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COURT OF APPEALS
DIVISION THREE
STATE OF WASHINGTON

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION THREE

No. 30851-1-III

IN RE THE MARRIAGE OF:

RICHARD TODD WIXOM,

Appellant,

and

LINDA BUCHHOLZ WIXOM,

Respondent,

and

Robert E. Caruso,

Additional Appellant.

BRIEF OF ROBERT E. CARUSO

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I. INTRODUCTION

Within an hour and 15 minutes of the close of the fifth day of trial, the adult daughter of the trial judge called attorney Robert E. Caruso about a dog for her father. Mr. Caruso deflected the call and reported the matter to the trial judge.

Two days after the call, the judge discussed the matter in open court on the record. What transpired then added more to what had happened.

What had happened, and what was explained to have happened, created a situation where the judge was obligated to recuse himself from the case. The totality of circumstances known were such that a reasonable person would conclude that the judge's "impartiality might reasonably be questioned." CJC¹ Rule 2.11 (A).

On April 9, 2012, over three months and 21 days after the trial concluded on December 19, 2011, the trial judge ordered Attorney Caruso jointly and severally with his client, Rick Wixom, to pay 90% of Linda Wixom's attorney's fees for a period of time starting from the time Attorney Caruso came into the case for Mr. Wixom. Under the calculation, the amount of the attorney's fees totaled \$57,531.58. The order of joint

¹ Code of Judicial Conduct.

and several liability for such fees, \$57,531.58, was said to be “as CR Sanctions and Attorneys Fees based on intransigence.”²

II. ASSIGNMENTS OF ERROR: ISSUES PRESENTED

A. Assignments of Error: Jurisdiction, Judge Was Disqualified.

1. Assignments of Error : Jurisdiction, Judge Was Disqualified.

Error is assigned to the failure of judge to disqualify himself as required by CJC Rule 2.11(A) and (C).

2. Assignments of Error: Findings of Fact Which are Conclusions of Law.

Error is assigned to certain Findings of Fact which are, in reality, conclusions of law.³

Whether a determination will be treated as a finding of fact or a conclusion of law depends on the content of the statement and not on its characterization. *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963); 89 C.J.S. TRIAL § 647 (1955).

Statements of fact included within conclusions of law will be treated as findings of fact. *Ferree v. Doric Co.*, 62 Wn.2d at 567.

² Order Re Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule (herein Order), CP 1129 at 1133; Judgment Summary, CP 1166.

³ The Findings of Fact and Conclusions of Law were entered on April 9, 2012, referred to herein as FFCL. CP 1104.

The Findings of Fact which are to be characterized as Conclusions of Law are as follows:

183. Richard Wixom and Mr. Caruso engaged in a course of conduct that was not in good faith beginning in late July 2011 and continued through trial.

184. Richard Wixom and Mr. Caruso pursued allegations and innuendos not well-grounded in fact. Instead these allegations and innuendos were interposed for the improper purpose of harassing and causing unnecessary and needless increase in the cost of litigation.

185. There has been an ongoing attempt by Richard Wixom and Mr. Caruso to harass, embarrass, threaten, and intimidate the GAL, the Court Commissioner, and Linda Wixom herself.

188. There is a basis for Linda Wixom to receive CR 11 sanctions and attorney's fees based upon intransigence against Richard Wixom and Mr. Caruso.

FFCL CP 1123 - 1124.

3. Assignments of Error - Conclusions of Law.

Error is assigned to the following Conclusions of Law (FFCL CP 1125 - 1126):

1. Richard Wixom shall pay Linda Wixom's attorney fees that she incurred beginning July 31, 2011 through the date of the oral ruling (January 19, 2012) less those fees that have already been awarded and less the work that was done for those matters that those fees were based on.

5. Mr. Caruso had an obligation under CR 11 to pursue a cause of action that was well-grounded in fact and was not interposed for an improper purpose, such as to harass or

cause unnecessary and needless increase in the cost of litigation.

9. The Court finds and concludes there was a conspiracy in this case. The conspiracy was between Mr. Caruso and Richard Wixom to wage an all-out war against Linda Wixom, her attorneys, the GAL, and the Court.

10. Mr. Caruso has abused his professional responsibilities and therefore the Court is making the award of attorney fees [see paragraph 1, above] the joint and several responsibility of both Mr. Caruso and Mr. Wixom.

It appears Paragraph 9 (FFCP CP 1125) was the basis for the Court's Conclusion of Law, Paragraph 10)(FFCP CP 1126), which made the award of attorneys fees in the fourth paragraph of the Order the "the joint and several responsibility of both Mr. Caruso and Mr. Wixom." CP 1132.

4. Assignment of Error: Order, Fourth Paragraph .

Caruso assigns error to the fourth paragraph of the Order (CP 1132):

Mr. Wixom and Mr. Caruso, jointly and severally shall pay 90% of Ms. Linda Wixom's attorneys fees (less those fees that have already been awarded and less the work that was done for those matters that those fees were based on) from July 31, 2011 through July 19, 2012 as CR Sanctions and Attorneys Fees based on intransigence.

B. Issues Presented.

1. To an objective reasonable person, would it appear there was a question of the appearance of impartiality of Judge James Triplet?
2. If yes, was the trial judge disqualified?

3. Did the trial court impose CR 11 Sanctions on Attorney Caruso?
4. And, if so, was it proper to impose CR 11 Sanctions on Caruso?
5. Did the trial court have authority to make Attorney Caruso jointly and severally liable for the payment of the attorneys fees of Linda Wixom as “Attorney Fees based on intransigence”?
6. Did the trial court have jurisdiction and authority to order Attorney Caruso be surety his client for the payment of the award against his client?

III. STATEMENT OF FACTS

A. Facts.

This case comprised a petition to modify the parenting plan by Linda Wixom and a petition to modify a parenting plan by Richard Wixom. FFCL FF #30, CP at 1107. The parenting plan of the children of the parties was entered during the decree of dissolution of the marriage of Linda and Richard Wixom on March 3, 2009. FFCL, FF #13, CP at 1105. A final parenting plan and final order of child support were entered with the decree of dissolution, on March 3, 2009. FFCL, FF #16, CP at 1106.

On February 8, 2011, Linda Wixom filed a petition to modify parenting plan. FFCL, FF #30, CP at 1107. On March 23, 2011, Richard Wixom filed a counter petition for modification of final parenting plan.

FFCL, FF #32, CP at 1107.

The trial regarding these petitions took place over seven days from November 8, 2011 to December 19, 2011. The trial dates were November 8, 2011, November 29, 2011, December 7, 2011, December 9, 2011, and December 19, 2011. FFCL FF#1 CP 1104

On April 9, 2012, Judge Triplet signed the Findings of Fact and Conclusions of Law. FFCL CP 1104.

