

64529.3

64529-3
RECEIVED
COURT OF APPEALS
DIVISION ONE

FEB 14 2011

No. 64529-3-I

COURT OF APPEALS, DIVISION ONE

STATE OF WASHINGTON

KAREN A. STEVENSON, Appellant/Cross-Respondent

v.

DAVID M. CANNING, PERSONAL REPRESENTATIVE OF THE
ESTATE OF MARY LOUISE CANNING, Respondent/Cross-
Appellant

BRIEF OF APPELLANT/CROSS-RESPONDENT

On appeal from King County Superior Court

Case No. 05-2-016751-3 SEA,

the Honorable Chris Washington presiding.

Karen A. Stevenson, pro se
424 21st Ave.
Seattle, WA 98122
Phone: (206) 860-3701

2011 FEB 18 AM 10:26

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
ASSIGNMENTS OF ERROR	6
STATEMENT OF THE CASE	18
ARGUMENT	29
CONCLUSION	80
APPENDICES	

TABLE OF AUTHORITIES

CASES

Beers v Ross, 137 Wn App 566, 154 P 3d 277 (2007)

Blair v. TA-Seattle E. #176, 150 Wn App 904, 210 P 3d 326 (2009)

Case v Dundom, 115 Wash. App. 119, 58 P. 3d 919 (2002)

City of Seattle v Holifield, 150 Wn App 213, 208 P 3d 24 (Div. One 2009)

City of Seattle v Holifield, 170 Wn 2d 230, ___ P 3d ___ (2010)

Clarke v State Attorney General's Office, 133 Wash. App. 767, 138 P. 3d 1444, review denied 160 Wash. 2d 1006, 158 P 3d 614 (2006)

Dependency of K. B., 150 Wn App 912, 210 P 3d 330 (2009)

Deutscher v Gabel, 149 Wn App 119, 202 P 3d 355 (Div. One 2009)

Discipline of Carmick, 146 Wn 2d 582, 48 P 3d 311 (2002)

Estate of Treadwell ex rel Neil v Wright, 115 Wn App 238, 61 P 3rd 1214 (Div. One, 2003) review denied, 149 Wn 2d 1035, 75 P 3d 969

Estates of Smaldino, 151 Wn App 356, 212 P 3d 579 (Div. One 2009)

Fertilizer Corp. v Martin, 103 Wash. App. 836, 14 P. 3d 877 (2000)

Gillett v Conner, 132 Wn App 818, 133 P 3d 960 (Div. One, 2006)

Hough v Stockbridge, 152 Wn. App 328, 216 P 3d 1077 (Sept 2009)

Indigo Real Estate Services v. Rousey, 151 Wn. App. 941, 215 P 3d 977 (Div. One, 2009)

In re Estate of Palmer, 145 Wn App 572, 187 P 3d 758 (2008)

In re Kerr, 86 Wn 2d 655, 648 P 2d 297 (1976)

Kennewick Irrig. Dist. v Real Property, 70 Wn App 368, 853 P 2d 488 (1993), review denied, 866 P 2d 40

Marriage of Rockwell, 157 Wn App 449, ___ P 3d ___ (July 2010, Div. One)

McCausland v McCausland, 129 Wn App 390, 118 P 3d 944 (2005), reversed 159 Wn 2d 607, 152 P 3d 1013 (2007)

Mosbrucker v Greenfield Implement, 54 Wn app 647, 774 P 2d 1267 (1989)

Optimer Int'l v. RP Bellevue, LLC, 151 Wn App 954, 214 P3d 954 (Div. One 2009)

Peoples State Bank v Hickey, 55 Wn App 367, 777 P 2d 1056 (1989)

Ralph's Concrete v Concord Concrete, 154 Wn. App. 581, ___ P 3d ___ (Div One 2010)

Rivers v Conf. of Mason Contractors, 145 Wash. 2d 674 (2002)

Roberson v Perez, 156 Wn 2d 33, 123 P 3d 844 (2005)

Rudolph v Empirical Research Sys., Inc., 107 Wash. App. 86, 28P 3d 813 (2001)

Seattle v. Sage, 11 Wn App 481, 523 P 2d 942 (1974)

Servis v Land Resources, Inc., 62 Wn App 888, 815 P 2d 840, reconsideration denied, review denied 827 P 2d 1012, 118 Wn 2d 1020 (1991)

Sherman v State, 128 Wash. 2d 164, 905 P. 2d 355, Reconsideration denied, amended 128 Wash. 2d 164, 905 p. 2d 355 (1995)

Singleton v Naegli Reporting, 142 Wn App 598, 175 P 3d 594 (2008)

Spokane Police Guild v. Wash. State Liquor Control Board, 112 Wn 2d 30, at 35-36, 769 P 2d 283 (1989).

