complaint). No further rent was received through March 2012. CP 34. Kinchen had received a letter from legal counsel for Koryatem dated January 9, 2012 demanding that all communications and payments be thereafter directed exclusively to Counsel, and not Koryatem. CP 16 (Exhibit E).

B Kinchen has never denied that he did not pay rent to Koryatem for the months of January, February and March 2012, except that he believed that he should not have been charged for the month of March as he was had previously given notice of intention to move December 15, and January 18, 2012, and that in March he was mostly moved out, despite the fact that he negotiated through legal counsel (Housing Justice Program) an Agreed Order (CP 21) to forestall issuance of a Writ of Restitution to give him more time to

move out. At no time prior to the issuance of the writ had Kinchen ever moved out all of his personal property and tendered the keys to Koryatem or his attorney.

C **Respondent.** Amin (George) Koryatem served a Three Day Notice to Pay or Vacate upon Kinchen. His Declaration of service, along with a copy of the Notice, was filed with the court on February 29, 2012 verifying that he fully complied with RCW 59.12.040 by posting and mailing via US Mail the required notice on January 12, 2012. Additionally, beyond that which is required by law, Koryatem sent the same notice via Certified Mail, return receipt requested on January 12, 2012. His Declaration of Mailing and the returned green card which came back "unclaimed" after at least 3 attempts by the Postal service, is filed of record. CP 19.

D It is unclear whether or not Kinchen denies that Koryatem served the Three Day Notice to Pay or Vacate as stated, or only believe that he wasn't allowed to serve it himself under the Civil Rules of Procedure.)

2. NATURE OF DISPUTE.

Procedure.

A. This appeal is taken from an ordinary civil action by Respondent Amin Koryatem for a sum owed to him under a written

contract with Appellant Stacey Kinchen. All issues raised by Kinchen concerning the Washington State Landlord Tenant Act became moot with the entry of an **Agreed Order** settling the issue of possession and providing for the issuance of a Writ or Restitution in favor of Koryatem, coupled with the subsequent entry of an Order converting the Unlawful Detainer action to an ordinary civil action in order to determine the contractual damages suffered by Koryatem.

B. This action originated as an *unlawful detainer* action after Kinchen failed to respond to a 3-day Notice to Pay or Vacate duly.

i) However, personal service of the summons and complaint could not be obtained upon the Defendant despite diligent and repeated efforts to try and do so. CP 10. For that reason an order was obtained for authority to use alternate service by mail and posting, to obtain limited jurisdiction over the sole issue of lawful possession of the subject property, under RCW 59.18.055.

ii) In accord with that Order, the Second Amended Summons, Complaint, Motion for Alternative Service, Order Authorizing Alternative Procedure, and Declaration supporting the motion, was served upon Kinchen by posting, and mailing. CP 14. Kinchen responded to those mailed documents by filing a written

Answer and a Response to the Amended Summons and Complaint. CP 15 and 16.

iii) Noteworthy is that Kinchen listed on his pleadings responding to the complaint that his address of record was **Post Office Box 1597, Mukilteo WA 98275.** CP 15 and 16. Kinchen has never given to the court or counsel an address other than the mailing address provided on his initial pleadings until after the Motion for Summary Judgment was filed. CP 33. Neither Koryatem and his attorney, nor the court, were ever notified by Kinchen of his *purported* change of mailing address. Kinchen admits that he continued to use his Post Office Box in Mukilteo as he states that he received the Motion for Summary Judgment mailed on June 22, 2012 at his Mukilteo post office boxes, although "..I rarely check anymore because it is so far away from my work and residence...". CP 53, page 1, lines 19 – 23. This contradicts Kinchen's assertion later that he had cancelled the Mukilteo PO Box effective April 2012 as a reason he supposedly failed to receive a Motion to Convert the Action to a Civil Action. Kinchen's Opening Brief (Amended) Statement of the Case, page 9.

C. Once Mr. Kinchen had made his written appearance, Koryatem served him by mail with a Motion and Order to Show

Cause for the issuance of a Writ of Restitution. CP 19. Mr. Kinchen appeared at court in person in response to the mailed Motion.

i) An Agreed Order (with the aide of an attorney with the Housing Justice Program) was entered in the unlawful detainer action on **March 6, 2012**. CP 21. The Agreed Order provided for the issuance of a Writ of Restitution if Kinchen did not vacate the property on or before March 12, 2012: Kinchen had no legal excuse for withholding rent, which he admitted to owing as to two months' rent, and admitted to continuing to occupy the property during the third month, (and thus liable for the full month's rent); however, the agreed order dealt only with possession, and gave him additional time to vacate the property: all issues regarding unpaid rent, late charges, attorney fees, damages and costs were reserved for further determination upon acquisition of personal jurisdiction upon the defendant.

ii) Nevertheless, Kinchen did not vacate the property as agreed, and a Writ was issued March 13, 2012 and thereafter served upon Kinchen by the Sheriff's office to forcefully remove defendant. CP 25. Kinchen vacated the property during March 2012.

D. Koryatem's attorney James R. Hawes served an amended summons and complaint personally upon Kinchen on

March 6, 2012. CP 24. Accordingly, the court obtained expanded jurisdiction over the person of Mr. Kinchen at that time.

E. Koryatem filed a Motion pursuant to CR 15(a) to convert the unlawful detainer action to an ordinary civil action. CP 27. That Motion was duly sent by mail to the only address of record provided to the Court and opposing counsel by Kinchen. CP 28.