On April 9, 2012, judge Triplet signed the Order (Order Re-Modification/Adjustment of Custody Decree, Parenting Plan/Residential Schedule). Order CP 1129.

The fourth paragraph of the Order provides as follows:

Mr. Wixom and Mr. Caruso, jointly and severally shall pay 90% of Ms. Linda Wixom's attorneys fees (less those fees that have already been awarded and less the work that was done for those matters that those fees were based on) from July 31, 2011 through January 19, 2012 as CR 11 Sanctions and Attorneys Fees based on intransigence. CP 1132.

On April 9, 2012, Affidavit of Paul B. Mack Re Attorney Fees (Affidavit) was filed. CP 1168.

On April 9, 2012, Judgment Summary in which the Judgment is \$57,531.58, was entered. CP 1166.

The \$57,531.58 attorney's fees amount was calculated on page 20 of the Affidavit, apparently by Judge Triplet whose initials appear at various fee strikeouts in the Affidavit. CP 1168 -1187, the calculation is at the end at CP 1167.

B. Telephone Call by Judge Triplet's Daughter to Mr. Caruso on December 9, 2011.⁴

On December 9, 2011, within an hour and 15 minutes of the time trial was concluded for the day on December 7, 2011, attorney Robert E. Caruso received a telephone call from the adult daughter of Judge James Triplet. She called Mr. Caruso about a dog for the judge. Verbatim Report of Proceedings 864, 867 - 873. This part of the Verbatim Report is attached as Appendix A.

Mr. Caruso reported this to Judge Triplet. The matter of the phone call was discussed prior to the commencement of the December 9, 2011 continuation of trial. *Id.*

⁴ A Washington attorney has a duty to report this situation to the court. RPC 8.3 (b) provides:

A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judges fitness for office should inform the appropriate authority.

IV. SUMMARY OF ARGUMENT

The decision against Robert E. Caruso should be reversed. First, the court lacked jurisdiction: (1) The judge was disqualified, (2) because of the disqualification, the judge did not have jurisdiction, and neither did the court, and (3) irrespective of the foregoing, the court did not have personal jurisdiction over Mr. Caruso to order him to be jointly and severally liable for the obligations imposed on him by the court.

Second, assuming for the sake of argument, the judge was not disqualified and the court had jurisdiction, did the court have legal grounds upon which to base its holding that Mr. Caruso was jointly and severally liable for the attorneys fees ordered to be paid by Rick Wixom? The answer is no and for several reasons, each of which will be discussed below.

V. ARGUMENT

A. Standards of Review.

There are various standards of review which apply.

1. Judicial Disqualification.

As to judicial disqualification for the questioning of a judge's impartiality, the standard is found in CJC 2.11 (A) and (C). CJC 2.11 (A) " A judge shall disqualify himself or herself in any proceeding in which the

judge's impartiality might reasonably be questioned.” The portion of the Verbatim Transcript of the Proceedings regarding an explanation of the circumstance of the call to attorney Caruso by the adult daughter of the judge is attached as Appendix A.

The judge’s disqualification will be discussed in detail in the last part of the Argument and in the Analysis of Transcript of Judge’s Explanation attached as Appendix B. *Infra* at p. 25.

2. Findings of Fact and Conclusions of Law.

The standards of review as to findings of fact and conclusions of law are as follows:

The court reviews a trial court's decision following a bench trial by asking whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law. *Casterline v. Roberts*, 168 Wn. App. 376, 381, 284 P.3d 743 (2012).

Where findings are challenged, the court reviews such findings for substantial evidence. *In re Marriage of Wilson*, 165 Wn. App. 333, 340, 267 P.3d 485 (2011). Whether the findings of fact support the trial court's conclusions of law is reviewed de novo. *In re Marriage of Herridge*, 169 Wn. App. 290, 297, 279 P.3d 956 (2012).

The court reviews conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

The court reviews conclusions of law de novo, even if they are mislabeled as findings of fact. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007).

3. CR 11 Sanctions.

CR 11 sanctions are reviewed for abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

First, it must be determined whether the court actually imposed CR 11 sanctions. It may appear that a court did, but upon analysis and reflection it might prove that in fact the court did not impose CR 11 sanctions even when it said it did. Such is the case here as will be shown and discussed.

Second, it must be established that the CR 11 sanctions were based upon an actual pleading signed by the party to be charged. CR 11 addresses two types of pleading problems: (1) filings that are not grounded in fact and warranted by law and (2) filings interposed for an improper purpose. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829

P.2d 1099 (1992). In both situations, there must be a pleading. And, the pleading must be signed.

Third, the purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *Biggs v. Vail, supra; Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004).

A filing is baseless if it is not well grounded in fact, or not warranted by existing law or a good faith argument for altering existing law. *Skimming*, 119 Wn. App. at 754. The burden is on the movant to justify the request for sanctions. *Biggs v. Vail*, 124 Wn.2d at 202.

Because CR 11 sanctions have a potential chilling effect, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. *Skimming*, 119 Wn. App. at 755.

The fact that a complaint does not prevail on its merits is not enough. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 745, 218 P.3d 196 (2009).

Fourth, the sanctions cannot be used as an excuse to shift attorneys fees of one party to another party. The purpose of the rule is to deter frivolous filings rather than act as a fee shifting provision. *Biggs v. Vail*, 124 Wn.2d at 197.

The trial court must make specific findings indicating which filings violate the rule and how such filings violate the rule or demonstrate bad faith. *Biggs v. Vail*, 124 Wn.2d at 201-202.

4. Disqualification of Judge; Lack of Jurisdiction.

The standards applicable to disqualification will be set forth and discussed in Part J. of the Argument.

B. Character of the Judgment Against Caruso.

Prefatory to argument, the “character” of the order and judgment against Caruso must need be clearly understood. The Order was as follows:

Mr. Wixom and Mr. Caruso, jointly and severally shall pay 90% of Ms. Linda Wixom's attorneys fees (less those fees that have already been awarded and less the work that was done for those matters that those fees were based on) from July 31, 2011 through July 19, 2012 as CR Sanctions and Attorneys Fees based on intransigence.

CP 1132 (fourth paragraph).

One must ask, “What does the joint and several responsibility order relate to, what is the character of the award?”

(1) First, one must look at how the amount was calculated.

There can be no doubt that “[t]he amount to be paid [was] “90% of Ms. Linda Wixom's attorneys fees (less those fees that have already been awarded and less the work that was done for those matters that

those fees were based on) from July 31, 2011 through January 19, 2012." Order, CP 1132.