State ex rel Keeler v Port of Peninsula, 89 Wash. 2d 764, 575 P. 2d 713 (1978)

State v. Napier, reconsideration denied, 49 Wn App 783, 746 P 2d 832 (1987)

State v. Quisimundo, 164 Wn 2d 499, 192 P 3d 342 (2008)

Stoulil v Epstein, 101 WN App 294, 3 P 3d 764 (2000)

State v. Heddick, 166 Wn. 2d 898, 215 P 3d 201 (2009)

State v Parada, 75 Wn App 224, 877 P 2nd 231 (1994)

State v Rafay, 167 Wn. 2d 644, ___ P 3d ___ (2009)

State v Schwab, 134 Wn App 645, 141 P 3d 658 (2006), *aff'd* 163 Wn 2d 664, 185 P 3d 1151 (2008, Div. One)

Wilcox v Lexington Eye Institute, 130 Wn App 234, 122 P3d 729 (Div. One, 2005)

Woodhead v Disc. Waterbeds, 78 Wn App 125, 896 P2d 66 (1995)

RULES

CJC 3 (A)(6)

RAP 12.2

RAP 12.9

RAP 12.9(a)

CR 6

CR 7

CR 16 (a)

CR 16 (b)

CR 26(f)

CR 26 (i)

CR 59 (b)

CR 59 (e)

CR 60 (b)(1)

CR 60 (b)(4)

LCR 7

LCR 37 (e)

LCR 37 (f)

LCR 59

Judge Washington's personal court rules (See Appendix I)

ASSIGNMENTS OF ERROR

No. 1. The trial court erred by failing to comply with the mandate issued in No. 58341-7-I.

No. 2. The trial court erred in entering Finding of Fact No. 21 (April 6, 2009 order dismissing the complaint): “Although the dismissal was later reversed because the necessary findings were not stated in the order of dismissal as required by Rivers v. Wash. State Conference of Mason Contractors, 145 Wn. 2d 674, 41 P. 3d 1175 (2002), there was no suggestion that Ms Stevenson should be excused from appearing for her deposition.”

No. 3. The trial court erred in entering Finding of Fact No. 21 (April 6, 2009 order dismissing complaint) stating in part that: “Ms. Stevenson has had ample opportunity to comply with her obligations under the Civil Rules and with this Court’s order. Her conduct has consumed precious judicial resources, harming not only her party-opponent but the judicial system itself.”

No. 4. The trial judge erred when he purported to set up a Status Conference for April 6, 2009 without entering an order as required by CR 16(a), and then employed the Status Conference as a pretext for conducting a hearing on Canning’s motion to dismiss the complaint.

No. 5. The trial judge erred by failing to determine Stevenson's CR motion for reconsideration of the February 10, 2009 order amending the order compelling discovery, before he dismissed the complaint for Stevenson's failure to comply with it, and by not deciding Stevenson’s timely CR 59 motion for reconsideration of the April 6, 2009 order dismissing the complaint, until October 29, 2009.

No. 6. The trial court erred by conducting an ex parte oral hearing on Canning's motion to dismiss the complaint on April 6, 2009 without giving

prior notice of hearing to Stevenson and by entering the April 6, 2009 order dismissing the complaint.

- Issues:
1. May a trial judge set up a Status Conference without entering an order as required by CR 16(a)?
 2. May a trial judge set up a Status Conference for a date he knows one party cannot be in court for?
 3. May a trial court set up a Status Conference without entering an order, then on the date of the purported "Status Conference" conduct a hearing on a motion to dismiss the complaint?
 4. Was the trial judge obliged to give Stevenson notice of hearing on Canning's motion to dismiss the complaint before oral hearing on that motion?