F. At the hearing on May 22, 2012, an Order was entered converting the action from an unlawful detainer proceeding into an ordinary civil case for collection of sums due under the rental agreement or as allowed by statute, since possession of the premises was no longer at issue, and service of process was perfected to acquire personal jurisdiction over the Defendant on March 6, 2012. No further amendment of the pleadings or answer was required pursuant to the terms of that Order.

Koryatem filed a Motion For Summary Judgment on June 22, 2012. Kinchen failed to appear for argument, but the court minute entry does note receipt by the court of Kinchen's responsive brief the day before the hearing. Nevertheless, Kinchen never served his opposing Brief upon Koryatem or his attorney.

One year later Kinchen filed a **Motion to Vacate Judgment and Order To Show Cause**. After the Commissioner denied that

motion, Kinchen filed a Motion for Revision. The Honorable George Bowden denied his Motion for Revision on August **2013**.

IV. LEGAL AUTHORITY AND ARGUMENT.

SUMMARY.

This brief will respond directly to each issue as raised by Kinchen in his Amended Initial Brief.

However, as indicated previously, there are threshold issues that must be first determined prior to determining Kinchen's issues on the merits.

Each of the Assignments of Error and Statements of Issues cited by Kinchen should not be considered in this review as the errors and issues that are raised in Kitchen's Brief herein, were originally raised, or should have been raised, in his response to the Motion For Summary Judgment, and therefore should have been raised in an appeal of the Order on Summary Judgment.

> **A Motion pursuant to CR 60 is not a substitute for an appeal. The courts have consistently rejected efforts to use a motion to vacate as a vehicle for asserting errors of law. See Port of Port Angeles v. CMC Real Estate Corp., 114 Wash. 2d 670, 790 P.2d 145 (1990)(extended discussion of general principles).**

Karl B. Tegland Tegland, A Rules of Appellate Procedure, 7th Edition at 82-83.

An appeal is allowed from a ruling on a motion to vacate, but an

appeal from the ruling does not bring the final judgment up for review. **RAP 2.2(a)(10), RAP 2.4(c).**

1. STANDARD ON REVIEW. On an appeal from a ruling on a motion to vacate, the scope of review is normally limited to determining whether the trial court abused its discretion in ruling on the motion. In re Marriage of Tang, 57 Wash. App. 648, 653, 789 P. 2d 118, 121 (Div. 1 1990). Id., at 83.

> **This court has long recognized the principle that an error of law will not support vacation of a judgment. Burlingame v. Consolidated Mines & Smelting Co., 106 Wash. 2d 328, 336, 722 P.2d 67 (1986); In re Estate of Leprous, 55 Wash. 2d 889, 890, 350 P.2d 1001 (1960). In State ex rel. Green v. Superior Court, 58 Wash. 2d 162, 164, 165, 361 P.2d 643 (1961), the court stated:**
>
> **If . . . the court decided the issue wrongly, the error, if any, may be corrected by that court itself . . . or by this court on appeal, but the motion to vacate the judgment is not a substitute.**

[Underlining Added]

Port of Port Angeles v. CMC Real Estate Corp., 114 Wash. 2d 670, 673, 790 P.2d 145 (WA. 05/03/1990).

> **[T]he appellate courts will not permit a party to appeal ordinary trial errors by way of a motion to vacate. A motion to vacate must be based on one of the grounds listed in CR 60; it is not an appropriate vehicle for claiming errors of law. If the motion raises a legal issue that could have been raised on an appeal from the final judgment, the motion is properly denied. Port of Port Angeles v. CMC Real Estate Corp., 114 Wash. 2d 670, 673, 790 P.2d 145 (Wa. 05/03/1990); In re Marriage of Thurston, 92 Wash. App. 494, 963 P.2d 947 (Div.1 1998).**

15A Karl B. Tegland and Douglas J. Ende, Washington Practice: Washington Handbook on Civil Procedure at 706 (2005).

Further, the Errors and Issues which allegedly arose from the decision of the Superior Court Commissioner is not a final appealable decision as Review was made by Motion For Revision to the Superior Court Judge.

> **When a superior court has made a decision on a motion for revision, the appeal is from the superior court's decision, not from the commissioner's decision. In re Estate of Fitzgerald, 172 Wash. App. 437, 294 P.3d 720, n.5 (Div. 1 2012), review denied, 177 Wash. 2d 1014, 302 P.3d 181 (2013).**

[Remaining Citations Omitted]

15A Karl B. Tegland and Douglas J. Ende, Washington Practice: Washington Handbook on Civil Procedure at 699 (2005).

2. CR 60 MOTIONS.

Kinchen's **Motion To Vacate** under CR 60 sets forth the specific sections of CR 60 that the motion was based upon: CR 60(b)(1), (5), (6), (9), (11). This in turn sets the limits as to the issues THAT could be brought before Judge Bowden on Kinchen's Motion For Revision, and subsequently also to the appellate court.

Time Limits. Motions brought under CR 60 (b)(1)(2) and (3) must be filed within one year after entry of said judgment or order. The instant motion meets only that criterion of the rule, in that it

appears to be filed exactly one year to the day.

A. However, the fact that Defendant knew about the one year deadline, and/or purposefully delayed filing for one year, is a strong factor that should enter into the courts determination when balancing equities and the discretionary powers of the court. If the reasons given as the basis for the motion were known early on, the fact that the motion was filed within one year does not mean the delay was reasonable, and is a basis for denying the motion.