(2) Second, it must be determined as to what the "amount" is to be paid for.

Again, it is clear. The amount is to be paid "as CR 11 Sanctions and Attorneys Fees based on intransigence."

(3) Third, one has to determine how the award is allocated as between "[a]CR 11 Sanctions and [2] Attorneys Fees based on intransigence." How much were the CR 11 sanctions?

This amount can be determined by first determining how the court calculated the award and how much the award amounted to. The Judgment Summary sets the judgment against Richard Wixon and Robert Caruso (jointly and severally) at \$51, 777.58. CP 1166.

This is the exact amount of the "grand total" of attorney fees due times 90% shown on the Affidavit of Attorney Fees submitted by Paul B. Mack on February 17, 2014 ($\$57,531.75 \times 90\% = \$57,531.575$). Affidavit, CP 1168 at CP1187.

This is the amount of "Attorney's Fees based on intransigence." Order, CP 1132.

No part of this amount was allocated to CR 11 sanctions. This is so because the whole of the award was for “attorney’s fees.” The order does not say the award for CR 11 sanctions and attorneys fees based on intransigence was 90% of the fees incurred. It says that “shall pay 90% of Ms. Linda Wixom's attorneys fees“ which ordered to be – \$57,531.58. Judgment Summary, CP 1166.

This is substantiated by Conclusion of Law No 1:

1. Richard Wixom shall pay Linda Wixom's attorney fees that she incurred beginning July 31, 2011 through the date of the oral ruling (January 19, 2012) less those fees that have already been awarded and less the work that was done for those matters that those fees were based on.

FFCL CL #1 CP 1125.

Thus, in conclusion, the entire award – the entire joint and several judgment against Richard Wixom and Attorney Caruso – was \$57,531.58.

And, that amount represented attorneys fees based on intransigence.

There was no amount for CR 11 sanctions against Attorney Caruso.

C. **The American Rule as to Attorney’s Fees.**

Washington law follows the American Rule concerning imposition of attorney’s fees. “Under the American rule, attorney fees are recoverable only when authorized by private agreement of the parties, or

statute, unless an equitable exception exists." *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 79, 272 P.3d 827 (2012).

CR 11 sanctions do not fit under this rule. Such sanctions are terms, not attorneys fees. Indeed, the court has said again and again that CR 11 is not a fee shifting mechanism. "CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings." *MacDonald v. Korum Ford*, 80 Wn. App. 877, 891, 912 P.2d 1052 (1996) citing *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

D. No Liability for the Award under CR 11.

Caruso cannot be ordered to pay the award as to CR 11 sanctions.

First, as discussed above, no part of the award actually represents CR 11 sanctions. The entire amount of the award is represented by an amount for "attorneys fees for intransigence." *Supra* at 14.

In this regard, the court cannot bootstrap the payment of attorneys fees under CR 11 by tying CR 11 sanctions to the payment of attorney's fees for a party's intransigence.

And, looking at it another way, the court cannot use a joint and several award against the attorney and his client for the payment of the

clients attorney's fees based upon his intransigence and also call it "CR 11 Sanctions."

There are more reasons why CR 11 sanctions cannot be sustained against Caruso. The court must identify the filings to which the sanctions refer. "The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system." *Bryant*, 118 Wn2d at 219. Here, the court does not identify any filings which violate the rule.⁵

In addition, as stated earlier, the trial court must make specific findings indicating which filings violate the rule and how such filings violate the rule or demonstrate bad faith. *Biggs v. Vail*, 124 Wn2d at 201-02. There are no such findings of fact; none.

Thus, even assuming some part of the award was for CR 11 sanctions, Caruso cannot be obligated to pay them. As to Caruso, the elements necessary for CR 11 sanctions are missing.

E. No Liability for Attorneys Fees Based on Intransigence.

As indicated, the American Rule allows an equitable exception from the rule. One exception is the payment of attorney's fees by a party in a domestic relations case based upon intransigence. A party's intransigence can substantiate a trial court's award of attorney fees,

⁵ The same is true for Mr. Wixom.

regardless of the factors enunciated in RCW 26.09.140; attorney fees based on intransigence are an equitable remedy. *In re the Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999) citing *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992).

As an equitable remedy, a trial court may order a party to pay reasonable attorney fees and costs, regardless of need or ability to pay, if his or her intransigence demanded additional legal services. *Eide v. Eide*, 1 Wn. App. 440, 462 P.2d 562 (1969); *In re Marriage of Greenlee*, 65 Wn. App. 703, 829 P.2d 1120 (1992); *see also Fleckenstein v. Fleckenstein*, 59 Wn.2d 131, 366 P.2d 688 (1961); *Gamache v. Gamache*, 66 Wn.2d 822, 409 P.2d 859 (1965).

The cases show that the exception is limited – it applies only to “a party” in a domestic case. *Id.*

The rule does not apply to attorneys for parties in domestic cases.

The author of this brief has searched all of the cases reported in Washington to determine if there is a holding which allowed attorney’s fees for intransigence against an attorney in any kind of case. None were found.⁶

⁶ All of the Washington cases reported in LOIS LAW (Supreme Court, 1939 to present, Court of Appeals, from creation in 1969 to the present). <http://www.loislaw.com/pns/index.htm>. Cases since territorial days

F. Caruso Cannot be Ordered to Pay Fees on the Basis of Conspiracy.

The court bases its order that Caruso is to be held jointly and severally liable for “the award of attorney fees” as a result of Conclusion of Law No. 9 and 10 (FFCP CP 1126).

9. The Court finds and concludes there was a conspiracy in this case. The conspiracy was between Mr. Caruso and Richard Wixom to wage an all-out war against Linda Wixom, her attorneys, the GAL, and the Court.

10. Mr. Caruso has abused his professional responsibilities and therefore the Court is making the award of attorney fees [see paragraph 1, above] the joint and several responsibility of both Mr. Caruso and Mr. Wixom.

The findings of fact do not establish the element of a conspiracy.

There are no findings of fact that would lead to the conclusion that Mr. Caruso “abused his professional responsibilities.” Thus there is no support for these conclusions.

Such inquiries need not be pursued because the court could not for other reasons exercise jurisdiction of the person of Caruso. The court does not have personal jurisdiction over Caruso. The court does not have the power to act as to a plaintiff in a cause of action which is intended to benefit a party to a civil action. The purpose of the court is to decide

(Territorial Reports) and from 1889 to 1939 were searched at MRSC, WASHINGTON COURTS found at http://courts.mrsc.org/washreports-/index_dtSearch.html.

cases, to fulfill the judicial function of courts of the state of Washington.