No. 7. The trial court erred in entertaining the October 29, 2008 motion to compel discovery when Canning's counsel had not "met and conferred" with Stevenson prior to the filing of the motion, no case schedule order was in effect, and the mandate did not provide for discovery by Canning.

No. 8. The trial court erred by not enforcing the order filed September 16, 2008, "Order Revoking/Lifting Stay; Clerk to Issue New Scheduling Order and Assign Judge".

No. 9. The trial court erred in denying Stevenson's April 16, 2009 CR 60 motion to vacate the April 6, 2010 order dismissing the complaint.

Issues: 1. Should the trial judge have denied Stevenson's CR 60 motion to vacate the April 6, 2009 order dismissing the complaint without providing grounds or reasons?

2. May a trial judge entertain defendant's motion to dismiss a complaint without giving prior notice to the plaintiff?

No. 10. The trial court erred in entering the Omnibus Order October 29, 2009 when Canning had provided no notice of presentation to Stevenson.

No. 11. The trial judge erred by denying Stevenson's motion for a change of judges and by not deciding such motion until after he dismissed the complaint.

Issue: Did the trial judge fail to meet the test of impartiality?

No. 12. The trial court erred by entering its order February 10, 2009 granting Canning's motion to amend the order compelling discovery.

No. 13. The trial judge erred in entering "findings of fact and conclusions of law 1 thru 7, in "Order Awarding Reasonable Attorneys' Fees and Costs to Defendant" filed October 29, 2009.

No. 14. The trial judge erred in denying Stevenson's March 9, 2009 CR 60 motion to vacate the discovery order of March 28, 2006.

Statement of Issues

- A. Did Judge Jones lack legal authority to entertain the motion to compel, when the motion failed to meet the requirements of CR 26 (i) and LR 37 (e)?
- B. Given the obvious collusion of Bittner with opposing counsel, to enable the trial judge to entertain a motion he lacked legal authority to consider, should the order have been vacated?
- C. Did Bittner's intentional failure to provide even minimally competent representation to his client, Stevenson, in an obviously collusive scheme with opposing counsel, meet one or more of the tests set out in CR 60 (b) (4) allowing relief from a court order on grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party"?

No. 15. The trial court erred in entering Finding of Fact No. 19 (April 6, 2009 order dismissing complaint) : "Ms. Stevenson has now refused to obey two separate discovery orders from this Court. She has provided no reasonable excuse or justification for failing to comply."

No. 16. The trial court erred in Finding of Fact No. 19 (April 6, 2009 order dismissing complaint): "Ms. Stevenson has established a clear pattern

of following the Civil Rules when it benefits her (and demanding that others follow the Civil Rules) and ignoring the Civil Rules and this Court's orders when it does not. Her refusal to obey the February 10 discovery order was willful and deliberate."

No. 17. The trial court erred in entering Finding of Fact No. 2, of the subject order dismissing the complaint, which states that "Ms. Stevenson did not appear for her deposition on November 30 [2005]."

No. 18. The trial court erred in entering Finding of Fact No. 3 (April 6, 2009 order dismissing complaint) stating that: "Mr. Canning re-noted Ms. Stevenson's deposition for January 12, 2006. Ms. Stevenson failed to appear."

No.19. The trial court erred in entering Finding of Fact No. 3 (April 6, 2009 order dismissing complaint) stating that: "Mr. Canning then filed a motion to compel Ms. Stevenson to appear for her deposition. The Notice of Hearing and Motion to Compel were mistakenly filed [in a different case]."

No. 20. The trial court erred in entering Finding of Fact No. 4 stating that: "Prior to the hearing, attorney James U. Bittner served a Notice of Appearance on behalf of Ms. Stevenson and requested that the motion to compel be stricken."

No. 21. The trial court erred in entering Finding of Fact No. 5 stating that: “On March 2, 2006, while still representing Ms. Stevenson, Mr. Bittner appeared for Ms. Stevenson’s deposition. Ms. Stevenson again failed to appear.”

No. 22. The trial court erred in entering Finding of Fact No. 6 stating that: “Mr. Canning filed a second motion to compel on March 16, 2006. Ms. Stevenson submitted a response in opposition to the motion.”

