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COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

99551-6

To: THE SUPREME COURT OF WASHINGTON

ASHLEY RAE LEWIS, Respondent /Petitioner, and KENDALL JAMES LEWIS Appellant/Respondent	)))))))	No. 19-3-01177-32 (Spokane Sup. Ct. no.) **No. 376109 Court of Appeals** PETITION FOR REVIEW TO THE SUPREME COURT

GARY R STENZEL
ATTORNEY AT LAW
1325 W. MALLON AVE
SPOKANE, WA 99201
(509)327-2000
(509)327-5151 FAX
Stenz2193@comcast.net

TABLE OF CONTENTS

I. STATEMENT OF FACTS.................................... page 1

II. ISSUES UNDERLYING THIS PETITION FOR REVIEW ......
.... page 3

III. LAW & ARGUMENT.. page 4

A. The basis for a procedural dismissal by the Court of Appeals is similar to a default dismissal and should be set aside if there is a meritorious defense and relatively no prejudice to the other party, and there are potential due process violations that may have produced the dismissal.. page 4

B. Because the appellant's new attorney filed a declaration with his notice of appearance, in response to the commissioner's dismissal hearing, the commissioner should have provided some form of response or notice of her plans to dismiss the case in December so that the Appellant and his new attorney knew what she had planned to do in the matter.. page 6

C. The Appellant had a meritorious claim in this appeal which should help in deciding to overturn this dismissal......................... page 8

D. The dismissal of this appeal for the alleged failure to file preliminary papers on a "suggested date", seems to be a "manifest" violation of his due process.......................... page 9

E. This court should accept review of this case.................. page 14

IV. CONCLUSION..page 16

TABLE OF AUTHORITIES

Washington Supreme Court

Ashcraft v. Powers,
22 Wash. 440, 61 P. 161 (1900)... p. 13

Cent. Puget Sound Reg'l Transit Auth. v. Miller,
156 Wn.2d 403, 128 P.3d 588 (2006)...................................... p. 11

Graves v. P.J. Taggares Co.,
94 Wash.2d 298, 303, 616 P.2d 1223 (1980)............................ p. 13

Housing Authority of King County v. Saylors,
87 Wn.2d 732, 557 P.2d 321 (1976).. p. 15

Jafar v. Webb,
177 Wn.2d 520, 303 P.3d 1042 (2013).................................... p. 12

Mellish v. Frog Mountain Pet Care,
172 Wn.2d 208, 257 P.3d 641 (2011).. p. 9

State v. Engel,
166 Wn.2d 572, 210 P.3d 1007 (2009).................................... p. 12

State v. Kirkman,
159 Wash.2d 918, 155 P.3d 125 (2007).................................... p. 9

State v. Stump,
185 Wn.2d 454, 374 P.3d 89 (2016)... p. 11

State v. Tomal,
133 Wash.2d 985, 948 p. 2d 833 (1997).................................... p. 14

Washington Court of Appeals

Grossman v. Will,
10 Wash.App. 141, 516 P.2d 1063 (1973).................................. p. 13

In re Custody of C.C.M.,
149 Wn.App. 184, 202 P.3d 971 (Div. 1 2009)............................ p. 11

In re Marriage of Maxfield,
47 Wn.App. 699, 737 P.2d 671 (Div. 3 1987).............................. p. 13

Luckett v. Boeing Co.,
98 Wn.App. 307, 989 P.2d 1144 (Div. 1 1999)........................... pp. 4, 8

Miller v. Patterson,
45 Wn.App. 450, 725 P.2d 1016 (Div. 1 1986)........................... p. 6

Olympic Stewardship Found. v. Environmental & Land Use Hearings Office,
199 Wn.App. 668, 399 P.3d 562 (Div. 2 2017)........................... p. 11

Plouffe v. Rook,
135 Wn.App. 628, 147 P.3d 596 (Div. 1 2006).......................... p. 13

Russell v. Maas,
166 Wn.App. 885, 272 P.3d 273 (Div. 1 2012).......................... p. 13