Wash. Const. Art. IV, § 1.⁷

In its conclusions of law the court says:

9. The Court finds and concludes there was a conspiracy in this case. The conspiracy was between Mr. Caruso and Richard Wixom to wage an all-out war against Linda Wixom, her attorneys, the GAL, and the Court.

It is upon this basis that the court says:

10. Mr. Caruso has abused his professional responsibilities and therefore the Court is making the award of attorney fees the joint and several responsibility of both Mr. Caruso and Mr. Wixom. [Emphasis added.]

The findings of fact do not support a conspiracy – one would assume a civil conspiracy is what the court is referring to. To establish a civil conspiracy, a party who asserts a cause of action for civil conspiracy establish the elements of the wrong.

Can the trial judge do this in this case, even if he tried. The judge of a court in another action cannot within that action become the plaintiff in a civil lawsuit for another party. Not only is that not a judicial function, it is not possible. (The Code of Judicial Conduct comes to mind.)

⁷ Wash. Const. Art. IV, § 1.

The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Even if a judge has that authority he would have to present it the matter to himself.⁸

Not only that but he would have to prove to himself “by clear, cogent, and convincing evidence that”:

(1) Two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and,

(2) The conspirators entered into an agreement to accomplish the conspiracy. *All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d

⁸ The axiom *nemo iudex in causa sua* – no-one should be a judge in his own cause. This principle relates directly to the disqualification rules in CJC Rule 2.11.

This will be a lesson to all ... tribunals to take care, not only that in their decrees they are not influenced by their personal interests, but to avoid the appearance of labouring under such an influence.

From United Breweries Co. v Bath, 1926 AC 586; see also, J.C. O’Neill, “Not judge in one’s own cause” and the Nature of Ethics, 76 NEW BLACKFRIARS, Issue 897, pages 441–455, (October 1995), <http://onlinelibrary.wiley.com/doi/10.1111/j.1741-2005.1995.tb07124.x/abstract>.

367 (2000), citing *Wilson v. State*, 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996), *cert. denied*, 522 U.S. 949 (1997).

Mere suspicion or commonality of interests is insufficient to prove a conspiracy. *Id.*

Also, “[When] the facts and circumstances relied upon to establish a conspiracy are as consistent with a lawful or honest purpose as with an unlawful undertaking, they are insufficient” to establish a conspiracy. *Lewis Pacific Dairymen's Ass'n v. Turner*, 50 Wn.2d 762, 772, 314 P.2d 625 (1957).

(3) Finally, to successfully establish civil conspiracy, a plaintiff must show that the factual circumstances supporting the conspiracy are “inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy.” *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 450 P.2d 166 (1969). Being a lawyer in a case, advancing the position of one’s client as the lawyer in his judgment determines is clearly a lawful purpose.⁹

Obviously, the trial judge, the court cannot establish these elements by clear, cogent and convincing evidence.

⁹ See *also*, the discussion below at p. 23, under the heading “Litigation Immunity”

G. The Court Does Not Have Jurisdiction to Make Caruso Jointly and Severally Liable for the Attorneys Fees Ordered to Be Paid by Richard Wixom.

The joint and several obligation to pay a certain portion of Ms. Wixom's attorney's fees was for "CR 11 Sanctions and Attorney Fees based on intransigence."

The court did not order Caruso to pay attorney's fees. It ordered that Caruso would be jointly liable for the attorney's fees to be paid by Richard Wixom calculated as 90% of the fees charged by Paul Mack for a certain period of time. The court mandated that Mr. Caruso was to be the surety for the payment of the attorney's fees Mr. Wixom was ordered to pay. The court cannot do this.

The court did not have jurisdiction over Caruso, he was not a party to the action, he was never served, he did not personally consent to the court's jurisdiction over his person. The court does not have jurisdiction.

Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party. *Ha v. Signal Electric, Inc.*, 70423-1-I, Page 8 (Wn. App. 7-14-2014) citing *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 324, 877 P.2d 724 (1994); *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997) (default judgment entered without

personal jurisdiction is void, whether a judgment is void is a question of law that the court reviews de novo).

In addition, one comes back to what was discussed earlier. The court does not have authority to render CR 11 sanctions against Caruso. CR 11 cannot be applied.

And, the imposition cannot be intransigence because fees for intransigence cannot be ordered by the court against an attorney.

It cannot be civil conspiracy because civil conspiracy has not been established and cannot be established under the law.

It cannot be because the court has the power to make a lawyer responsible for the obligations imposed upon the lawyer's client. The court simply does not have judicial power to do that.

H. Litigation Immunity.

Attorneys and law firms have absolute immunity from liability for acts arising out of representing their clients. *Jeckle v. Crotty*, 120 Wn. App. 374, 386, 85 P.3d 931 (2004).

Attorney Caruso cannot be held liable for his actions at trial vis a vis Mr. Wixom. Nor can the court make him liable by imposing joint and several liability on him for something for which the court imposes on his client.

I. Imposition of Joint and Several Liability Violates Due Process.

The court, in making Attorney Caruso liable under joint and several responsibility for the obligation the court has imposed on Caruso's client, is acting arbitrarily. As indicated, the court does not have personal jurisdiction over Mr. Caruso. To impose an obligation on Mr. Caruso, to force Mr. Caruso to have to give up something of his own, the court must not only have jurisdiction, but it must have a basis in law for doing so. Here, the court has neither. As such, the court is violating Attorney Caruso's rights of due process of law guaranteed to him under the 14th Amendment to the United States Constitution and by the Washington State Constitution art. I, § 3.

The due process clause of the Washington Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Wash Const. art. I, § 3. "[D]ue process refers to the procedures that the government must follow before it deprives a person of life, liberty, or property." *Dellen Wood Prods, v. Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014) citing *Nieshe v. Concrete Sch. Dist*, 129 Wn. App. 632, 640, 127 P.3d 713 (2005).

The trial court did not follow the necessary procedures to make Caruso a surety for the obligations of his client to Ms. Wixom, Respondent in the action.

J. Trial Judge Was Disqualified; Court Did Not Have Jurisdiction.

The circumstances of the phone call by Judge Triplet's daughter an hour and fifteen minutes after the close of a trial day in the Wixom case on December 7, 2011, and the daughter's efforts about a dog she wanted to get for her father, implicate CJC Rule 2.11 (A). Verbatim Report of Proceedings 867 - 873.

The circumstances raise the specter that Judge Triplet's "impartiality might reasonably questioned." CJC Rule 2.11 (A).

On December 9, 2011, the judge put the matter on the record and provided more facts as to what had happened the evening of December 7, 2011. At the time, Judge Triplet also asked and obtained a "waiver" from Rick Wixom and Linda Wixom and their counsel. Verbatim Report of Proceedings, 867 - 873.

