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64274-0

NO: 64274-0-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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JOHN BENJAMIN FREEMAN,

Appellant,

v.

GARY C. BERGAN, THOMAS  
WHITTINGTON BERGAN STUDEBAKER,  
INC., P.S., a Washington law firm

Respondent(s)

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AMENDED REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Appellant John Benjamin Freeman seeks reversal of the trial court's July 16, 2009 dismissal order granting Respondents motion for judgment on the pleadings pursuant to CR 12(c) without first determining whether or not Respondents had met their burden of proof and their entitlement to such a motion.

The threshold issue before this Appeal Court is whether Appellant's claims and issues filed on May 5, 2009 identical in all respects to those claims and issues filed by Appellant on August 15, 2009.

It is particularly disturbing by the fact that the trial court on July 16, 2009 simply took the words of Respondents counsel of record Lauren D. Studebaker [hereinafter Studebaker] that the claims and issues raised in Appellant's complaint on May 5, 2009 were the same claims and issues which were alleged in as prior adjudication which led to the August 15, 2007 judgment which Appellant seeks to have vacated based on the judgment of August 15, 2007 being obtained by fraud as well as misrepresentation being committed by Respondent(s) Gary C. Bergan the main Respondents and his counsel of record Lauren D. Studebaker [hereinafter Studebaker].

The July 16, 2009 hearing held by the trial court on Respondents motion for judgment on the pleadings was to permit the trial court to ask

questions and obtain answers from Respondents as to Respondents motion for judgment on the pleadings and for the trial court to make a sound determination that on July 16, 2009 the moving party had met their burden of proof by the propounded of the moving party's evidence submitted to the trial court with their motion for judgment on the pleadings.

As stated oral arguments permits the court to ask questions, challenge assertions, test theories, and determine the answers to critical issues. It also allows the parties to the action to point out mistakes in the court's initial response to those issues, factual and legal, and to show why precedents that may appear to be binding are in fact distinguishable. A party's view on the critical questions is always helpful to the court.

The parties have often, as here, lived with the case for a considerable period of time, while the court may, as here, be seeing the issues for the first time and may, rightly or wrongly, consider itself subject to extraordinary time constraints.

Of course, there are the important underlying questions that no court will ever reach because the first trial court and the second trial court have refused to review Appellant's evidence clearly showing that the August 15, 2007 judgment had been obtained by fraudulent means and misrepresentation by Respondents and their counsel of record Studebaker. The trial court has a duty to resolve difficult questions of law in a calm

and orderly fashion. However, litigation should not be disposed of on any such technical consideration. A litigant should not be compelled to secure the judgment on the court upon a debatable question of pleadings at the expense of losing his case if the court differed in its conclusion from the contention of the party. Courts are not instituted or maintained to enable shrewd attorney's to practice legal gymnastics, but to administer justice.

## **II. STATEMENT OF CASE**

In May 2009 Appellant John Benjamin Freeman filed a civil lawsuit pursuant to CR 60(c) seeking vacationing of an August 15, 2007 judgment which had been obtained against him by Respondents and their counsel of record Studebaker. Where the August 15, 2007 judgment was obtained by misrepresenting facts and issues during a bench trial on January 30, 2007 before the honorable Theresa B. Doyle one of the Judges for King County Superior Court.

Appellant sought relief from the August 15, 2007 through legal means by presenting to the Superior Court evidence which disputed Respondents counsel of record Studebaker misrepresented facts and issues that Appellant Freeman had not disclosed his witness list as provided by the trial court schedule issued on August 15, 2005 when Appellant filed his first lawsuit and that Appellant Freeman had not complied with the pre-trial order of Judge Gregory Canova in preparing for trial.

All of the evidence Appellant Freeman presented to the Superior Court taken from court file number: 05-2-26618-0-SEA clearly showed that Appellant Freeman had filed and served Appellant's witness list on June 9, 2006 and that Appellant Freeman was in full compliance with King County Superior Court Judge Gregory Canova's pre-trial order.

Appellant Freeman also submitted evidence that King County Superior Court file number: 05-2-26618-0-SEA showed that Respondents and their counsel of record Studebaker was the parties that had not complied with the trial court schedule and the party who had not complied with the dates set forth in Judge Canova's pre-trial court order with Respondents and their counsel Studebaker filing and serving their pleadings two and three days late.