Smith v. Kent,
11 Wash.App. 439, 523 P.2d 446 (1974)....................................p. 7

Statutes / Court Rules

RCW 13.34... p. 5

RCW 26.44.053... pp. 5, 8, 16

RCW 17.4.. pp. 7, 8, 9, 11, 14

RAP 17.6.. pp. 7, 10

RAP 18.5.. pp. 7, 10

RAP 18.8.. p. 7

RAP 18.9.. p. 7

Treatises

4 Orland, Wash. Pract. Rules Practice § 5502 (1983)..................... p. 6

I. FACTS

The Appellant filed this appeal pro se. However, he was naturally confused about filing of the clerk's papers and record because he had paid for the transcript, and obtained a copy from the court reporter long before it was required in the appeal. He did this to allow an appeal attorney to review the facts to determine if he had a case for an appeal. After filing the appeal, Mr. Lewis hired an attorney to draft his opening and reply briefs. He did not hire him to help with the transcripts, clerk's papers, or oral argument. However, after Mr. Lewis failed to file his preliminary trial papers and transcript properly the appeal commissioner set a hearing for dismissal, Mr. Lewis asked his consulting attorney to deal with the filing of the preliminary papers a day before that hearing.

More specifically, on the date of November 17th, 2020, Mr. Lewis contacted the consulting attorney about a possible problem with his filing of the clerk's papers, and the arrangements regarding filing the trial transcript. As the "drafting" attorney looked at the case, and since Mr. Lewis already paid for the trial transcript and actually had it available in writing, it seemed it would be an easy task to have it sent to Division III. However, Mr. Lewis had no idea how to file a certified copy of the transcript quite a while so court set the matter for dismissal for abandonment, which parenthetically was the next morning. With less than one day before the hearing would be heard, the drafting attorney agreed to file his appearance with a declaration about how these papers could be filed, if it would be allowed this late.

On the morning of November 18th, 2020 Mr. Lewis personally took the appeal attorney's NOA (Notice of Appearance) and declaration that indicated that if they allowed it the necessary paperwork would even be filed by November 25th. Surprisingly, no hearing was held, even though Mr. Lewis was ready to appear by telephone and so his appeal attorney waited for the commissioner's ruling whether the case would be dismissed or when the papers would now be due. However, not only was there no hearing for Mr. Lewis no ruling from that November "hearing" was sent to either Mr. Lewis or the attorney.

To complicate things, the attorney had hip surgery 6 days before the hearing and was working from home most of the time. Also, the attorney's laptop had an older Adobe program therefore, and so some decisions by the appeals court had come through without all their attachments[1]. Additionally, the attorney had other appeal cases pending and so the attorney realied on the normal RAP notice process for any decisions by the court of appeal to reach his email, so he could calendar all necessary appeals court items for filing in the various courts.

To make things worse and seemingly inconsistent with the attorney's experience with the appellate process and rules, the Commissioner on this case did not file and/or send any ruling the day of the hearing, or soon thereafter that they agreed to allow the Appellant to file the proper papers through his attorney. No letter was sent or email was posted saying anything about what

[1] Later research online showed that some PDF's from newer programs were not compatible with older Adobe programs.

the decision of the appeals commissioner on the 18th, so that this problem could be solved. Not even a small email from the commissioner's assistant saying something to the affect (and for example), "the hearing has been moved one week and will be stricken as long as the proper paperwork is filed by the 25th of November".

Without any information from the court of appeals about what was decided on November 17th Mr. Lewis's attorney waited for some inkling of what happened in this case. There was an email from the appeals court in the middle of December, however, that email did not show any decision about the case, therefore the attorney still did not know what had happened. Without any information about why the commissioner said nothing to the attorney or Mr. Lewis, on or about the date of January 4th, 2021 the attorney went ahead and filed the clerk's papers and record via the portal. About a week later the court indicated that these pleadings were rejected because the case had been dismissed in mid-December.[2] A reconsideration motion was filed and was denied.