No. 23. The trial court erred in entering Finding of Fact No. 10 stating as follows: “After the mandate was issued, Mr. Canning served a notice of deposition on Ms. Stevenson to appear at her deposition on Friday, October 24, 2008. Ms. Stevenson did not appear.”

No. 24. The trial court erred in entering Finding of Fact No. 10 stating: “Her response [to the motion to compel] did not identify a reason that she should not attend her deposition.”

No. 25. The trial court erred in entering Finding of Fact No. 10 stating in part that: “Mr. Canning then filed a third motion to compel Ms. Stevenson to appear for her deposition.”

No. 26. The trial court erred in entering Finding of Fact No. 10 stating in part that: “Ms. Stevenson responded [to the second motion to compel,

falsely described as the third motion to compel] by filing a motion to strike the declaration of Mr. Canning's counsel”.

No. 27. The trial court erred in entering Finding of Fact No. 12 stating that: “Although the hearing [on the motion to amend the discovery order] was noted for December 10, 2008, the order granting the motion to amend was not signed and filed until February 10, 2009.”

No. 28. The trial court erred in entering Finding of Fact No. 14 stating that: “Ms. Stevenson failed to comply with the Court's February 10 [2009] order [compelling discovery].”

No. 29. The trial court erred in entering Finding of Fact No. 15 stating that: “James Canning, who was at that time a licensed attorney, represented both himself and Ms. Stevenson [in the Kevin Delany, Bernard Krisher and Avelin P. Tacon III v. James Canning and Karen Stevenson case].”

No. 30. The trial court erred in entering Finding of Fact No. 15 stating that: “The court of appeals subsequently sanctioned Ms. Stevenson and James Canning for their appeal, which it characterized as ‘totally without merit’ and ‘frivolous.’”

No. 31. The trial court erred in entering Finding of Fact No. 16 stating that “James Canning is currently suspended from the practice of law”.

No. 32. The trial court erred in entering Finding of Fact No. 15.

No. 33. The trial court erred in entering Finding of Fact No. 18 stating that: “Ms. Stevenson has made full use of the discovery process for her own benefit. She served two sets of requests for admissions on Mr. Canning. . . Mr. Canning timely responded to her discovery and her concerns about earlier discovery requests.”

No. 34. The trial court erred in entering Finding of Fact No. 19 stating that: “Ms. Stevenson has now refused to obey two separate discovery orders from this Court. She has provided no reasonable excuse or justification for failing to comply.”

No. 35. The trial court erred in entering Finding of Fact No. 20 stating that: “Ms. Stevenson’s claim is based on eight promissory notes allegedly signed by the decedent, Mary Canning, in favor of Ms. Stevenson over a period of eighteen years, from 1982 until 2000.”

No. 36. The trial court erred in entering Finding of Fact No. 20 stating that: “Mr. Canning cannot obtain meaningful information about and defend against the claim without taking Ms. Stevenson’s deposition.”

No. 37. The trial court erred by entering Finding of Fact (unnumbered but would have been No. 23 at page 9 of the April 6, 2009 order dismissing the complaint).

No. 38. The trial court erred in its Finding of Fact No. 22: “Although the dismissal was later reversed because the necessary findings were not stated in the order of dismissal. . .there was no suggestion that Ms. Stevenson should be excused from appearing for her deposition.”

No. 39. The trial court erred by denying Stevenson’s motion to vacate the April 6, 2009 order dismissing the complaint.

No. 40. The trial court erred in entering Conclusion of Law No. 1 stating that: “King County Local Rule 37 (d) provides that when a party fails to appear for her deposition, this Court is authorized to ‘make such orders in regard to the failure as are just,’ including ‘any action authorized under CR 37.’”

No. 41. The trial court erred in entering its Conclusion of Law #3 of order dismissing the complaint: “Ms. Stevenson’s pattern of misconduct and refusal to obey the February 10 [2009] discovery order was willful and deliberate, and her conduct has substantially prejudiced defendant David Canning’s ability to prepare for trial.”

No. 42. The trial judge failed to meet the test of impartiality and violated the appearance of fairness doctrine.

No. 43. The trial court erred by failing to determine Stevenson's April 8, 2009 motion for the trial court to produce a copy of the notice of hearing that trial court bailiff claimed Stevenson had received for the April 6, 2009 hearing on Canning's motion to dismiss the complaint.