Appellant Freeman brought all of this evidence to the attention of King County Superior Court Judge Theresa B. Doyle before her on March 26, 2007 entered CR 11 sanction against Appellant. But, the evidence clearly demonstrating why the court should not have entered the CR 11 sanction against Appellant Freeman, it was fruitless.

### **III. STATEMENT OF ISSUES**

Whether the Superior Court for King County erred on July 16, 2009 granting Respondents motion for judgment on the pleadings pursuant to CR 12(C)?

Whether the Respondents presented supportive evidence that the claims and issues alleged in Appellant's amended complaint of June 3, 2009 were the same claims and issued adjudicated against Appellant on January 30, 2007?

Whether the Respondents met their burden of proof to satisfy the requirement of collateral estoppel and res judicata doctrine?

#### **IV. STATEMENT OF ERROR**

The trial court on July 16, 2009 erred in granting Respondents motion for judgment on the pleadings by failing to require Respondents to place before the trial court on July 16, 2009 the entire record of the prior complaint filed by Appellant on August 12, 2007 and failed to require Respondents to place before the court the June 3, 2009 amended complaint for vacation of the August 15, 2007 judgment which Appellant seeks to have vacated on the grounds that the August 15, 2007 was obtained by fraud and misrepresentation and to determine whether or not Appellant's claims and issues of August 12, 2005 and those of June 3, 2009 are identical in all respects to satisfy collateral estoppels and res judicata doctrine.

#### **V. ARGUMENT**

With the court on August 14, 2008 denying Appellant's motion for vacationing of the August 15, 2007 judgment [CP 135-136]. Appellant

was left with only one opinion and that was to seek the aid of CR 60(c):

**“CR 60(c): Do not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding. The provision contemplates that a separate action will be filed to provide the relief desired.”** Kruger Engineering Inc. v.

Sessumns, 26 Wash.App. 721, 615 P.2d 502 (1980); Wager v. Goodwin, 92 Wash.App. 876, 964 P.2d 1214 (1998); United States v. Beggerly, 524 U.S. 38, 118 S. Ct. 1862 (1998).

May 15, 2009 Respondents moved by filing a motion for judgment on the pleadings pursuant to CR 12(c) by alleging in their moving pleadings that: “(v) Mr. Freeman is collaterally estopped from pursuing the vacation of judgment issue again in this action. The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted. [quoting Studebaker] Rains, 100 Wash.2d at 664 (1983). [quoting Studebaker] as stated in Rains at 665, affirmative answers must be given to the following questions before collateral estoppel is applicable. Page 2, line 15 through line 22 of page 2. [CP 30]

**(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final**

**judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?**

Page 2, line 23 through line 26 of page 2 [CP 30]; page 3, line 1 of page 2 [CP 31]. [quoting Studebaker] Here, the answers to all of these questions are in the affirmative: **(1) the central issue in both actions—whether the judgment should be vacated is identical; (2) there was final order on the merits entered against Mr. Freeman; (3) Mr. Freeman, the party against whom the plea is asserted, is the same party; and (4) the application of collateral estoppel will not work an injustice against Mr. Freeman since he had an opportunity to litigate his claim in a neutral forum—The King County Superior Court.** See Rains, 100 Wash.2d at 666. [quoting Studebaker] Therefore, Mr. Freeman is foreclosed by the doctrine of collateral estoppel from re-litigating the exemption issue here. [quoting Studebaker] The claims and issues raised in this action were litigated and resolved against Mr. Freeman in the earlier state court proceedings and are therefore barred by collateral estoppel. [quoting Studebaker] Judgment should be entered herein dismissing plaintiff's claims with prejudice. Page 2, line 2 through line 15 of page 3. [CP 31]

June 2, 2009 the trial court granted Appellant's motion to amend Appellant's complaint. Thereby reopening the pleadings which had been closed on April 29, 2009 the date Respondents entered their first and an affirmative defenses. June 3, 2009 Appellant Freeman served upon Respondents a copy of his amended complaint which was not identical of Appellant's complaint filed and served upon Respondents. [CP 5-22 First Complaint] [CP 75-94 Amended Complaint]