The statements made in open court did nothing to reduce the level questioning regarding the judge's impartiality. In fact, as will be shown, the explanations and statements and circumstances related in court,

enhanced the concern that Judge Triplet's impartiality might reasonably be questioned.

Further, the fact that the judge asked for and secured a waiver from the parties also enhances questions of the judge's impartiality. The Code of Judicial Conduct does not permit a waiver "impartiality reasonably be[ing] questioned. CJC Rule 2.11 (C).

Trial judge was disqualified pursuant to CJC Rule 2.11(A). Because he was so disqualified, he should have recused himself. The court did not have jurisdiction.

Judge Triplet was disqualified because the trial was a "proceeding in which the judge's impartiality might reasonably be questioned." CJC Rule 2.11 (A).

CJC Rule 2.11 (A) provides:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

This rule is mandatory. The Comments to CJC 2.11 (A) provide:

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply. In many jurisdictions in Washington, the term "recusal" is used interchangeably with the term "disqualification." [Emphasis added.]

The Washington “impartiality might reasonably be questioned” rule does not allow for waiver. CJC Rule 2.11 (C) provides:

(C) A judge disqualified by the terms of Rule 2.11(A)(2) or Rule 2.11(A)(3) may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing or on the record that the judge's relationship is immaterial or that the judge's economic interest is de minimis, the judge is no longer disqualified, and may participate in the proceeding. When a party is not immediately available, the judge may proceed on the assurance of the lawyer that the party's consent will be subsequently given.

There can be no waiver because the circumstances where there can be waiver do not apply to CJC Rule 2.11(A)(2) or Rule 2.11(A)(3).

Waiver regarding CJC Rule 2.11 (A) is not permitted.

The Comment to the rule is specific about this:

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply. In many jurisdictions in Washington, the term "recusal" is used interchangeably with the term "disqualification." [Emphasis added.]

The call and the facts pertaining to the call and surrounding the call lead to the legal conclusion that Judge Triplett was “disqualified” because his “impartiality might reasonably be questioned.” CJC 2.11 (A).

"The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts." *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988)).

In determining whether recusal is warranted, actual prejudice need not be proved; a "mere suspicion of partiality" may be enough to warrant recusal. *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" *Id.* at 206 (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988)).

In *Sherman*, the court held that a judge engaged in prohibited ex parte contact under former Canon 3(A)(4) when, at the judge's request, a judicial extern called an organization that played a key role in the case and discussed general procedures for monitoring people in the plaintiff's position. This ex parte communication warranted recusal under former Canon 3(D), we concluded, because the judge "may have inadvertently obtained information critical to a central issue on remand,"

leading a reasonable person to question his impartiality. *Sherman*, 128 Wn.2d at 206.

In *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 524, 145 P.3d 1208 (2006), the court held that former Canon 3(D) required a justice to recuse himself from a consolidated case involving several sexually violent predators (SVPs) when he met with a group of SVPs, including at least one who was a party to the consolidated case and who inquired about a central issue in the case. This court concluded the justice's actions violated former Canons 1 and 2(A) and required recusal because a reasonable person would question the judge's impartiality. *State v. Davis*, 175 Wn.2d 287, 307, 290 P.3d 43 (2012).

“In determining whether recusal is warranted, actual prejudice need not be proved; a ‘mere suspicion of partiality’ may be enough to warrant recusal.” *State v. Davis*, 175 Wn.2d at 306 quoting *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995).

During the course of the proceedings at the morning session on December 9, 2011, Judge Triplett said he wanted to put “something that may be a little perplexing to Mr. Caruso, a phone call that happened I want to say two nights ago.” VRP Line 10, page 867. A reading and an analysis of the transcript of the hearing where Judge Triplet discussed the

situation of the daughter's phone call is set forth in Appendix B, incorporated herein at this point and made a part hereof. From the reading and analysis it must be concluded that what first indicated that the impartiality of the judge might reasonable questioned became more indicated – the call and the explanation cause a reasonable person to conclude that Judge Triplet's impartiality might be reasonably questioned.

VI. CONCLUSION

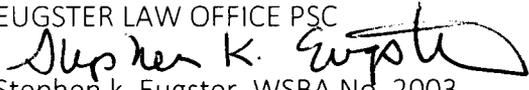
The case should be reversed and dismissed. The trial judge was disqualified. The judge should have disqualified himself due to telephone call to Mr. Caruso and its surrounding circumstances and the explanation of the call the proceeding became a proceeding in which the judge's impartiality might reasonably be questioned. CJC Rule 2.11 (A).

Respondent cannot be ordered to be jointly and severally liable with Wixom for the payment of a portion of Ms. Wixoms' attorney's fees as a result of one or more of the reasons stated and discussed above.

The order against Robert Caruso that he be jointly and severally liable for attorneys fees to be paid by to Ms. Wixom should be reversed.

Respectfully submitted this 5th day of September, 2014.

EUGSTER LAW OFFICE PSC


Stephen k. Eugster, WSBA No. 2003
Attorney for Additional Appellant
Robert E. Caruso

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CERTIFICATE OF SERVICE

I, Stephen K. Eugster, certify that I served this Brief of Additional Appellant Robert Caruso on the people identified below and in the manner so designated opposite their names, on September 5, 2014.

Paul Beymer Mack 422 W Riverside Ave., Ste 1407 Spokane, WA 99201-0306 paul@paulbmack.com	<input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input checked="" type="checkbox"/> Email to email address.
Nichole Swennumson 422 W Riverside Ave., Ste 1407 Spokane, WA 99201-0306 nikki@paulbmack.com	<input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input checked="" type="checkbox"/> Email to email address.
Kenneth H. Kato 1020 N Washington St Spokane, WA 99201-2237 khkato@comcast.net	<input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input checked="" type="checkbox"/> Email to email address.
Michael John Gainer 1320 N Atlantic St Ste B Spokane, WA 99201-2304 mike@mikegainer.com	<input checked="" type="checkbox"/> Personal Service to address. <input type="checkbox"/> U.S. Mail (postage prepaid) to address. <input checked="" type="checkbox"/> Email to email address..

Signed at Spokane, Washington on September 5, 2014.


Stephen K. Eugster, WSBA # 2003

APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

RICHARD T. WIXOM,)	
Petitioner,)	
)	No. 07-3-02327-3
v.)	COA No. 308511
)	
LINDA WIXOM,)	BENCH TRIAL
Respondent.)	