II. ISSUES FOR THIS PETITION FOR REVIEW

1. Were the action of the pro se appellant in this matter suggestive of an abandonment of this appeal?

[2] Unfortunately, Mr. Lewis's appeal was dismissed a few weeks after the hearing on the 18th. In researching this issue, it showed that an email was sent to his appeals attorney but contained nothing in the email, so it was disregarded as a mistake. It turned out that that particular email, sent in the middle of December contained the order that the case was dismissed, however, the older adobe program did not capture it. Even so this was an "after the fact" decision terminating the appeal, therefore, the only thing that could have been done was to either file a review petition or reconsideration and Mr. Lewis chose the reconsideration motion without success.

2. Should the appeals court commissioner have included the appellant and/or his new attorney in her decision to dismiss this case if the appellant's new counsel did not file the clerk's papers on November 25th, 2020?

3. Was some kind of notice, albeit minimal required before this case was dismissed in mid-December 2020?

4. Do the RAP rules require some kind of further argument or notice when the a party files any kind of response to a motion for dismissal?

5. Should the appeals court commissioner act solely on the word of the appellant's attorney to make a decision to dismiss the appeal in this matter without notice that that was her plan?

III. LAW & ARGUMENT

A. The basis for a procedural dismissal by the Court of Appeals is similar to a default dismissal and should be set aside if there is a meritorious defense and relatively no prejudice to the other party, and there are potential due process violations that may have produced the dismissal.

Case law on Superior Court Clerk's dismissals and/or other procedural dismissals, indicates that if there is a meritorious claim and/or little or no prejudice to the other party or the court, a motion to set aside a dismissal should generally be granted. See e.g. *Luckett v. Boeing Co.*, 98 Wn.App. 307, 989 P.2d 1144 (Div. 1 1999).

In this case, there is little or no prejudice to the other party since Mr. Lewis has already paid for the trial transcript, and it would easily be supplied virtually immediately, saving at about 30 to 60 days that it would normally take for a typed transcript to be completed. And although Mr. Lewis took a long time in trying unsuccessfully to get the clerk's papers and statement of arrangements

filed, there was nothing that the Respondent in this appeal filed to say she was prejudiced by the any delays that were caused.

As for a meritorious claim, Mr. Lewis has a legitimate basis for asking for the dismissal to be set aside since neither he or his new attorney received any notice whatsoever about the plan to dismiss the case by the commissioner after the 25th of November. Even though it would have been very easy to do, no letter ruling was sent to help Mr. Lewis and his new counsel address the problem.

One of the primary reasons for this Petition for Review is that it seems that the standard notices required by the RAP rules were not sent in this matter, especially after his attorney filed a declaration about the problem.

With regard to whether Mr. Lewis had a meritorious case for an appeal, this case was primarily about the parenting plan and sex abuse allegations. Both parties agreed to a GAL pursuant to RCW 26.44.053(1). However, appointing a was rejected by the judge even though there is clearly a statutory requirement for such an order. RCW 26.44.053(1) states:

> In any judicial proceeding under this chapter or chapter 13.34 RCW in which it is alleged that a child has been subjected to child abuse or neglect, the court shall appoint a guardian ad litem for the child as provided in chapter 13.34 RCW. The requirement of a guardian ad litem may be deemed satisfied if the child is represented by counsel in the proceedings.

Once the allegations that there was possibly sexual abuse the court had a statutory duty to appoint a GAL for the child or explain why he did not do so. Mr. Lewis felt that a GAL investigation would exonerate him, but without a GAL his parenting time was completely restricted, based on the hearsay of the

child and other witnesses. He should be able to appeal this unfortunate circumstance, but cannot because his case is dismissed.

B. Because the appellant's new attorney filed a declaration with his notice of appearance, which was in response to the commissioner's dismissal hearing, the commissioner should have provided some form of response or notice of her plans to dismiss the case in December so that the Appellant and his new attorney knew what she had planned.