June 19, 2009 Respondents entered an answer an affirmative defense to Appellant's amended complaint. Admitted to the amended allegations of Appellant's complaint, paragraph 1 through 7, and 9 through 20; Admitted to paragraph 8. Except denied by Respondents; for lack of knowledge Respondents denied paragraph 21 of Appellant's amended complaint; Admitted paragraph 1 on page 5. Except as denied by the Respondents; Admitted to the allegations of paragraph 2 on page 6. Except as the Respondents denied paragraph 2 on page 6; Admitted Appellant filed two ethics complaints against Respondent Gary C. Bergan and one against his counsel of record Lauren D. Studebaker and all of them were decided against Appellant Freeman as alleged in paragraph 4 on page 6; Denied the allegations of paragraphs 5 and 6 on page 6; Admitted the allegations of paragraph 7 on page 7 and 10 on page 8; Denied the allegations of paragraphs 9 on page 7, 11 on page 8, 12 on

page 8; Denied the remaining allegations of Appellant's complaint, including I CLAIMS I PROXIMATE CAUSE OF ACTION, II FIRST CAUSE OF ACTION, SECOND CAUSE OF ACTION, THIRD CAUSE OF ACTION, FOURTH CAUSE OF ACTION, FIFTH CAUSE OF ACTION, SIXTH CAUSE OF ACTION and SEVENTH CAUSE OF ACTION.

July 16, 2009 Appellant John Benjamin Freeman as did Attorney Lauren D. Studebaker appearing for Respondents appeared before the trial Court on Respondents motion for judgment on the pleadings. During oral argument the following was recorded: MR. SUTDEBAKER: The defendants take the position that plaintiff is collaterally estopped from bringing an action to vacate at this time because he's already had those two bites at the apple plus his appeal. MR. STUDEBAKER: The case is somewhat strange in that plaintiff is looking to, I think, re-litigate his original claim, which would be precluded by res judicata. But he's bringing an action to overturn the judgment which I believe is ruled by principles of collateral estoppel. MR. STUDEBAKER: We think that the Rains [phonetic] case, which I cited in my brief, makes it clear what the test is insofar as the application of the doctrine of collateral estoppel, and we think that the four-part question that are posed in the Rains case apply. Mr. STUDEBAKER: Number one, is there an identical issues? We say, yes. It's the issues of the

vacation of the judgment. THE COURT: All right. Sir, this is your chance to respond. If you will give your argument, please.

MR. FREEMAN: Yes, I do, Your Honor. In the first place, where is his proof? He hasn't submitted anything. His burden of proof, it's on him. He's the moving party, right? MR. FREEMAN: All these issues that are in here he said they are identical. It's a far cry from being identical; no way can they be identical. MR. FREEMAN: If you look at the rule, Rule 12, defenses and objections, motion for judgment and plea and summary judgment, this case, it centers around whether or not the defendants are entitled to judgment on the pleadings. That is his motion he's got. I am correct? THE COURT: You are.

**(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?** Proving the identity of issues for purposes of establishing the applicability of the doctrine of collateral estoppel required that the Respondents moving for judgment on the pleadings on July 16, 2009 were required to specifically identify the issues and the underlying legal principles litigated in the prior proceeding must be established by competent evidence in order for the decision maker in the subsequent proceeding to undertake the necessary analysis of whether the issues in each proceeding are, in fact, identical. *Lemond v. State of*

Washington Department of Licensing, 143 Wash.App. 797, 180 P.3d 829 (2008).

Collateral estoppel required that the issues decided in the prior adjudication is identical with the one at hand [Appellant's amended complaint for vacation of judgment-independent equitable action] [CP 75-97]. *Luisi Truck Lines, Inc. v. State of Washington Utilities and Transportation Commission*, 72 Wash.2d 887, 894, 435 P.2d 654 (1967). When an issue arises in two entirely different contexts, this requirement is not met. *Luisi*, at 895, 435 P.2d 654.