VERBATIM REPORT OF PROCEEDINGS
Volume VIII

BEFORE: Honorable James M. Triplet

DATE: December 9, 2011
Morning Session

APPEARANCES:

FOR THE PETITIONER: ROBERT E. CARUSO
Attorney at Law
1426 W. Francis Avenue
Spokane, Washington 99205

FOR THE RESPONDENT: NICHOLE SWENNUMSON
PAUL MACK
Attorneys at Law
422 W. Riverside, Suite 1407
Spokane, Washington 99201

Allison R. Stovall, CCR No. 2006
Official Court Reporter
1116 W. Broadway, Department No. 2
Spokane, Washington 99260

A

1 VERBATIM REPORT OF PROCEEDINGS

2 DECEMBER 9, 2011

3 MORNING SESSION

4 THE COURT: We are on the record. This is Spokane
5 County Cause No. 07-3-02327-3, Richard and Linda Wixom.

6 Mr. Wixom is present with his attorney, Mr. Caruso.

7 Ms. Wixom is present with her attorneys, Ms. Swennumson and
8 Mr. Mack. We are back on the record on this case.

9 Before we get started, we have two things to talk
10 about. First, I want to put on the record something that
11 may be a little perplexing to Mr. Caruso, a phone call that
12 happened I want to say two nights ago. We finished on
13 Wednesday, and I need to put a little bit of background
14 here.

15 I have been looking for a dog to buy for my wife and
16 had found a breeder out of town and was going to go
17 Wednesday night to check out this dog and pick it up. My
18 daughter was coming with us, along with four grandkids. And
19 I had written down the directions to this breeder on a piece
20 of paper I keep beside my bed on a pad of paper for things
21 that might come up.

22 There was the name Bob at the top of that sheet of
23 paper with a phone number that was Mr. Caruso's number that
24 I had from a week or two earlier when I was trying to get
25 phone numbers from my bailiff to make some phone calls. My

1 daughter apparently called Mr. Caruso on Wednesday night,
2 thinking that he was the dog breeder, and asked Mr. Caruso
3 if he still had the dog. She was trying to avoid a trip out
4 of town in the event the dog had been sold.

5 Understandably, that would have caused Mr. Caruso to
6 be caught off guard when she identified herself as calling
7 on behalf of Judy Triplet, and he asked if it was related to
8 the judge; and she said, Yes, but what does that have to do
9 with the dog, is my understanding. So I can understand how
10 it would've been a perplexing call for Mr. Caruso, trying to
11 figure out why someone was calling about a dog that he
12 wasn't selling. I just want to put on the record how that
13 confusion would've occurred and why my daughter might have
14 kept trying to be persistent in finding out whether you
15 still had the dog for sale or not. So I want to put that on
16 the record.

17 I know that Mr. Caruso told my daughter, apparently,
18 that he would need to report that communication to the Court
19 and opposing counsel. She told me she assured him that she
20 would call me; and in fact, she called me right away. And
21 so I'm just disclosing that on the record. I did not speak
22 with Mr. Caruso. Certainly, we didn't talk about the case.
23 Other than him asking if there was a relation with the
24 judge, there's nothing that he said about the case that I
25 have ever heard.

1 But I apologize for you getting a wrong call,
2 Mr. Caruso. She thought you were the dog breeder since the
3 notes for the directions were on the same page as your
4 number. Is there anything you'd like to put on the record
5 from anything about that call that I didn't summarize?

6 MR. CARUSO: Well, just that -- that I'm sure that
7 the Court will take judicial notice that my younger brother,
8 who's also an attorney, was a prosecuting attorney for
9 18 years.

10 THE COURT: Fred Caruso?

11 MR. CARUSO: Yes. And over that 18-year period of
12 time, I had been offered bribes and money from various and
13 sundry individuals to try to buy him; so I'm very, very
14 leery of that. I never took any money. I always turned it
15 over to Mr. Brockett and to my brother. And -- and when she
16 started talking about a dog, I thought she was talking about
17 this case here, you know, for -- for whatever reasons, and
18 so I kind of laughed and smiled. She was very, very polite.

19 But my experience indicated to me that, number one,
20 we have to protect the integrity of the court here and that
21 we have to protect the integrity of our -- our witnesses and
22 our clients; and I have spoken to my client about this and
23 -- and given him the same rundown that you just gave us on
24 the record here and -- and indicated the seriousness of the
25 problem, and that if -- and we talked about the -- you know,

1 the conspiracy rules and those type of things; and he
2 indicated that -- he indicated he was willing to waive in
3 this case and that he would be willing to waive on the
4 record.

5 So I made Mr. Mack aware of that, and I believe that
6 it would be appropriate for both parties to waive on the
7 record that -- that there was no -- no nefarious intent, and
8 it was -- it was just a one-in-a-million deal, and that
9 there is no -- the integrity of the court remains intact
10 here as far as my client goes.

11 And Mr. Wixom, will you stand up and acknowledge
12 that, please, that you waive?

13 MR. WIXOM: I do. I waive.

14 THE COURT: All right. Well, Ms. Wixom, again, you
15 know, I'm just disclosing this. I didn't make the call,
16 Counsel. You know, I'm not sure about a conspiracy or
17 bribery type things. You know, I'm not going to debate what
18 your initial reactions would've been. I understand how this
19 phone call would've been out of the blue, especially since
20 it happened within an hour or two after we were out of
21 court. Her message to me was about 5:15 that night; so it
22 was within an hour, hour and 15, of walking out of court.

23 I didn't get the impression from her that she talked
24 about the cost of the dog or anything else, and I know that
25 she doesn't know anything about the case or the name of the

1 case. So if you connected reference to dog to the case, I'm
2 sorry for that. Again, I'm sorry that she called the wrong
3 number, which is really what I think it was. But what I
4 want to know is was there any other discussions with her
5 that you feel are relevant to put on the record that I
6 didn't summarize. I mean did I accurately summarize --

7 MR. CARUSO: Absolutely. And I -- and I just
8 suggested, I said, You have to tell your dad about this.

9 THE COURT: And she called me right away, and I can
10 assure you she was mortified. And while she is an adult
11 woman, I lectured her about being more careful. But, you
12 know, it's a mistake calling a number. I didn't write down
13 "Bob Caruso". I had "Bob" and a phone number that I had to
14 give to my bailiff. That's probably my fault. But anyway,
15 so I just wanted to put it on the record. It's our first
16 time back on it. I'm not going to make any other comments.