Issues pertaining to Assignment of Error:

1. Should the trial court have decided Stevenson's April 8, 2009 motion for the trial court to produce a copy of the notice of hearing (for the April 6, 2009 hearing on Canning's motion to dismiss the complaint) before the trial judge denied Stevenson's CR 60 motion to vacate the April 6, 2009 order dismissing the complaint?
2. Should the trial court have determined Stevenson's April 8, 2009 motion?

No. 44. The trial court erred by granting Canning's October 29, 2008 motion to compel discovery by order filed November 21, 2008.

No. 45. The trial judge erred by failing to rule on Stevenson's objection to a status conference, prior to his hearing Canning's motion to dismiss the complaint, and by confusing CR 16(a) and CR 26(f).

No. 46. The trial judge erred by determining Canning's March 9, 2009 motion to dismiss the complaint, before he determined Stevenson's February 20, 2009 motion for reconsideration of the amended order

compelling discovery, when the dismissal of the complaint was on grounds Stevenson had not complied with the amended order compelling discovery.

No. 47. The trial court erred by failing to determine Stevenson's timely-filed CR 59 motion for reconsideration of the May 9, 2006 order dismissing the complaint.

No. 48. The trial judge erred when he granted Canning's motion to dismiss the complaint, by order filed May 28, 2006, when Canning's counsel failed to state in the motion to dismiss, that he had "met and conferred" with Stevenson prior to filing the motion.

No. 49. The trial judge erred by failing to determine motions in a timely, logical and fair manner

No. 50. The trial court erred by refusing to enter an order to show cause after Stevenson filed her April 16, 2009 CR 60 motion to vacate the order dismissing the complaint, by declining to conduct an oral hearing on the motion, by declining to request further briefing from the parties, and by not deciding the motion until October 29, 2009.

No. 51. The trial court erred by not determining motions in a logical, fair manner.

No. 52. The trial court erred when the trial judge failed to determine Stevenson's motion seeking a change of judges before he dismissed the complaint.

No. 53. The trial judge erred when he denied Stevenson's CR 59 motion for reconsideration of the order dismissing the complaint, and Stevenson's CR 60 motion to vacate the order dismissing the complaint, without providing any grounds or reasons for his decisions.

No. 54. The trial judge erred in entering the November 30, 2009 judgment in favor of Canning.

STATEMENT OF THE CASE

On January 25, 2006, Canning filed a "declaration in support of a motion to compel discovery." CP 176-209. No motion or Notice of Hearing was filed. LCR 7 mandates that the motion and the notice for that motion to be filed with the Clerk not later than six court days before the hearing.

On February 2, 2006, James Bittner executed a Notice of Appearance for the Plaintiff, and transmitted a copy to Canning's attorney. Bittner did not file the document until February 14, 2006. CP 1185-1187.

Hurt's declaration dated April 19, 2006, "the original Motion to Compel Karen Stevenson to Attend Deposition was stricken at the request of Mr. Bittner who I allowed to become acquainted with the facts of the case and then rescheduled the deposition." Declaration of James Hurt in Support of Motion to Dismiss Complaint. (CP at 92) [CP 1821-1858]. No hearing had been scheduled, and no deposition had been scheduled.

On February 23, 2006, Bittner filed his Notice of Intent to Withdraw. CP 1188-1190. Stevenson objected March 6, 2006. CP 1191-1192.

Stevenson agreed to the appropriateness of the withdrawal, given Bittner's tacit admission that an actual or likely conflict of interest existed and told Bittner she would need at least three weeks to obtain replacement counsel. CP 1191-1192.

On March 2, 2006, Bittner "appeared" at a "deposition." CP 210-215. Stevenson was unaware that Bittner "appeared" until she was served with Hurt's declaration in support of March 16, 2006 motion to compel discovery. CP 210-215. Hearing on "renewed" motion to compel was noted for March 27, 2006. CP 2321-2324.