Collateral estoppel only applies when a party has had a full and fair opportunity to present its case. *Barr v. Day*, 124 Wash.2d 318, 324-325, 879 P.2d 912 (1994) (quoting *Hanson v. City of Snohomish*, 121 Wash. 2d 552, 561, 852 P.2d 295 (1993)). Appellant Freeman on July 22, 2008 sought that opportunity to bring the Respondents before the court on August 12, 2008 for the purpose of the Respondents to show why the relief Appellant Freeman was seeking and that was for the vacation of the August 15, 2007 judgment which had been obtained by means of fraud and misrepresentation by Respondents and their counsel of record Lauren D. Studebaker [hereinafter Studebaker] with Judge Theresa Doyle ruling on Appellant's CR 60(e)(2)

show cause order and motion without holding a hearing as required by CR 60(e)(2). CP 135, 136

Respondents were required on May 15, 2009 when they filed their motion for judgment on the pleadings and on July 16, 2009 arguing their position that Appellant's claims and issues asserted in Appellant's amended complaint were all litigated on January 30, 2007 before a prior court and that court on January 30, 2007 ruled on the merits of each of the allegations set forth in Appellant's amended complaint filed and served on June 3, 2009. *State Farm Mutual Insurance Company v. Avery*, 114 Wash.App. 299, 304, 57 P.3d 300 (2000); *Luisi Truck Lines, Inc. v. State of Washington Utilities and Transportation Commission*, 72 Wash.2d 887, 894, 435 P.2d 654(1967).

MR. STUDEBAKER: Two, is there a final judgment on the merits? the answer to that, of course, is, yes. There was an order of dismissal. (2)  
**Was there a final judgment on the merits?**

MR. STUDEBAKER: Mr. Freeman appealed that judgment to the Court of Appeals, and the Court of Appeals dismissed the appeal. And Mr. Freeman then appealed further to the Supreme Court, and the Supreme Court also dismissed, and you can see that in Mr. Freeman's exhibit. THE COURT: Both of those occurred due to procedural matters, not having

heard it substantively, because the record was never evidence. Is that true?

MR. STUDEBAKER: That is correct.

MR. FREEMAN responded by informing the trial court that the dismissal of his appeal was not made on the merits of Judge Theresa Doyle August 15, 2007 judgment order. But, the appeal was dismissed because after Appellant Freeman had submitted the January 30, 2007 bench trial transcription to King County Superior Court for forwarding to the Court of Appeals the Superior Court did not complete its duty by forwarding the January 30, 2007 bench trial transcription to the Appeals Court. Appellant Freeman further argued that the dismissal was no just sense an affirmance of the judgment appealed from. Neither the opinion nor the remittitur contained an affirmance of the August 15, 2007 judgment, or in any manner adopted it as the judgment of the Appeals Court. The Appeals Court action in dismissing Mr. Freeman's appeal of the August 15, 2007 judgment was that the Appeals Court found that the appeal of the August 15, 2007 judgment had been abandoned. In support of his Argument Appellant cited *Prentice v. Superior Court of Franklin County*, 86 Wash. 90, 149 P. 321 (1915) and also cited *Heilman v. Wentworth*, 18 Wash.App. 751,571 P.2d 963 (1977).

Appellant Freeman made a good faith effort to provide the Appeals Court with the January 30, 2007 bench trial transcription for the portions of the record required by Rule 9.2(b), the appellate will not ordinarily dismiss a review proceeding or affirm, reverse, or modify a trial court decision because of the failure of the party to provide the appellate court with a complete record of the proceedings. Appellant Freeman made a good faith effort to provide the Appeals Court with the necessary transcription from the January 30, 2007 bench trial. It was the Superior Court for King County that did not fulfill its job by forwarding the January 30, 2007 transcription to the Court of Appeals after having been delivered to the Superior Court forwarding. *City of Seattle v. Torkar*, 25 Wash. App. 476, 610 P.2d 379 (1980).

MR. STUDEBAKER: The parties were identical, which satisfies the third element of the doctrine. **(3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?**

Appellant Freeman argued it was first necessary for the trial court and the Respondents to understand something of the recognized meaning and scope of res judicata, a doctrine judicial in origin. The general rule of res judicata applies to repetitious suits involving the same cause of action,

it rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other offered for that purpose. *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 LEd. 195 (1876). The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatsoever, absent fraud or some other factor invalidating the judgment. But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matter which might have been litigated and determined, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 LEd. 195 (1876); *Russell v. Place*, 94 U.S. 606, 24 LEd. 214 (1876); *Southern Pacific Rail Company v. United States*, 168 U.S. 1, 48, 18 S. Ct. 18, 27, 42 LEd. (1897); *Mercoid Corporation v. Mid-Continent Company*, 320 U.S. 661, 671, 64 S. Ct. 268, 273, 88 LEd. 376 (1944). Since the cause of action involved in the second

proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, which in Appellant Freeman's case would be Appellant's lawsuit filed on August 12, 2005.