When courts considers a case that has been dismissed on a technical motion it is general said that the purpose behind such technical rulings is to clear the courts of cases that seem to be "dead wood" or were just filed to delay, rather than to solve a legal problem. The case of *Miller v. Patterson*, 45 Wn. App. 450, 725 P.2d 1016 (Div. 1 1986) said it this way:

> "The purpose of this rule is to provide a relatively simple means by which the court system itself, on its own volition, may purge its files of *dormant cases*. See 4 Orland, Wash. Pract. Rules Practice § 5502, at 243 (1983). To warrant dismissal under this rule, three elements are prescribed:
>
> (1) The clerk must mail the required notice to the attorneys.
>
> (2) No action of record in the case during the preceding 12 months.
>
> (3) No action of record, and no showing of good cause for continuing the case, within 30 days following the notice."

It also well known, by experienced attorneys in every county, that to avoid such a clerk dismissal order most, if not all court clerks in Washington, allow a party to simply file a motion or declaration to forestall a dismissal in the case, and the clerks do not dismiss the matter. The court of appeals must use the RAP rules for any dismissals. These rules prescribe the basis for a dismissal of an appeal. The court can dismiss a case if it is filed for purposes of delay or it is

deemed frivolous; *Id*, or where there has been a "want of prosecution", commonly known as abandonment. See also RAP 17.4, 17.6, 18.5, 18.8, & 18.9.

Here the commissioner dismissed the case without any further notice, based on the attorney's declaration that said he could file the papers required, but he needed to know what the commissioner decided on November 18th, to avoid wasting time and fees. The attorney should have received some form of notice or comment about the commissioner's plans.

It may be argued that the appellate rules allow commissioners to make a decision without argument, however, that is as long as it does not affect a "substantial right" of a party. RAP 17.4. It would seem that not having an entire appeal case dismissed is a "substantial right," since the right to appeal in some cases can be a constitutional right, and any decision of the court that affects such a right seems to affect a substantial right. See e.g. *Smith v. Kent*, 11 Wash.App. 439, 523 P.2d 446 (1974). In such cases, although RAP 17.4(c) allows a commissioner to make a ruling without argument, since a dismissal would affect a "substantial right", the rules seem to require some form of notice of every part of that process. RAP 17.4(c) states,

> (c) Summary Determination.(1) The commissioner or clerk may summarily determine without oral argument, and without awaiting an answer, a motion which, in the judgment of the commissioner or clerk, does not affect a *substantial right of a party*.(2) If the commissioner or clerk makes a summary determination granting a motion under subsection (c)(1) of this rule, and a party files and serves a timely responsive pleading after the ruling has been entered, *the commissioner or clerk will treat the responsive pleading as a motion for reconsideration of the ruling*. If such a responsive pleading is filed, the commissioner or clerk may permit the moving party to file a reply and may allow oral argument on the motion. (Emphasis added)

Although RAP 17.4(c) gives a commissioner the latitude to decide something without a hearing, but it has limitations. By rule, if a "responsive pleading" is filed, which is what the attorney's declaration was, the commissioner should have at least given notice of what she planned to do with that declaration. Had the attorney just filed a NOA and nothing more, the commissioner would have been within her rights to not involve the attorney with what she had planned. However, the burden on the court of appeals was very slight, since it could have simply involved a short letter stating her regarding the 25th. Instead of a small letter being sent, the commissioner ignored that and summarily dismissed the case without any further information.

C. <u>The Appellant had a meritorious claim in this appeal which should help in deciding to overturn this dismissal</u>.

As stated previously, Mr. Lewis' appeal was not even close to being frivolous. A parenting plan was entered with substantial limitations on his parenting time, based on an untested allegation that he committed sexual abuse on his daughter seems clearly to be meritorious. See e.g. *Luckett v. Boeing Co., supra.* To make things worse, both Mr. Lewis and his estranged wife agreed to assign a GAL to the case but the judge denied that request, even though RCW 26.44.053 seems to require that a GAL be appointed for a child. The trial went on without the input of an unbiased court appointed expert on the veracity of the sex abuse claims without consideration of the purpose of RCW 26.44.053. Because this sexual claim was so important to Mr. Lewis he thought that having the transcript typed up would help him for a possible appeal. Because of the

meritorious basis for this claim, it would seem that there was never any intent to abandon the case by the Appellant.