B. As is detailed below, when determining whether or not to set aside judgments the court is directed by case law to review both **"the reason for the party's failure to appear timely."** and **"the party's diligence in seeking relief following notice of the default."** Defendant has a history of Motions to Stay Enforcement of Judgment in the trial court, Court of Appeals, and bankruptcy court. Defendant should be barred from presenting this Motion based upon principles of **Laches.**

C. The types of alleged errors claimed by Defendant are not those that are subject to CR 60(a). As stated by Division One of the Appellate Court:

> **"It is well established that CR 60(a) is designed for the correction of mere mechanical mistakes only and cannot be used to effect substantive changes. Foster, 10 Wash.**

App. at 177. Moreover, the language of the rule provides only for the correction of mistakes and errors within a judgment or order, not for the vacation of a judgment or order.

***Western Community Bank v. Grice*, 55 Wash. App. 290, 293 777 P.2d 39 (1989).**

The Division One Appellate Court has elucidated the difference between error that can be corrected under CR 60(a) and judicial error as follows:

> [I]f the trial judge 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 Rule 60. The testimony of the trial judge signing the judgment or decree will be received in this connection. (Citations omitted.)
>
> 4 L. Orland, Wash. Prac., Rules Practice § 5712, at 540 (3d

ed. 1983).

Thus, "[t]he test for distinguishing between 'judicial' and 'clerical' error is whether, based on the record, the judgment embodies the trial court's intention." Marchel v. Bunger, 13 Wash. App. 81, 84, 533 P.2d 406, review denied, 85 Wash. 2d 1012 (1975).

Defendant does not make any claim that some portion of the judgment deviates from what the court intended. Accordingly, the present judgment is presumed to accurately reflect the intention of the court, and CR 60(a) is not appropriate to be used to set aside the instant judgment.

D. Further, the appropriate remedy for claimed errors at law is an appeal: "The courts have consistently rejected efforts to use a Motion To Vacate as a vehicle for asserting errors at law." Civil Procedure, Karl B. Tegland, Volume 14 of Washington Practice at p. 607.

E. The Defendant had alleged in his Motion to Vacate, and the Declaration attached thereto, the existence of alleged defenses. However, those defenses were presumably taken into consideration by the Honorable Judge Bowden when making his determination on the Motion For Summary Judgment, and found to be baseless.

Defendant filed an answer, and a document designated as a Response, in answer to the complaint. Defendant's response to the Motion for summary judgment is merely a recitation of the assertions submitted by him previously in his Response/Answer to the complaint.

Defendant admits that he voluntarily withheld payment of rent, but failed to state a legal excuse for doing so. RCW 59.18.080 states that Payment of rent is a condition to exercising any of the tenant remedies provided in Chapter 59.18. Accordingly, any defenses based upon remedies afforded

under the Landlord Tenant Act are precluded by operation of law. However, several of the purported defenses mentioned in the present motion are bought for the first time, either in his response to the Summary Judgment Motion, or in the present Motion to Vacate. This was not a motion for default. His answer was filed, and considered, and no basis is given to allow defendant to attempt to amend his answer now.

F. It should be noted that the Defendant evaded service for a prolonged period, requiring Plaintiff's counsel to get permission from the court for alternative service by mail. At hearing on the Show Cause proceeding, Defendant appeared **with legal counsel** (Housing Justice Program) and a **Stipulated Order** was entered giving Defendant additional time to move out, and upon failure to do so, a Writ would be issued forthwith. Of course, he failed to move out and a Writ was required to be served.

G. The Court considered Defendant's claim that the Plaintiff failed to serve him with a 3-Day Notice to Pay Or Vacate and found it not credible or relevant. This notice is only relevant to the unlawful detainer action regarding the issue of possession, and was effectively waived by entry of the Stipulated Order agreeing for the issuance of a Writ if Defendant did not vacate the property timely.

The Judgment was based upon a civil action for breach of contract, not an unlawful detainer action.

In any event, Plaintiff filed his Declaration of Posting of the "3-Day Notice to Pay Or Vacate" on the front door of the property, and additionally gave his Declaration of Mailing of the said notice to the Defendant. Attached to the Declaration was a copy of a US Postal Service Certified Mail receipt showing multiple attempts to deliver, and that the Defendant failed to pick up the same despite not less than three (3) attempts at delivery. The Court found the Defendants allegation to not be credible. **The Purpose of this discussion is this: full due process was afforded Defendant each step of the way, and he had access to legal counsel.**

H. **Excusable Neglect / Irregularity**. Defendant claims ignorance of the law, and bad traffic on I-5, as the reasons for his failure to appear and argue the case, and file his response timely to the Motion For Summary Judgment.

I. There was no irregularity in obtaining judgment. To the contrary, out of an abundance of caution, Plaintiff gave written notice of the filing for hearing of His Motion for Summary Judgment to Defendant not only at the address of record with the court when he filed his Notice of Appearance, but also to an address in Kent, WA.,

that Counsel became aware of inadvertently. Defendant ***admits*** that he received that notice. The court had before it for consideration his Answer and his detailed Response, which basically duplicated his untimely filed Response to the Plaintiff's MSJ.

J. Washington follows the general rule that an attorney's negligence or incompetence will not constitute sufficient grounds to vacate a judgment and is not excusable neglect. *Lane v Brown & Haley*, 81 Wa App 102 (1996). Washington State holds a pro se litigant to the same standard as an attorney. *Batten v. Abrams*, 28 Wn. App. 737, 739 n.1, 626 P.2d 984, review denied, 95 Wn.2d 1033 (1981).

K. In any event, as the Defendant's Response to the MSJ was nearly identical to his Answer and his detailed Response already in the court file, such that his neglect in timely filing resulted in a harmless error as his position on the legal issues was determined fully by review of the records and files, and no sworn testimony of facts supporting his claim was given in his Response to support his many claims.