MR. STUDEBAKER: And, fourth, it with not work an injustice against Mr. Freeman in that he's had many opportunities to bring this action and he's actually brought it and had it heard in a neutral forum.

In direct relations for seeking relief from the August 15, 2007 judgment as Appellant Freeman has explained above. There was a show cause order issued on July 22, 2008 for the Respondents to appear before the court on August 12, 2008 and show cause why the relief Appellant was seeking and that relief was vacation of the August 15, 2007 judgment. Judge Doyle did not hold a hearing on Appellant's CR 60 (e)(2) show cause or motion but decided the CR 60(e)(2) and motion for vacation of the judgment on August 14, 2008 without oral argument. [CP 135-136].

The trial court left under-answered the four questions presented by the Respondents. The court focused more on Appellant Freeman bring an action against the Respondents stating for the record: “Not only are there the problems that I have outlined—that is, your failure to show standing in this case itself—but it is a case that has been adjudicated not just once but

repeatedly. And unfortunately, while there may be an earnest belief in the claim, and there may be something to it—I frankly don't know—it is not properly before this Court, and the defense is entitled to a dismissal on the pleadings before the Court today. I will so order.”

**(4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied? [quoting Studebaker]** And fourth, it will not work an injustice against Mr. Freeman in that he’s had many opportunities to bring this action and he's actually brought it and had it heard in a neutral forum. Appellant Freeman had scheduled a CR 60 (e)(2) hearing for August 12, 2008 before the trial court who on August 15, 2007 entered the unjust judgment against Appellant Freeman. The trial court not complying with CR 60(e)(2) denied Appellant's CR 60(e)(2) show cause order and motion for vacation of the August 15, 2007 judgment without oral argument. [CP 135-136] Appellant Freeman was never heard in a neutral forum as alleged by Respondents counsel Studebaker. The denial order of August 14, 2008 is nothing more than a paper trail. A fundamental requirement of due process is the "opportunity to be heard". *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187 (1965). It is an opportunity which must be granted at a meaningful time and in a meaningful manner which was not afforded Appellant on August 14, 2008. *Armstrong v. Manzo*, 380 U.S. 545, 85 S.

Ct. 1187 (1965). The court could have fully accorded this right to the Appellant on August 14, 2008 only had King County Superior Court Judge Theresa B. Doyle complied with CR 60(e)(2). *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187 (1965). Only that would have wiped the slate clean. Only that would have restored the Appellant to the position he would have occupied had Judge Theresa Doyle complied with CR 60(e)(2) and the Fourteenth Amendment Due Process Clause. *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187 (1965).

From this standpoint Respondents counsel Studebaker makes one statement out of court and when in court he makes a totally different statement which is not consisted with any of the statements he has made. Respondents counsel Studebaker denies any knowledge of Appellant's contractual ties to the Respondent Gary C. Bergan's law firm. [CP 226]. The case before this case and this case in itself.

While fraud has no all-embracing definition and is better left undefined lest crafty men find a way to committing fraud which avoids the definition, the following essential element of actionable fraud are well established had the trial court took time, to review Appellant's evidence instead of simply taking the words of crafty and shrewd attorneys in this case Lauren D. Studebaker and his client and law partner Gary C. Bergan

are well established, (1) False representation or concealment of a material fact; (2) reasonably calculated to deceive, (3) made with intent to deceive; (4) which does in fact deceive; (5) resulting in damage to the injury party. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974); *Johnson v. Owens*, 263 N.C. 754, 140 S.E.2d 311 (1965); *Early v. Eley*, 243 N.C. 695, 91 S.E.2d 919 (1956); *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202 (1951); *Insurance Company v. Gullford County*, 226 N.C. 441, 38 S.E.2d 519 (1946); *Laundry Machinery Company v. Skinner*, 225 N.C. 285, 34 S. E.2d 190 (1945); *Ward v. Heath*, 222 N.C. 470, 24 S. E.2d 5 (1943); *Pritchard v. Dailey*, 168 N.C. 330, 84 S. E. 392 (1915).