17 But Ms. Wixom, does this cause you any concern
18 hearing what you've had disclosed to you?

19 MS. WIXOM: No concerns.

20 THE COURT: All right. And I guess Mr. Caruso asked
21 his client to waive any concerns. Do you want to talk to
22 your attorney about that or is that something you're willing
23 to waive after hearing --

24 MR. WIXOM: We don't need to talk. There's no
25 problem.

1 THE COURT: And I really don't see it as an issue at
2 all. Again, if I had called Mr. Caruso and started talking
3 about things, I think we're talking about maybe something
4 significantly different. But I just want it on the record.
5 I think my responsibility is to disclose these things so the
6 record's clear; and if anything, I'm a little embarrassed
7 that my daughter bothered you that night, Counsel. I'm
8 sorry about that.

9 MR. CARUSO: No apology necessary.

10 THE COURT: I'm glad she was polite with you because
11 as she's telling me the story, she was fairly forceful with
12 why you wouldn't answer the question about the dog she was
13 going to go pick up, and she was worried that she was going
14 to waste a trip with screaming grandkids in the car. So if
15 she was short with you, I apologize for it.

16 MR. CARUSO: Don't.

17 THE COURT: All right. So I put that on the record.
18 And apparently -- well, apparently. I have some documents,
19 objection to motion to strike memorandum of background
20 issues, notice of some other records; I've got about four
21 documents that were filed, apparently, today -- no, three
22 documents filed today and one filed on the 6th. I haven't
23 read them yet. I finished my second hearing this morning
24 about 20 minutes ago, maybe 25 minutes ago, and literally
25 stepped off the bench, cleared some documents away, used the

1 bathroom and came back on.

2 So I don't know when we want to discuss these, but I
3 need time to read them before we talk about it. So if we
4 need to talk about this right this minute, I'll put you on
5 the clock, each of you, and we can. There is one other
6 thing I need to talk about on my time. Mr. Mack, when
7 Mr. Wixom was in here but Mr. Caruso wasn't, asked how long
8 we were going today; and I asked him to wait until
9 Mr. Caruso was here before we talked. Here is what my plan
10 is for today. Let me get my calendar out here.

11 MR. MACK: I apologize. I just blurted it out.

12 MR. CARUSO: I don't have a problem with that.

13 MR. MACK: In response to a request from my wife.

14 THE COURT: And, you know, both sides have a right
15 to ask me what the schedule is. I just want to talk about
16 it with both sides here. So again, we all know what the
17 rules are about discussing the case and details of the case
18 ex parte; and as far as I'm concerned, I have not had
19 anything that's even close to a -- an even issue on that,
20 but I just don't even want to talk about scheduling issues
21 without both people here.

22 So here's the plan. We go until noon today. My
23 staff has really not had a break since we started about 8:15
24 or 8:30; so we will take a short break probably 10 minutes
25 sometime this morning. I have a 1 o'clock phone conference

APPENDIX B

APPENDIX B

Analysis of Transcript of Judge's Explanation

Analysis is to be found in the footnotes on each page which footnotes are tied to certain text of the transcript.

To connect the footnotes to the text on the page of the transcript and the line numbers please look at the transcript attached as Appendix A to the brief.

[First page 867]

VERBATIM REPORT OF PROCEEDINGS DECEMBER 9, 2011, MORNING SESSION

THE COURT: We are on the record. This is Spokane County Cause No. 07-3-02327-3, Richard and Linda Wixom. Mr. Wixom is present with his attorney, Mr. Caruso. Ms. Wixom is present with her attorneys, Ms. Swennumson and Mr. Mack. We are back on the record on this case.

Before we get started, we have two things to talk about. First, I want to put on the record something that may be a little perplexing to Mr. Caruso,¹ a phone call

¹ "... may be a little perplexing to Mr. Caruso, a phone call that happened I want to say two nights ago" it was perplexing. That is why Mr. Caruso called the judge.

that happened I want to say two nights ago.² We finished on Wednesday, and I need to put a little bit of background here.

I have been looking for a dog to buy for my wife and had found a breeder out of town and was going to go Wednesday night to check out this dog and pick it up.³ My daughter was coming with us, along with four grandkids.⁴ And I had written down the directions to this breeder on a piece of paper I keep beside my bed on a pad of paper for things that might come up.⁵

² The judge speaks as if he is the one who is bringing the subject up. Later, it appears Mr. Caruso brought the subject to the court's attention.

³ The judge was going on Wednesday night, the night of the phone call – an hour and fifteen minutes after the judge and counsel had gotten out of court.

⁴ The daughter was apparently with the judge or near the judge when she made the call. The call was hour and fifteen minutes after the judge had finished with court and left the presence of counsel.

⁵ "And I had written down the directions to this breeder on

There was the name Bob at the top of that sheet of paper with a phone number that was Mr. Caruso's number⁶ that I had from a week or two earlier when I was trying to get phone numbers from my bailiff to make some phone calls.⁷

a piece of paper I keep beside my bed on a pad of paper for things that might come up.”

The piece of paper was on the pad of paper. It was not a piece of paper simply floating about the house.

The directions to the breeder on a piece of paper he keeps beside his bed “for things that might come up.”

⁶ “On that sheet of paper” there was the name Bob with a telephone number he had gotten from his bailiff.

⁷ He had it a week earlier when he was trying to get telephone numbers from “my bailiff to make some calls.” Why would the judge have gotten Mr. Caruso’s number so he could make some calls? A judge is not to have ex parte contact. Any calls the judge had to make for other purposes would be calls the bailiff would have made. The judge had the number for another purpose, a personal purpose, perhaps.

Later in the transcript the judge says that the slip of paper was to something that the judge’s bailiff was to have.

He says on page 871 that “I had “Bob” and a phone number that I had to give to my bailiff.” Was the judge thinking that the

My

[end of 867]

[page 868]

daughter apparently called Mr. Caruso on Wednesday night,⁸ thinking that he was the dog breeder, and asked Mr. Caruso if he still had the dog. She was trying to avoid a trip out of town in the event the dog had been sold.⁹

Understandably, that would have caused Mr. Caruso to be caught off guard when she identified herself as calling on behalf of Judy Triplet, and he asked if it was related to the judge; and she said, Yes, but what does that have to do with the dog, is my understanding.

So I can understand how it would've been a perplexing call for Mr. Caruso, trying to figure out why someone was

note with Mr. Caruso's number on it with directions to the breeder written down on it was to be given to his bailiff? Look to footnote 4 above.

⁸ That Wednesday night just after court the judge's daughter called Mr. Caruso.

⁹ Did the daughter say anything about this to Mr. Caruso?

calling about a dog that he wasn't selling.

I just want to put on the record how that confusion would've occurred and why my daughter might have kept trying to be persistent in finding out whether you still had the dog for sale or not.¹⁰ So I want to put that on the record.¹¹

I know that Mr. Caruso told my daughter, apparently, that he would need to report that communication to the Court and opposing counsel.