L. **EFFECT UPON PLAINTIFF.** Plaintiff will incur substantial prejudice if this relief is granted. Plaintiff has already incurred costs for 4 garnishments, attorney fees in this court and in

Bankruptcy court. The bankruptcy court is the best place to handle this, and has already shown its frustration with the conduct of the Defendant, and given him several "second chances", to the point that justice required firm action by the court, and the same was given. Before the court will consider an error, there must be a clear showing of prejudice to substantial rights of the Defendant.

Regarding Issue 2.1A: A Landlord is required to serve a Three-Day Notice pursuant to RCW 59.12.030(3) prior to filing an Unlawful Detainer action.

Koryatem would accept as a general principal that a landlord is required to serve a 3-day notice to pay or vacate as a prerequisite to filing an unlawful detainer. In fact, this was done in this case in manner that exceeded the requirements of the statute, RCW 59.12.040. the court should note that while Kinchen may state that he did not receive a 3-day notice to pay or vacate, he has no proof of that, and the record contains two Declarations of service of that notice to the only address known to Koryatem, the subject premises. See CP 19k, the Declarations of Service filed by Koratem indicating that he posted and mailed via US Mail the required notice on January 12, 2012. Additionally, beyond that which is required by

law, Koryatem also sent the same notice via **Certified Mail, return receipt requested** on January 12, 2012. His Declaration of Mailing and the returned green card which came back "unclaimed" after at least 3 attempts by the Postal service, is filed of record as proof of attempted service, at that is all that is required to be done. So if Kinchen did not receive notice it was because he refused to pick up his certified mail, and ignored what was in his mailbox and on his door. But as the notice was posted and also sent via regular first class mail, service is presumed to be completed after mailing:

> **[W]hen a copy of notice is sent through the mail, as provided in this section, service shall be deemed complete when such copy is deposited in the United States mail in the county in which the property is situated ...**

RCW 59.12.040 Service of notice — Proof of service

Accordingly, upon posting of the notice, it is presumed that Kinchen received the notice.

Regarding Issue 2.1B: Can a Landlord serve his own three day notice or must it be served in the same manner as service of summons in a civil action.

Kinchen claims that service could not legally be accomplished by the Landlord, as he is disqualified by virtue of Civil Rule 4(g) from serving the notice himself. However, Kinchen has no legal support

for his position, and misinterprets the applicability of Civil Rule 4(g). The Civil Rules of Procedure, by their own terms, only apply to litigation after it has been commenced:

> **RULE CR 1 SCOPE OF RULES**
> **These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81**...

RCW 59.12.030(3) and .040 is intended to regulate the manner and method of affording due process between the parties **prior** to an action being brought, and is a prerequisite to bringing the suit. These statute do not say that service of the notices must be accomplished in the same manner as service in a civil action, but only states that proof of service can be made the same as in a civil case (i.e., by sworn statement). There is nothing prohibiting service of the notices of RCW 59.12.030(3) by the owner or his agents (property managers).

In any event, this is a claimed **error of law** which cannot be the basis for a Motion to Vacate. Port of Port Angeles v. CMC Real Estate Corp., 114 Wash. 2d 670, 673, 790 P.2d 145 (Wa. 1990). Accordingly, denial was proper. Further, it is an issue that should have been addressed in appeal of the Order of Summary Judgment, and must be denied on that basis.

Issue 2.1C (Pertaining to Error 2.1). Prior to Amin Koryatem converting his unlawful detailer into a civil action, was he required to give notice of hearing?

It is important to an understanding of the sequence of events to note that after the complaint was filed for the unlawful detainer, service of original process could not be obtained upon Kinchen despite diligent and repeated efforts to try and do so. CP 10.

Accordingly, an order was obtained for alternate service by mail and posting to the ***leased premises:*** ***2109 127th PL SE Unit B, Everett WA 98208***. **CP 13.** **RCW 59.18.055** allows alternate service by posting and mailing, but then restricts the issues to possession of the property, only, as no personal jurisdiction is acquired.

As a result of the posting and mailing of the Motion, Declaration, Order authorizing alternate service, Second Amended Summons and Complaint, to **the leased premises** Kinchen appeared by filing and serving written Answer and a written "Response" to the Complaint. CP 15, CP 16.

KINCHEN'S ADDRESS OF RECORD. It should be noted that the only address given on the written appearance by Kinchen was PO Box 1597 Mukilteo WA 98275. Since that date, and through the

date when Koryatem filed his Motion For Summary Judgment, Kinchen never provided to the court or counsel any other mailing address.

Kinchen thereafter appeared in person at court on March 6, 2012 in response to an Order to show Cause that was mailed to the PO Box contained on the Answer, PO Box 1597 Mukilteo WA 98275.

During that appearance, he was personally served with a Third Amended Summons and Complaint. CP 24 Declaration of Service.

At the hearing an Agreed Order (with the aide of an attorney for the Housing Justice Program) for the issuance of a Writ of Restitution if Defendant did not vacate the property, on or after March 12, 2012. This gave the defendant additional time to vacate the property. That Agreed Order also provided that all issues regarding unpaid rent, late charges, attorney fees, damages and costs were reserved for further determination upon acquisition of personal jurisdiction upon the defendant.

However, Defendant did not vacate the property as agreed and a Writ was issued March 13, 2012 and thereafter served upon Defendant by the Sheriff's office to forcefully remove defendant. Defendant vacated the property during March 2012.

MOTION TO CONVERT UD TO CIVIL ACTION. Approximately 60 days later Koryatem filed his Motion to Convert Unlawful Detainer Case to a Civil Case (based upon CR 15(a) as stated in the motion), on May 10, 2012 since the issue of possession was settled. That motion was granted on May 22, 2012. CP 30. This court then had personal jurisdiction over the Defendant and could address the issue of judgment for the monetary sums as requested in the complaint. That Motion and Declaration in support was mailed to the only address of record provided by Kinchen to the court or counsel and the only address known to counsel at that time, to wit: the PO Box contained on the Answer, **PO Box 1597 Mukilteo WA 98275**. Proof of service was contained on the Calendar Note for hearing on the motion.

In Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985), the court addressed the issue that an Unlawful Detainer is an action that is strictly limited to the issue of possession of a dwelling, and those issues related thereto, such as rent, damages, etc. However, once the issue of possession is resolved, the unlawful detainer action can no longer proceed, even if the issues of rent and damages remain unresolved:

> **We create today not another exception, but a rule which is collateral to the general rule: Where the right to possession ceases to be at issue at any time between the commencement of an unlawful detainer action and trial of that action, the proceeding may be converted into an ordinary civil suit for damages, and the parties may then properly assert any cross claims, counterclaims, and affirmative defenses.**
> **Munden, 105 Wn.2d at 45-46**

This was the purpose of Koryatem's action of converting the unlawful detainer action to an ordinary civil action. It is important to note that the issue of possession of the demised premises was resolved by the Agreed Order on March 6, 2012, and Kinchen was represented by an attorney from the Housing Justice Program at that proceeding. CP 21. While at that hearing, and before the order was entered, Kinchen was personally served with a copy of the third Amended Summon and Complaint by Counsel James R. Hawes.

Issue 2.2 (Pertaining to Error 2.2). Stacey Kinchen (did not) respond and participate at every step of proceedings.

This purported issue recites a verbal finding by the Commissioner on hearing of the Motion to Vacate. Since appeal from that decision is not allowed, it should be denied. In any event, this is a claimed **error of law** which cannot be the basis for a Motion to Vacate. Port of Port Angeles v. CMC Real Estate Corp., 114

Wash. 2d 670, 673, 790 P.2d 145 (Wa. 1990). Accordingly, denial was proper. Further, it is an issue that should have been addressed in appeal of the Order of Summary Judgment, and must be denied on that basis.

In short, and to echo the finding of the commissioner, the record evidences that Kinchen was provided notice throughout the proceedings and he participated therein. The issues relevant to a unlawful detainer action were resolved with his execution of an Agreed Order stipulating to turn over possession to the Landlord. At that point the Court would have had no further jurisdiction over the monetary issues until Kinchen was personally served, and the action was converted to a civil action.

<u>Issue 2.3A (Pertaining to Error 2.3).</u> Amin Koryatem's Three-Day Notice is defective, improper service, contradicting, fraudulent and fail to comply with the requirements of RCW 59.12.030(3).

Kinchen points out in his argument only that the Declarations of service reflect that service was accomplished essentially contemporaneously, on the same day.

The second Declaration was delayed in its filing because Kinchen failed to pick up his mail, despite repeated notice to him by the U.S. Post Office that he had mail, and when the green Certified

Mail card came back to Koryatem after multiple service attempts, it was given to his attorney and attached to the Declaration of mailing, and filed with the court together with the other Declaration. The proof of the mailing of the notice to Kinchen is a part of the record. CP 19. Although the "different dates" apparently confuse Kinchen, those hand written dates on the envelope are the dates written on the certified mail by the postman and initials after each attempted service.

This is a claimed **error of law** which cannot be the basis for a Motion to Vacate. Port of Port Angeles v. CMC Real Estate Corp., 114 Wash. 2d 670, 673, 790 P.2d 145 (Wa. 1990). Accordingly, denial was proper. Further, it is an issue that should have been addressed in appeal of the Order of Summary Judgment, and must be denied on that basis.

The remainder of this claimed issue duplicates the issue labelled as **Regarding Issue 2.1B:** and the response of Koryatem to that issue is incorporate herein by this reference thereto.

Issue 2.3B (Pertaining to Error 2.3). Amin Koraytem failed to satisfy the service of notice requirement regarding his Motion pursuant to CR Rule 5(b)(1).

This issue duplicates the prior issues raised at **Issue 2.1C (Pertaining to Error 2.1).** and the response of Koryatem to that issue is incorporate herein by this reference thereto.

Pro se litigants are bound by the same rules of procedure and substantive law as attorneys. Westberg v. All-Purpose Structures, Inc., 86 Wn. App. 405, 411, 936 P.2d 1175 (1997).

Kinchen cites the correct rule: under RULE CR 5(b)(1): "...Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address." The only address made known to the court, or to Koryatem's attorney was the address given by Kinchen at the bottom of his pleadings (his "Answer" and "Response"), to wit: **PO Box 1597 Mukilteo WA 98275**. Koryatem's service on Kinchen was complete when he deposited notice in the US Mail to the last known address of Kinchen.

SCLCR 11(a) requires that a pro se litigant advise the court and other parties in writing of any change in mailing address.

The record is devoid of any evidence to support Kinchen's bare assertion that notice was given to Koryatem's attorney by return of mail to him, and Kinchen's assertions on this point are contradictory.

First Kinchen asserts that he ***cancelled*** his PO Box in Mukilteo on **April 30, 2012**. Please note that he never asserts that he gave anyone notice of the *purported* cancellation or his new address. However, it is also noted that in the "Declaration of Stacey A. Kinchen In Support of Motion For Order Vacating Judgment" (CP 53) at line 20 – 23 on page one, filed over a year later on July 25, **2013**, Kinchen reports that a reason for his not responding sooner to the Motion For Summary Judgment was that he rarely checked his Mukilteo PO Box any more **"...because it is so far away from my work and residence, and my Kent PO Box."** Nowhere does Kinchen state that he cancelled that PO Box, and he specifically mentions that he seldom goes there only because it is inconvenient, NOT that is was cancelled.