The trial court on July 16, 2009 was required to view the facts and permissible inferences in the light most favorable to Appellant Freeman but failed to do so. *Bastek v. Federal Corp Insurance Corporation*, 145 F.3d 90(2<sup>nd</sup> Cir. 1998), certiorari denied, 119. Ct. 539, 525 U.S. 1016,142 LEd.2d 448; *Mullins v. Kaiser Steel Corporation*, 642 F.2d 1302, 1323 n. 26, 206 U.S. App. D.C. 334 (1980) (quoting *Wright & Miller*, reversed on the merits, 102 S. Ct. 851, 455 U.S. 72, 70 LEd.2d 833 (1982); *Walker Distributor Company v. Lucky Lager Brewing Company*, 322 F.2d 1 (9<sup>th</sup> Cir. 1963).

As the moving party for judgment on the pleadings on July 16, 2009 Respondents were required to present to the trial court evidence clearly demonstrating that the claims and issues raised in Appellant amended complaint were actually determined and adjudicated against Appellant John Benjamin Freeman.

**5. Did the trial court on July 16, 2009 err in granting Respondents motion for judgment on the pleadings?**

A motion for judgment on the pleadings under Rule 12(c) may be granted only if all material issues can be resolved on the pleadings by the trial court. *Hal Roach Studios, Inc. v. Richards Feiner and Company*, 883 F.2d 1429 (9<sup>th</sup> Cir. 1989). *National Fidelity Life Insurance Company v. Karagnis*, 811 F.2d 357 (7<sup>th</sup> Cir. 1989). Otherwise, a summary judgment motion or a trial was necessary. Similarly, a defendant will not succeed on a motion under CR 12(c) if there are allegations in the plaintiff's pleadings that, if proved, would permit his recovery on his claim. *Institute for Scientific Information, Inc. v. Gordon and Breach, Science Publishers, Inc.* 931 F.2d 1002, 1005 (3<sup>rd</sup> Cir 1991) (quoting *Wright and Miller, centiorari denied*, 112 S. Ct. 302, 502 U.S. 909, 116 LEd.2 245.

On July 16, 2009 the trial court did not resolve the four questions presented by the Respondents in support of Respondents motion for

judgment on the pleadings. Respondents counsel of record Lauren D. Studebaker asked the questions and gave his own answers which the trial court on July 16, 2009 accepted as true.

Respondents counsel Studebaker also alleged that Appellant Freeman during oral argument on July 16, 2009 on Respondent's motion for judgment on the pleadings that Appellant Freeman was relying on subsection 4 of the rule-of fraud. The hearing transcription of July 16, 2009 makes no indication that on July 16, 2009 Appellant Freeman for the record raised any issue(s) that Appellant was relying on subsection 4 of the rule-of fraud.

Appellant Freeman has never alleged in any of the two lawsuits filed against the Respondents that Appellant was suing for the return of the \$10,000.00 being over billed to Appellant. Appellant suit deal with the issue that Appellant paid all monthly bills to Respondent Gary C. Bergan and with these monthly payments being current. Appellant Freeman should have a \$5,000.00 retainer with Respondent Bergan, which should have been refunded.

Appellant does not seek to reiterate his claims and issues against Respondents. Appellant seeks to have an unjust judgment entered against him and vacated. Appellant Freeman has not been afforded a fair hearing

on any of his motions seeking relief from the August 15, 2007 judgment. The lower court has ruled on all of Appellant's motions for vacation of the August 15, 2007 without oral argument.

**6. Did Appellant John Benjamin Freeman have standing to seek vacation of the August 15, 2007 judgment entered against him?**

Appellant Freeman informed the court that the August 15, 2007 judgment had been entered against Appellant and further that the case before the trial court on July 16, 2009 had been filed on May 5, 2009 and the trial court had made no ruling on the case before Respondents filed their motion for judgment on the pleadings CR 12(c) on May 15, 2009.

The trial court on July 16, 2009 never did explain which case the trial court was referring to Appellant's complaint filed on August 12, 2005 or Appellant's complaint filed with the court on May 5, 2009.

The determination of one's standing is to be determined by the weight of Appellant's involvement in the first cause of action which the judgment on August 15, 2007 was entered against Appellant John Benjamin Freeman and not Appellant's son Robert Lee Freeman. It is in this context that the standing question presented by the Court's ruling on July 16, 2009 must be viewed by the Court of Appeals and the Court's

ruling on Appellant's standing to seek vacation of the August 15, 2007 judgment must be evaluated.