Suffice it to say this dismissal came as a surprise to the Appellant and his attorney, not in terms of the fact that he had properly complied with filing the request for the clerk's papers, but because there was no notice from the commissioner after his attorney appeared and provided a declaration of what could be done to cure the problem. Again, the main reason for this petition is because Mr. Lewis and his counsel, did not receive any notice of the commissioner's plans following the dismissal hearing schedule November 18th. Receiving some notice or letter, no matter how minimal would seem to have been appropriate, given the magnitude of the issues in the case. And with Mr. Lewis having an attorney on board, who parenthetically only had what Mr. Lewis told him the day before the hearing about what had transpired as the basis for what he could and would do in the matter to solve the problem, it seemed in the balance to favor at least some form of notice.

D. The dismissal of this appeal for the alleged failure to file preliminary papers on a "suggested date", seems to be a "manifest" violation of his due process.

It has been held that a violation of the right due process in the dismissal of a case can be a "manifest" constitutional violation and where there is a possible violation of due process, such a violation can support a dismissal order being vacated. See e.g. *Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 257 P.3d 641 (2011), citing *State v. Kirkman*, 159 Wash.2d 918, 926, 155 P.3d 125 (2007).

RAP 18.5 indicates that all parties to an appeal must properly give notice of any "motions" or proceedings they file in this state's appellate courts, to the other party. If a party does not give such notice, sanction or dispositive rulings can be entered by the court. However, this rule also references that there are other "notice" rules that affect the clerks and commissioners of the appellate court. For example, this RAP rule states at (a), "Service. Except when a rule requires the appellate court commissioner or clerk or the trial court clerk to serve a particular paper, and except as provided in rule 9.5, . . ."; therefore, it implies that the notice rules also apply to the commissioner's as well.

With regard to commissioners, RAP 17.6, which states in part: "(a) Motion Decided by Commissioner or Clerk. A commissioner or clerk decides a motion by a written ruling <u>which includes a statement of the reason for the decision</u>. A court 'ruling' is the decision of the court. The commissioner or clerk is to file the ruling '<u>and serve a copy on the movant and all persons entitled to notice of the original motion</u>. . . .'" Any ruling initiated by a motion of an appeals court commissioner is required to be a written ruling that is served on all parties who received the original motion. It seems that the commissioners in this matter should have provided some form of a decision to the Appellant's attorney.

There also appears to be insufficient notice that if the attorney did not file the clerk's papers and arrangements on or before the 25th, as he mentioned that he could do, that the entire case <u>would be</u> dismissed sua sponte, sometime in the future. Certainly, such an outcome may have seemed possible but the "possibility" of such an order of dismissal is not simply expected without some

kind of proper notice under RAP 17.4 to all those it would adversely affect. Especially in light of the importance of the right to an appeal and due process implications.

Additionally, since "[p]rocedural errors, such as lack of proper notice, are questions of law [to be] reviewed de novo", this would also assume there had to be some sort of hearing to give a clear warning to Mr. Lewis what would happen if the papers were not filed on the 25th. (See *Cent. Puget Sound Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 412, 128 P.3d 588 (2006); from *Olympic Stewardship Found. v. Environmental & Land Use Hearings Office*, 199 Wn.App. 668, 399 P.3d 562 (Div. 2 2017) regarding a *de novo* hearing of such issues).

Procedural due process and proper notice in a parenting plan case has been thoroughly discussed by our courts in the case of the *In re Custody of C.C.M.*, 149 Wn.App. 184, 202 P.3d 971 (Div. 1 2009). In that case, the court found that the higher the stakes the greater the definition of what is proper notice. For cases that involve a parent's rights to his children a reviewing court must demand that there is substantial notice.