Additionally, Kinchen stated that he never forwarded any of the mail to that Mukilteo PO Box (CP 66 Declaration of Defendant, Stacey Kinchen In Support of Response (to Motion for Revision) page 3, lines 16-19), therefore he would not have received any mail on this case, and cannot be held to complain about his alleged purposeful failure to receive anything on this case.

The Duty was upon Kinchen to maintain his current address with the court and the parties at all times.

Kinchen never sent to Koryatem's legal counsel his response to the Summary Judgment Motion, so any change of address contained on that document was never provided to counsel, and only given to the court the day before the hearing.

Issue 2.4 (Pertaining to Error 2.4). Snohomish County Superior Court lacked subject matter jurisdiction to grant Motion to Convert Case to a Civil Action, grant Summary Judgment, impose attorney fees and awards.

I am unable to reply to the first paragraph under this issue as it only makes an ambiguous references to the "Order for Writ of Restitution", CP 21, but fails to specify the point trying to be made.

The court possessed subject matter jurisdiction at all times. The Limited statutory jurisdiction over an unlawful detainer action concluded with the resolution of the issue of possession. However, this did not end the action, and as noted, Kinchen appeared in person and in writing and was served personally with the Summons and Complaint, thus acquiring personal jurisdiction over Kinchen regarding all of the reserved monetary issues.

The Declaration in support of the Motion to Convert the Case recited specifically that the motion was based upon CR 15(a) as authority to amend pleadings with leave of the court.

The Order converting the case to a civil case provided that neither party was required to further amend or serve additional pleadings, as the issues remaining to be litigated where all addressed fully in the existing pleadings.

The unlawful detainer Summons is an instrument that is dated, specifying a deadline by which an answer is due, and the document become stale if unable to be served timely, 7 days in advance of the response date in an unlawful detainer action. In all other respect the Summons remained identical to all prior versions. Thus, the Summons changed several times as Kinchen avoided service, as did the dates on the several orders to show cause. However, the allegations in the complaint remained unchanged. There is no requirement to change the Complaint, and no authority is cited in support of such a contention. There is no requirement that the summons be altered to be wholly sufficient, as the matter was changed to a civil action and the form of the summons, at the least, substantially complied with the requirement to place Kinchen on notice to appear and defend, both of which he did.

Kinchen was afforded due process, notice and opportunity to be heard throughout these proceedings.

The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. **RCW 4.36.240 Harmless error disregarded.**

The Order converted the case to a civil case without further amendment or filing of pleadings constituted 'leave of the court' as referenced in CR 15. If this Order was in error, it is an error in interpreting the timing and administration of CR 15, and as such it would be an **error of law** which cannot be the basis for a Motion to Vacate. Port of Port Angeles v. CMC Real Estate Corp., 114 Wash. 2d 670, 673, 790 P.2d 145 (Wa. 1990). Accordingly, denial was proper. Further, it is an issue that should have been addressed in appeal of the Order of Summary Judgment, and must be denied on that basis. There is no requirement under the statute or the cases discussing Conversion of a Unlawful Detainer action to a civil action that an additional or different summons be utilized, and re-served with the complaint. To the contrary, the court in Munden v. Hazelrigg, Id.,at 45, annunciated a new rule that allows the conversion of an unlawful detainer action without the need to file a

new lawsuit, and provided for the filing of additional pleadings without further leave of the court:

> **We create today not another exception, but a rule which is collateral to the general rule: Where the right to possession ceases to be at issue at any time between the commencement of an unlawful detainer action and trial of that action, the proceeding may be converted into an ordinary civil suit for damages, and the parties may then properly assert any cross claims, counterclaims, and affirmative defenses.**

Issue 2.5 (Pertaining to Error 2.5). Commissioner Tracy Waggoner eroded (sic) and abused her discretion in rendering her ruling, after asking Amin Koryatem's attorney, James Hawes if any credits had been applied to the current Judgment regarding RCW 59.18.280. ("RP) at P. 13-14.

ABUSE OF DISCRETION.

Very early in the history of the court in Kuhn v. Mason, 24 Wash. 94, 64 P. 182, it was decided that errors of law could not be corrected on a motion to vacate a judgment. More recently, in Kern v. Kern, 28 Wash. 2d 617, 183 P.2d 811, the following statement of the rule in 1 Black on Judgments (2d ed.) 506, ? 329, was approved:

> **"'The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ**

of error, or certiorari according to the case, but it is no ground for setting aside the judgment on motion.'"

In the case of *In re Marriage of Littlefield*. 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997), the court reviewed the standard for abuse of discretion:

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Kinchen claims there was an error in the commissioner asking a question of counsel during a hearing on the Motion to Vacate. Reliance by Kinchen on the absence of a grant of authority in RCW 59.18.310 to ask questions is misplaced, and no authority is otherwise given for that proposition.

In any event, the assertion of this error again concerns an issue of law, the interpretation of a statute, and is not subject to review on a Motion to Vacate.

The statute in question, RCW 59.18.310 contemplates matters occurring or to be done outside the scope of litigation, and does not contemplate pending litigation. In the case of most evictions, the property is unlawfully detained, such that the amount of damages, and continuing rent, is not even able to be determined until after the sheriff has removed the tenant, or even later, until after a trial is completed. In such cases after commencement of an action for unlawful detainer, the Complaint constitutes a full report of the status of the disposition of the deposit by virtue of the claimed amounts owing (setoffs) for rent, damages and attorney fees, and leaves it to the court for judicial determination. Presently, the complaint served upon Kinchen by mail prior to his forceful removal from the premises, let him know that the amount sought to be charged against him <u>far exceeded the amount of his deposit</u>. No further report was necessary, nor able to be done while the issues remained pending.