On March 15, 2006, Bittner filed a motion to withdraw. CP 174-175. The motion set hearing date for March 24, 2006. CP 2319-2320. The motion was served on Stevenson on March 20, 2006. Four days later, the trial judge

signed the order authorizing withdrawal. CP 218-219. In the “renewed” motion to compel, Canning’s attorney stated that Bittner had “appeared” at the “deposition”, and communicated to Hurt that he intended to withdraw as Stevenson’s attorney because she had failed to appear. Bittner had served the notice of intent to withdraw on Hurt ten days earlier. CP 1188-1190.

Hearing for the motion to compel was stricken from the court clerk’s docket on March 22nd. CP _____. Stevenson informed Judge Jones that she did not object to the granting of the motion to withdraw, provided she was not prejudiced by the hearing of the motion to compel three days later because she needed time to obtain replacement counsel. CP 1193-1196, 1802-1808.

On the afternoon of March 24th, Judge Jones signed orders granting both motions. CP _____. On April 20th Canning filed a motion to dismiss the complaint. CP 222-227. Stevenson responded. CP _____. Canning replied CP _____. The judge filed his order granting dismissal on May 9, 2006. CP 231-233. Stevenson filed a CR 59 motion for reconsideration May 19th. CP 234-237. This motion was never determined by the trial judge.

Stevenson appealed the order dismissing the case. See Notice of Appeal No. 58341-7.

The mandate in No. 58341-7 was filed in King County No. 05-2-16751-3 SEA on August, 20, 2008. CP 241-243. In the unpublished opinion, Division One noted that:

Karen Stevenson has appealed the trial court order dismissing her complaint for failure to comply with a discovery order. David Canning concedes that there are inadequate findings to support the order. *He requests that the matter be remanded for additional findings.* [Emphasis supplied.]

* * *

We accept respondent's concession of error and remand to the trial court for proceedings consistent with this opinion.

The mandate directed the trial court to enter the findings of fact omitted from Judge Richard A. Jones's May 9, 2006 order dismissing the complaint. CP 241-243. The mandate allowed Stevenson to raise the issue of improper trial court orders filed March 28, 2006, authorizing untimely withdrawal of counsel (CP 218-219) and compelling discovery (CP 220-221).

On August 27, 2008, Canning filed a motion for a case schedule order (CP 2077-2090); notice of hearing set a date of September 9, 2008. CP 2091-2092. Canning on September 8th filed further notice re-setting hearing September 15th. CP 2093-2094. The trial court filed a Case Schedule Order on November 26, 2008. CP 2315-2316. Canning believed it would be difficult to obtain a judge who would provide the findings omitted by Judge

Jones in the order dismissing the complaint. CP 2152-2160.

Before the case schedule order was filed, and instead of arranging for Judge Chris Washington to enter the findings omitted from Judge Jones's May 9, 2006 order dismissing the complaint, David Canning sought a new order compelling discovery. CP 278-286. Canning's attorney stated: "It is time for the Court to intervene to put a stop to Ms. Stevenson's incomprehensible conduct." CP 1221-1229. The motion was granted by order filed November 21, 2008 *before the case schedule order was entered*. CP 312-314. On December 1, 2008 Stevenson filed CR 59 motions for reconsideration of the discovery order and the order denying motion to strike portion of Hansen's declaration supporting motion to compel. CP 317-328. The trial court did not request a response from Canning to either CR 59 motion. On December 9, 2008, Canning filed a notice of unavailability. CP 2098-2099. In the notice, Canning asked that the trial court allow sufficient time for Kevin Hansen to file any response requested by the trial judge. CP 2098-2099.

Canning filed a motion to amend the discovery order on November 26, 2008. CP 651-656. The trial court granted this motion by order filed February 10, 2009. CP 1866-1867. Stevenson filed a timely CR 59 motion

for reconsideration (CP340-348) with notice of hearing CP 1931-1932. The trial court did not request a response to this motion, and the trial judge had not decided Stevenson's prior CR 59 motions filed December 1, 2008.

On March 9, 2009, Stevenson filed a motion to vacate the March 28, 2006 discovery order. CP 372-378. Stevenson replied to Canning's response. 393-397. The trial court denied the motion by order filed March 19, 2009. CP 401-402. With three CR 59 motions undetermined, Canning on March 9, 2009 filed a motion to dismiss the complaint based on Stevenson's failure to comply with the February 10, 2009 order. CP 349-371. Hearing was set for March 19, 2009. CP 501-539.