In this case we are saying that the court commissioner did not properly follow the RAP rules in providing notice of the decision on when Mr. Lewis had to file his clerk's papers, after receipt of his attorney's declaration. As such the Supreme Court has the right and duty to interpret the meaning and application of the RAP rules regarding service of notice and rulings. As they said in the case of *State v. Stump*, 185 Wn.2d 454, 374 P.3d 89 (2016) "To resolve this case, we

must interpret the Rules of Appellate Procedure (RAPs). The interpretation of a court rule presents a question of law that we review de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009) (we review questions of statutory interpretation *de novo*); *Jafar v. Webb*, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013) (we interpret court rules in the same manner as statutes). However, this court is "uniquely positioned to declare the correct interpretation of any court-adopted rule." *Jafar*, 177 Wn.2d at 527."

Obviously, what the commissioner did or did not do on the 18th of November, and then subsequently in December of last year affected Mr. Lewis' right to appeal his case, which in anyone's definition is a "substantial right". Although the commissioner was within her right to hold a hearing on the 18th, she did not dismiss the case on that date, but seems to have made the decision to dismiss Mr. Lewis's case after a literal reading of the attorney's declaration, and making some sort of unknown decision about what was should happen without notifying the appellant's attorney about the new time schedule or whether she granted the attorneys suggestion. The commissioner kept this mental decision in complete secret without any notice of what would happen if not followed. Therefore, with no notice of the commissioner's plan it was clearly plausible that the new attorney waited for a decision on the matter. There should have at least been a letter ruling or comment that stated clearly that as long as the Appellate filed the clerk's papers by the 25th, the case would not be dismissed. Instead, the commissioner simply assumed that both the appellant and his newly hired attorney would file the clerk's papers on November 25th, and told no-one

of that plan. Then when the papers were not filed on the 25th, she dismissed the case.

Notice of an impending dismissal has been so important that dismissals in the Superior Court, for example, have been overturned and the case reinstated if improper notice has been given, or no notice at all. See *Plouffe v. Rook*, 135 Wn.App. 628, 147 P.3d 596 (Div. 1 2006). Again, the RAP rules indicate that notice should be given and an explanation whenever the court makes a decision that affects a substantial right of a party. To reiterate, a dismissal of an appeal by the court of appeals affects a substantial right of a party. See e.g. *In re Marriage of Maxfield*, 47 Wn.App. 699, 737 P.2d 671 (Div. 3 1987); and *Russell v. Maas*, 166 Wn.App. 885, 272 P.3d 273 (Div. 1 2012).

Additionally, it has been said that an attorney may not surrender a substantial right of a client without special authority granted by the client. *Graves v. P.J. Taggares Co.*, 94 Wash.2d 298, 303, 616 P.2d 1223 (1980). For example, an attorney needs the client's express authority to accept service of process, *Ashcraft v. Powers*, 22 Wash. 440, 443, 61 P. 161 (1900); to settle or compromise a claim, *Grossman v. Will*, 10 Wash.App. 141, 149, 516 P.2d 1063 (1973); and to waive a jury trial, *Graves*, 94 Wash.2d at 305, 616 P.2d 1223. From *Russell*, 166 Wn.App. 885, 272 P.3d 273 (Div. 1 2012).

In this case, the appeals commissioner used the declaration of the new attorney to decide that Mr. Lewis abandoned his case, however, what was said by the attorney never indicated that he wanted to abandon the case. Instead, it actually ratified that he wanted to continue in the case. The commissioner should

have at least provided notice of her intent to dismiss if the filing date of the 25th was not met. However, the commissioner could not have done that without the consideration of at least a small amount of notice that that was her intention.

Finally, RAP 17.4(c) does not allow the commissioner to make a decision affecting a substantial right without proper notice and opportunity to be heard. However, as is clear, the commissioner for some reason felt that notice of her decision to dismiss the case if the papers were not filed on the 25th was somehow sufficiently clear that everyone knew that was the plan. What if hypothetically the attorney was somehow incapacitated by Covid or an accident, there was no way to know if such emergencies would have affected Mr. Lewis' rights.

E. This court should accept review of this case.

The decision of the appeals court to dismiss this appeal puts in question the application of cases on the issue of notice before a case is dismissed, which are supported by the Supreme Court.