When the emphasis in the standing problem is placed on whether the person invoking a state court jurisdiction is a proper party to maintain the action, the weakness of the Court's ruling of July 16, 2009 becomes apparent. The question whether a particular party in this case Appellant John Benjamin Freeman is a proper party to seek vacation of the August 15, 2007 judgment or whether Appellant's son as the trial court asserts the proper party to seek vacation of the August 15, 2007 judgment, by this force, raise separation powers problems related to improper judicial interference in areas of the court's jurisdiction. Such problems arise, if at all, only from the substantive issue the individual seeks to have adjudicated. The question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution, it is for that reason that the emphasis in standing problems is on whether the party invoking it has a personal stake in the outcome of the controversy. Here, Appellant John Benjamin Freeman has a stake in seeing that the August 15, 2007 judgment entered against him be vacated on the grounds that Respondents obtained the August 15, 2007 judgment by means of fraud and misrepresentation. *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962);

Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 27, 57 S. Ct. 461 (1937).

Appellant's rights to have access to the court to seek justice and redress from a judgment which still to date is an unjust judgment.

Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment. Christopher v. Harbury, 536 U.S. 403, 415 n. 12, 122 S. Ct. 2179, 153 LEd.2d 4T3 (2002) (noting the U.S. Supreme Court's past reliance on all of these bases). Bank of Jackson County v. Cherry, 980 F.2d 1362, 1370 (11<sup>th</sup> Cir. 1993) (grounding the right of access in the First Amendment). To pass constitutional muster, access to the courts must be more than merely formal; it must also be adequate, effective and meaningful. Ryland v. Shapiro, 708 F.2d 967, 972 (5<sup>th</sup> Cir. 1983) citing Bounds v. Smith, 430 U.S. 817, 822, 97 S. Ct. 1491, 52 LEd.2d 72 (1977); Chappell v. Rich, 340 F.3d 1279 (11<sup>th</sup> Cir. 2003).

Further, access-to-courts claims fall into two categories: claims that systemic official action frustrates a plaintiff in preparing and filing suits at the present time, where the suits could be pursued once the frustrating

condition has been removed; and claims of specific cases that cannot be tried, no matter what official action may be in the future.

Regardless of whether the claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the point of recognizing an access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong. Thus, the access-to-courts right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court. It follows that the underlying claim is an element that must be described in the complaint as though it were being independently pursued; and that, when the access claim (like this one) looks backward.

### **CONCLUSION**

The trial court judgment of July 16, 2009 should be reversed as the application of the doctrine will work an injustice upon Appellant John Benjamin Freeman, as Appellant Freeman will have to live and face and unjust judgment which was obtained on August 15, 2007 by fraud and misrepresentation.

Signed and dated this 10<sup>th</sup> day of May 2010.

Presented by:

  
John Benjamin Freeman, Appellant

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WASHINGTON STATE COURT OF APPEALS  
DIVISION I

JOHN BENJAMIN FREEMAN,

Appellant,

vs.

GARY C. BERGAN, et al,

Appellees.

Case No.: 64274-0

DECLARATION OF SERVICE  
OF REPLY BRIEF/APPELLANT

I am over the age of eighteen (18)

I am a citizen of the United States of America and a resident of King County,  
Washington.

I am not a party to or have any interest in this pending civil appeal.

I am competent to give testimony herein.

That on Monday, June 7, 2010, I caused to be served upon Appellees counsel of  
record Lauren D. Studebaker a copy of Appellant's reply brief.

Service was made at the last known address for Appellees counsel of record and that  
address is:

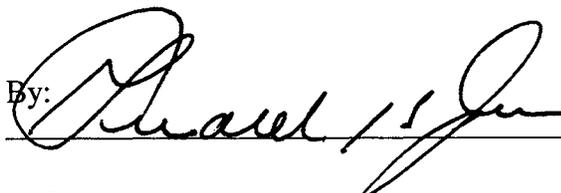
**ORIGINAL**

1  
2 Lauren D. Studebaker  
3 Thomas Whittington Bergan Studebaker, Inc. P.S.  
4 1505 Northwest Gilman Blvd. #1  
5 Issaquah, Washington 98027

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

8  
9 Signed and dated this 7<sup>th</sup> day of June 2010, at Seattle, Washington.

10  
11 Service Fee Paid \$75.00 6/7/2010 – Cash

12  
13 By: 

14  
15 GERALD H JONES

16 Gerald Henry Jones  
17 14800 Interurban Avenue S  
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