With several CR 59 motions undecided, and with Canning's motion to dismiss also pending, Judge Washington purported to set up a Status Conference without entering an order. CP 756-765. The trial judge's bailiff, Mary Radley, had emailed Stevenson and Hansen on March 25th, stating: "Judge Washington will have the status conference on April 6, 2009 at 8:30 in W 905." CP 756-765. On April 3rd, Ms. Radley emailed Stevenson and Hansen stating: "Judge Washington has received Stevenson's paperwork filed April 2, 2009. The status conference will go forward on April 6, 2009 at 8:30 in room W 905." Stevenson objected. CP 756-765. Stevenson had also

informed the trial court on April 2nd that she could not appear in court on the first Monday of any month due to her work schedule. CP 418-422.

On April 6, 2009, the trial judge proceeded with the “Status Conference”; instead of having a Status Conference, the trial judge *conducted a hearing ex parte, and with no notice to Stevenson*, on Canning’s motion to dismiss the complaint, and dismissed the complaint. CP 424-433. The transcript of the hearing showed that the trial judge was aware Stevenson could not be in court on April 6, 2009. CP 482-492. The trial judge at the hearing invited Canning’s lawyer to write in a “finding of fact” that the trial judge had contacted Stevenson with possible dates for a hearing. CP 424-433.

On April 8, 2009, Stevenson filed a motion for trial court to produce a copy of purported Notice of Hearing for April 6, 2009 hearing. CP 436-454. Hearing was set for April 17, 2009. CP 1965-1966.

Stevenson filed a timely CR 59 motion for reconsideration, and also asked for relief under CR 60 in the same document. CP 455-481.

Stevenson’s declaration supporting both motions was also filed April 16, 2009. CP 1967-1997. Hearing was set for April 30, 2009. CP 1933-1934.

On April 23, 2009, Stevenson filed an amended CR 60 motion, based on

information obtained *after* she filed the CR 59 motion. CP 493-500. On April 29, 2009, Stevenson provided the trial judge with an amended proposed Order to Show Cause. CP 751-754. On May 7, Stevenson filed "Plaintiff's Declaration Regarding Amended Proposed Order to Show Cause (CR 60)". CP 756-765. Judge Washington declined to enter an order to show cause despite Stevenson's several requests that he do so. CP 540-550.

On May 22, 2009, Canning filed a response to the April 16th motions of Stevenson. CP 501-539. Stevenson objected on grounds the trial judge had not entered an order to show cause and had not requested a response to the motion for reconsideration. CP 540-550. On July 23, 2009 Stevenson again objected to the trial court's failure to enter an order to show cause. CP 551-569. The trial court attempted to set up a Status Conference in August 2009, once again without using a court order, and Stevenson objected. CP 771-786. In October 2009, the trial court requested proposed orders granting or denying pending motions, and Stevenson objected. CP 808-823. On October 29, 2009, the trial judge denied the April 16th CR 59 and CR 60 motions. CP 593-596. The trial judge the same day also filed an order setting attorneys' fees. CP 133-135. The trial judge did not decide Stevenson's April 8, 2009 motion for trial court to produce a copy of the

notice of hearing for the hearing conducted April 6, 2009. Stevenson on October 29th filed a letter to the trial judge setting out her procedural concerns and objections. CP 591-592.

On November 30, 2009, the trial court denied Stevenson's CR 59 motion for reconsideration of the "omnibus order" and entered judgment in favor of Canning for attorneys' fees. See Notice of Appeal filed December 30, 2009. Subsequently, on February 11, 2010, the trial court entered a further award of attorney's fees, and on March 9, 2010 entered a further judgment against Stevenson. See Notice of Appeal filed March 12, 2010, Case No. 65121-8.

On October 25, 2010, Stevenson filed a CR 60 motion to vacate the October 29, 2009 order awarding attorneys' fees, on grounds the trial court had failed to comply with the mandate. CP 2140-2149. Canning responded, arguing that Stevenson had waived her rights under the mandate and asking for CR 11 sanctions. CP 2152-2160. The trial court on November 19, 2010, denied Stevenson's CR 60 motion and awarded CR 11 sanctions to Canning. CP 2229-2245. Stevenson filed a timely CR 59 motion for reconsideration. CP 2234-2245. The trial judge did not request a response from Canning and he has not determined the motion.