In this case in the Order for Summary Judgment the court specifically gave credit toward the amount of deposits as an offset against rents owed. The lease, signed by Kinchen, provided that the amount of the deposits was **$1,375.00**. CP 33 (Motion For Summary Judgment, Exhibit "A" (the Lease, at paragraph 14). The

Order on Summary Judgment gave full credit for that amount as an offset against rent owed. CP 39, at Page 2, line 17-19.

Issue 2.6 (Pertaining to Error 2.6). Stacey Kinchen's case has Merits that supports a Prima Facie Case.

Kinchen's case has no meritorious defense. Kinchen admits, or at the very least fails to deny, that he owed and failed to pay rent as required under the lease for the months of January and February 2012. He admits he was not completely moved out of the property during March, thus rent for the whole month of March is also due. If one dollar was owing at the time that the unlawful detainer was commenced, it was well founded. However, where the case was converted to a civil action, the judgment was not based upon an unlawful detainer action; thus the alleged defenses contended by Kinchen as a meritorious based upon the Landlord Tenant Act is without merit because they do not apply.

Further, RCW 59.18.080 provides that payment of rent is a condition precedent to his ability to utilize the remedies under the Landlord Tenant Act:

> **The tenant shall be current in the payment of rent including all utilities which the tenant has agreed in the rental agreement to pay before exercising any of the remedies accorded him or her under the provisions of this chapter**

As Kinchen admits he owed rent, he cannot not use the provisions of the Landlord Tenant Act as a defense to the complaint of Koryatem pursuant to RCW 59.18.080.

Issue 2.7 (Pertaining to Error 2.7). Amin Koryatem meets the definition of a contractor under RCW18.27.010(1). Under RCW 18.27.020, contractors are barred from hiring unregistered and unlicensed contractors. Unregistered and unlicensed contractors are barred from bidding on contracts and it's a crime to do so.

Kinchen misinterprets the Contractor Registration Act (CRA) and misstates the law. Koryatem is not a contractor.

> **RCW 18.27.090 Exemptions.**
> **The registration provisions of this chapter do not apply to:**
> ....
> **13) An owner who performs maintenance, repair, and alteration work in or upon his or her own properties, or who uses his or her own employees to do such work;**

Koryatem, or any other property owner, can hire anyone they want to do whatever work they wish on their property without being in contravention of the CRA. In any event, by hiring a handyman to do the repair work on the duplex to get it ready for the next tenant, Koryatem is not barred in any fashion and does not waive the right to collect from Kinchen for the cost for repairs beyond the normal wear and tear.

In any event, this is a claimed **error of law** which cannot be the basis for a Motion to Vacate. Port of Port Angeles, supra. Accordingly, denial was proper. Further, it is an issue that should have been addressed in appeal of the Order of Summary Judgment, and not my Motion to Vacate, and must be denied on that basis.

Issue 2.8 (Pertaining to Error 2.8). Amin Koryatem was barred from retaining Stacey Kinchen's deposits pursuant to RCW 59.18.280 where he failed to mail Stacey Kinchen's a full specific statement for the basis of retaining Stacey Kinchen's deposits.

The assertion of this error concerns an issue of law, i.e., the interpretation of a statute, and is not subject to review on a Motion to Vacate and should be denied.

This issue duplicates Issue 2.5; Koryatem incorporates his response to issue 2.5 by this reference thereto.

Issue 2.9 (Pertaining to Error 2.9). Attorney James Hawes committed fraudulent acts and grossly misled the Snohomish County Superior court with his misrepresentations, interpretations and statements.

It appears that Mr. Kinchen believes himself entitled to call a fraud anyone whose opinion differs from his. He lists 6 items whereby he alleges Attorney Hawes has committed dishonesty fraud deceit or misrepresentation. Kinchen has failed to demonstrate that

any of the allegations of fraud are connected to entry of the order on summary judgment, or the order on the Motion for Revision.

> **Fraud or misconduct that is harmless will not support a motion to vacate. Peoples State Bank v. Hickey, 55 Wash. App. 367, 777 P.2d 1056 (Div 1, 1989)**

15A Karl B. Tegland and Douglas J. Ende, Washington Practice: Washington Handbook on Civil Procedure at 613 (2005).

Koryatem's response follows in the order presented:

A. Filed false Declaration. Kinchen cites to the Declaration filed to support the Motion for authority for Alternate Service. However, he neither describes which of the three paragraphs in that declaration he is referencing to, nor does he cite proof that any portion of that declaration is incorrect, let alone fraudulent, or that Attorney Hawes knew the same to be false. Accordingly, I am unable to respond, except to re-verify all of the content thereof, and claim that the repeated allegation are in violation of Civil Rule 11, and constitute a frivolous action.

B. Filed false three-day Notices and Declarations. The reference is to the two separate declarations signed by Koryatem stating that he posted, mail by regular US Mail, and by Certified Mail, the 3-day note to pay or vacate. Again, he provides no proof for his

assertions that any portion of those documents are incorrect, let alone fraudulent, or that Attorney Hawes knew the same to be false.

C. Filed false document stating he mailed Notice and Proposed Order; Again, Kinchen provides no proof for his assertions that any portion of those documents are incorrect, let alone fraudulent, or that Attorney Hawes knew the same to be false.