She told me she assured him that she would call me; and in fact, she called me right away.¹²

¹⁰ Why would the judge say that his "daughter might have kept trying to be persistent in finding out whether [Mr. Caruso] had the dog for sale or not"?

¹¹ Mr. Caruso did not say anything about his daughter being persistent. Seems the judge knew she was being persistent and that he wanted to get that aspect of the phone call on the record.

¹² The daughter called the judge as soon as the phone call with Mr. Caruso was over. But did she? Would it not be that she was actually with her father and the time and then immediately

And so I'm just disclosing that on the record. I did not speak with Mr. Caruso. Certainly, we didn't talk about the case.¹³

Other than him asking if there was a relation with the judge, there's nothing that he said about the case that I have ever heard.¹⁴

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But I apologize for you getting a wrong call, Mr.

related matters to her father? Or that her father already knew what the call had been like?

¹³ What is the meaning of this? The judge says "I did not speak with Mr. Caruso. Certainly, we didn't talk about the case." That sounds as though the judge may have been there when the call was made, that his daughter was making the call for him, and that "we" the judge and his daughter did not talk about the case with Mr. Caruso.

¹⁴ This looks more and more that the judge was either on the call or that he was present when his daughter was making the call. Mr. Caruso is not being quoted at this juncture. The judge is saying "[o]ther than him [Caruso] if there was a relation to the judge, there is nothing that he [Caruso] said about the case that I ever heard." This would indicate that the judge was actually listening to the phone call being made by his daughter.

Caruso. She thought you were the dog breeder since the notes for the directions were on the same page as your number.

Is there anything you'd like to put on the record from anything about that call that I didn't summarize?

MR. CARUSO: Well, just that - that I'm sure that the Court will take judicial notice that my younger brother, who's also an attorney, was a prosecuting attorney for 18 years.

THE COURT: Fred Caruso?

MR. CARUSO: Yes. And over that 18-year period of time, I had been offered bribes and money from various and sundry individuals to try to buy him; so I'm very, very leery of that. I never took any money. I always turned it over to Mr. Brockett and to my brother. And - and when she started talking about a dog, I thought she was talking about this case here, you know, for - for whatever

reasons, and so I kind of laughed and smiled. She was very, very polite.

But my experience indicated to me that, number one, we have to protect the integrity of the court here and that we have to protect the integrity of our – our witnesses and our clients; and I have spoken to my client about this and – and given him the same rundown that you just gave us on the record here and -- and indicated the seriousness of the problem, and that if – and we talked about the – you know, [870] the conspiracy rules and those type of things; and he indicated that – he indicated he was willing to waive in this case and that he would be willing to waive on the record.

So I made Mr. Mack aware of that, and I believe that it would be appropriate for both parties to waive on the record that – that there was no – no nefarious intent, and it was – it was just a one-in-a-million deal, and that there is no – the integrity of the court remains intact here as far as my client goes.

And Mr. Wixom, will you stand up and acknowledge

that, please, that you waive?

MR. WIXOM: I do. I waive.

THE COURT: All right. Well, Ms. Wixom, again, you know, I'm just disclosing this. I didn't make the call, Counsel. You know, I'm not sure about a conspiracy or bribery type things.¹⁵ You know, I'm not going to debate what your initial reactions would've been. I understand how this phone call would've been out of the blue, especially since it happened within an hour or two after we were out of court. Her message to me was about 5:15 that night; so it was within an hour, hour and 15, of walking out of court.¹⁶

¹⁵ Why would the judge have brought up "conspiracy" or "bribery?"

¹⁶ The judge said his daughter's message to him was about 5:15 on Wednesday – see above. The judge was home, the note pad was near his bed, it had Mr. Caruso's name on it, there were directions to the breeder, and at the same time the daughter calls Mr. Caruso. One might surmise that the judge and the daughter

I didn't get the impression from her that she talked about the cost of the dog or anything else, and I know that she doesn't know anything about the case or the name of the case. So if you connected reference to dog to the case, I'm sorry for that.

Again, I'm sorry that she called the wrong number, which is really what I think it was.¹⁷ But what I want to know is was there any other discussions with her that you feel are relevant to put on the record that I didn't summarize. I mean did I accurately summarize -

MR. CARUSO: Absolutely. And I - and I just suggested, I said, You have to tell your dad about this.

were together when the call was made. Later it will be noted that the judge adds certain facts about the phone call that supposedly his daughter related to him after ward. But perhaps he knew them because he was near her when the call was made.

¹⁷ How could she have called the wrong number? Mr. Caruso's number was on the same note on the notepad with the information about the dog.

THE COURT: And she called me right away,¹⁸ and I can assure you she was mortified. And while she is an adult woman, I lectured her about being more careful.¹⁹ But, you know, it's a mistake calling a number. I didn't write down "Bob Caruso". I had "Bob" and a phone number that I had to give to my bailiff. That's probably my fault.²⁰ But anyway, so I just wanted to put it on the record. It's our first time back on it. I'm not going to make any other comments.

But Ms. Wixom, does this cause you any concern hearing what you've had disclosed to you?

MS. WIXOM: No concerns.

¹⁸ "Called right away" she had the note, but the judge says nothing about her getting the note prior to the time of the call. It appears she got the note the same time as the call.

¹⁹ "More careful" of what? Supposedly she was calling the breeder. Why would she have had to be more careful about that?

²⁰ The judge earlier said the number was on a pad next to his bed. Why would that pad have been something his bailiff was to have. Was the bailiff to have made the call about the dog?

THE COURT: All right. And I guess Mr. Caruso asked his client to waive any concerns. Do you want to talk to our attorney about that or is that something you're willing to waive after hearing -

MR. WIXOM: We don't need to talk. There's no problem.

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THE COURT: And I really don't see it as an issue at all. Again, if I had called Mr. Caruso and started talking about things, I think we're talking about maybe something significantly different. But I just want it on the record. I think my responsibility is to disclose these things so the record's clear; and if anything, I'm a little embarrassed that my daughter bothered you that night, Counsel. I'm sorry about that.

MR. CARUSO: No apology necessary.

THE COURT: I'm glad she was polite with you because as she's telling me the story, she was fairly forceful with why you wouldn't answer the question about the dog she was going to go pick up, and she was worried that she was going to waste a trip with screaming grandkids in the car. So if she was short with you, I apologize for it.²¹

MR. CARUSO: Don't.

THE COURT: All right. So I put that on the record. [end at line 16, page 872]

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²¹ This paragraph seems unusual. Again he seems to be adding matters which create or heighten the degree of concern one might have about his impartiality under the circumstances.