The *State v. Tomal*, 133 Wash. 2d 985, 948 p. 2d 833 (1997), for example, although a criminal case, said that a litigant should not suffer a loss of his right to appeal because of the actions of his counsel. In this case, the final decision to dismiss this case seemed to entirely be based on the assumption that the appellant's counsel would file the clerk's papers and statement of arrangements on November 25th. However, since the commissioner said nothing to either the appellant's counsel or the appellant about accepting the attorneys suggestion, nothing was done because there was no ruling from the hearing on the 18th of November, and the court of appeals did not let Mr. Lewis' attorney participate in any hearing. Although the *Tomal* case is a criminal case, it still

stands for the proposition that there must be some form of intent of the client to abandon a case before it is dismissed for want of prosecution, and that the appeals court cannot take a substantial right away from an appellant without proper notice.

This case involves a significant public policy issue that should be resolved by the Supreme Court.

The Court rules are a product of the application of the constitution in an effort to implement fairness and due process for everyone. Unlike the right to appeal a criminal conviction, a person's right to file an appeal in any civil matter is measured and controlled by application of the rules and statutes that both the Supreme Court and the Legislature promulgate. See e.g. *Housing Authority of King County v. Saylors*, 87 Wn.2d 732, 557 P.2d 321 (1976). It is therefore presumed that when the RAP rules are disregarded to the extent that there has been a dismissal of a case with the possibility that the court of appeals failed to completely follow those rules, it is seems to be a clear violation of the public policies behind the rules. Without these rules and the public policy behind them being enforced, the appeals court is left to simply dismiss every case they want to without concern for following the rules. It is presumed that the commissioner meant well in this matter but by simply presuming that the clerk's papers request and the statement of arrangements would be filed on the 25th, it was not fair to the Appellant, especially when there was not one word to the him or his new attorney about that being the expectation and threshold that would trigger a dismissal.

IV. CONCLUSION

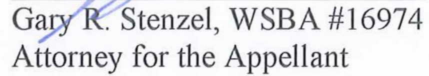
On November 17th, 2020 the appellant in this matter hired an attorney to attend a hearing which was set for the dismissal of his appeal because the clerk's papers and transcript of the trial, which had already been transcribed and paid for, was not filed. There was to be a hearing by the appellate court commissioner to dismiss the case since those preliminary papers were not appropriately filed with the court. The new attorney for the appellant filed a notice of appearance in the appeal the morning before the hearing, and gave the commissioner a declaration that he would file the necessary papers if allowed to do that by the 25th of November.

Both the declaration and NOA were again, given to the court of appeals for filing. After the morning of November 18th, neither the clerk or the court commissioner sent either the appellant or his counsel an order or letter stating that the arrangements of filing the papers on November 25th was acceptable. Nothing was sent out in the way of a after the hearing decision.

In the middle of December, a few weeks later the commissioner filed and signed an order dismissing this appeal. This seemed very unfair, and especially since the appeal was filed because the court failed to appoint a GAL pursuant to RCW 26.44.053, to find out if the appellant sexually abused his daughter and a highly limiting parenting plan was order without the aid of a professional to ferret out whether the appellant actually committed such abuse. This left the father with little or no contact with his daughter. The appellant has filed this

request for discretionary review of the commissioner's decision to overturn this dismissal.

Dated: 3-3-21



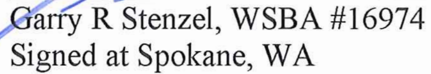
Gary R. Stenzel, WSBA #16974
Attorney for the Appellant

Declaration of Service

I Gary R Stenzel do state under penalty of perjury under the laws of the State of Washington that on 3rd day of March 2021 I did send a true and correct copy of this Petition for Review to:

Matthew Dudley Attorney at Las
104 S Freya St Ste 120A
White Flag Building
Spokane, WA 99202-4893

By placing said copy in an envelope addressed to Mr. Dudley with the US Postal Service.



Garry R Stenzel, WSBA #16974
Signed at Spokane, WA

STENZEL LAW OFFICE

March 03, 2021 - 2:08 PM

Transmittal Information

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