D. Made false statements and misrepresented true facts in open court;

Kinchen makes reference to page 13 of that report of proceedings.

i) First, it is inaccurate to say that the typed document of a tape recording from the Commissioner's Civil Calendar is a Report of Proceedings as that phrase is generally used, and objection is made to the document in itself in form and content as the report is not from a court of record.

ii) Second, page 13 addresses Kinchen's many nuisance Bankruptcies (5 since 2011) filed in rapid succession to prevent Koryatem from recovering his judgment, which has greatly added to the costs and fees. The bankruptcy court successively denied each of his attempts to get a stay of proceeding on enforcement of that judgment (until the fifth one), including his attempt to re-open his

Chapter 7 Bankruptcy the day before the hearing on the Motion for Summary Judgment, in lieu of his making an appearance.

iii) On page 14, there is a reference to a discussion with the Commissioner regarding whether credit for the amount of Kinchen's deposit. The reference is that the credit was given in the order of summary judgment by judgment Bowden. However, there is a $125.00 discrepancy in the numbers referenced, as the credit given in the Judgment was the same amount that Kinchen agreed in writing was the amount of the security deposit, i.e., one month's rent, of $1,375.00. In the report of proceedings, off of the top of my head I recalled the amount to be $1,500.00. However, that was the amount that was being claimed, not the amount receipted for by Koryatem in writing. This exchange occurred in front of kinchen, and he had the opportunity to correct the record and failed to do so. Kinchen has submitted copies of checks that are unreadable, and it is submitted that that the memo lines on the checks could have been altered at any time, and the totals are not consistent with what the Defendant has been arguing, i.e., that the checks represent a $1,500.00 security deposit (despite the total being $2,580.00), contrary to his signed lease provisions that security deposit was $1,375.00. In any event, it is a $125.00 discrepancy, which should have been handled

at the appeal of the Order on Summary Judgment, and is not appropriate for determination on appeal from the Motion to Vacate.

E. Served unfiled documents other than what he filed; This sets a new low for Kinchen, as he purposefully misrepresents to this court that a minor clerical error constituted an attempt at fraud.

i) Specifically, Kinchen filed his Motion to Vacate. In response, Koryatem filed a document entitled :<u>Plaintiff's Responsive Brief Re: Motion to Vacate Judgment"</u>.

ii) Inadvertently, a clerical error in that document occurred: to wit, the case caption was wrong and the case number was inaccurate. This document was mailed to Kinchen, original filed with the court, and a working copy sent to the Commissioners' Hearing Confirmations in-box.

iii) At the hearing, on August 9, 2013, and in the presence of Kinchen, Commissioner Tracy Waggoner inquired of Koryatem's legal counsel that his Responsive Brief contained a number of people listed as defendants and was that just a processing issue? The reply was that it was a clerical error and that it was intended to be filed in this matter. The Commissioner said "Okay". **RP at Page 3**. She then proceeded with the hearing. No objection was ever made by Kinchen that he was somehow prejudiced by the clerical

error, although he now tries to make it appear as a basis for attempted fraud. The hearing was on a Friday.

The following Tuesday the Original copy of the Brief was returned from the Clerk's office due to it having the inaccurate file number. The first page of that Brief was changed, re-typed to correct the name of the Defendant and the file number, and sent back to the clerk's office for re-filing. Nothing else was changed in the content of the brief. This is what Kinchen says was fraudulent.

F. Filed late document and still use them in a hearing. This claim does not rise to the level of even a slight misrepresentation, let alone fraud, assuming if it was true. Kinchen further produces nothing to show that he could have been prejudiced by the such acts or omissions, assuming, arguendo, their accuracy. Accordingly, the error should be disregarded. Further, attention is called to the Declaration of Christina Nelson, CP 76, secretary for James Hawes, who had sent out several of the documents which Kinchen is complaining about as being served late. Because of his complaint, the documents referenced in the Declaration was sent by Delivery Confirmation in order that it could be tracked. It appears that even his Po Box in Kent WA is not used by Kinchen, as the Post Master stated that the documents were forwarded from that PO Box

to his residence, which delayed receipt of the documents such that documents would have been received early, ended up being received late. In short, Kinchen sabotages his own mailing addresses, just so he can have something to complain about.

V. CONCLUSION.

A. Each assigned error and stated issue was either brought up in the Summary Judgment proceeding, or could have been brought up in that proceeding, or in an appeal of that Judgment. Given that the Judgment was not appealed, this court should deny each assigned error that was or could have been handled in the Summary judgment proceeding or its direct appeal.

B. None of the alleged errors by the trial court of legal issues that could have been raised on an appeal from the final judgment or on the motion for Revision are properly brought up in a CR 60 Motion to Vacate.

C. All assignments of errors and statement of issues arising out of the commissioner's ruling that was subsequently brought up for Motion for Revision are properly before this court and should be dismissed.

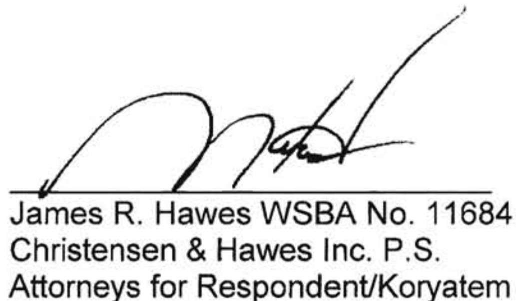
Request is made to affirm the Judgment dismissing the Motion to Vacate.

VI. ATTORNEY FEES.

Request is made for the award of Respondent's Koryatem's costs, and fees on appeal. The lease (CP 33 Motion For Summary Judgment, Exhibit "A") at paragraph 16 provides for attorney fees to the prevailing party in the event of suit to enforce the terms of the lease. Further, fees were driven higher due to unreasonable positions taken by Kinchen that protracted the litigation in Superior Court, Appellate Court, and Bankruptcy Court.

Respectfully Submitted

March 19, 2014.



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