On January 3, 2011, the trial court entered judgment in favor of Canning for the CR 11 sanctions awarded November 19, 2010. CP 2337-2338. Stevenson filed a CR 59 motion for reconsideration on January 11, 2011. CP _____. As of February 13, 2011, the trial court has not requested a response from Canning and he has not determined the motion.

Stevenson appealed, and subsequently appealed further orders and judgments of the trial court. Stevenson moved to stay proceedings on the appeals until the appellate court ruled on the issue of whether the trial court complied with the mandate issued in No. 58341-7. Canning objected, arguing the issue should be raised in appellant's brief and treated with the other issues raised in the appeals. The commissioner denied the motion *on grounds the record did not show that Stevenson had asked for recall of the mandate*. Stevenson's motion to modify the ruling was denied.

Stevenson also sought immediate remand to trial court for provision of grounds and reasons relied on by the trial court in denying Stevenson's April 16, 2009 motion for reconsideration of the order dismissing the complaint. The commissioner denied the motion and Stevenson's motion to modify was denied.

The court administrator/clerk consolidated the second appeal, No. 64792-0 with No. 64529-0, acting on his own motion and without objection. Stevenson moved to consolidate the third appeal, No. 65121-8, with the two previous appeals. Canning objected, and the motion was denied. Stevenson's motion to modify the ruling was denied.

Stevenson filed a motion to consolidate the fourth appeal with the first two appeals. Canning again objected. The commissioner denied Stevenson's motion to consolidate the fourth appeal with the first two, and instead consolidated the fourth appeal with the third. Stevenson's motion to modify was denied.

Stevenson's motions for discretionary review of the above procedural decisions of the Court were denied.

On December 19, 2010, Stevenson appealed the order awarding CR 11 sanctions. Stevenson in her notice of appeal also asked for appellate review of the trial court's failure to request a response from Canning to Stevenson's October 4, 2010 CR 59 motion for reconsideration of the judgment filed September 22, 2010. That motion, CP 2343-2353, has not been determined by the trial court as of February 13, 2011.

On January 14, 2011, Commissioner Mary Neel consolidated the appeal (No. 66520-1) with No. 65121-8 rather than 64529-3. Stevenson

filed a motion to modify, seeking consolidation of No. 66520-1 with No. 64529-3. This motion was pending as of February 13, 2011.

ARGUMENT

Standard of Review

As noted in *Dependency of K. B.*, 150 Wn App 912, 210 P 3d 330 (2009), an appellate court reviewing a trial court's ruling stands in the same position as the trial court in reviewing the record if both the trial court and appellate record consists solely of affidavits and documents and the trial court neither saw nor heard testimony requiring competency or credibility determinations and did not weigh the evidence in reaching its decision. *Spokane Police Guild v. Wash. State Liquor Control Board*, 112 Wn 2d 30, at 35-36, 769 P 2d 283 (1989). This is the situation that obtains in this case.

No. 1. The trial court erred by failing to comply with the mandate issued in No. 58341-7-I.

By mandate in No. 58341-7-I filed August 20, 2008, this Court reversed the trial judge and remanded the case to the trial court so that the trial judge could provide the mandatory findings of fact omitted from the original order dismissing the complaint, and to enable Stevenson to raise the

issues of untimely withdrawal of counsel and improper granting of a discovery order.

The trial court failed to comply with RAP 12.2 which obliges the lower court to follow the decision taken by a higher court. Specifically, RAP 12.2 provides as follows:

Upon issuance of the mandate of the appellate court..., *the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court...*

The mandate in No. 58341-7-I included the unpublished opinion of Division One that stated:

David Canning concedes that there are inadequate findings [in Judge Richard A. Jones's order dismissing the complaint] to support the order. *He requests that the matter be remanded for additional findings.*

* * *

The record before us does not contain the findings necessary to support dismissal.

Canning's motion to dismiss the complaint, filed March 9, 2009 stated at page 11: "It is time to put an end to Ms. Stevenson's shenanigans and dismiss the lawsuit." In fact, the "shenanigans" were entirely performed by Canning's own lawyers. They knew the trial judge was obliged to supply the findings of fact *missing from the order of Judge Jones filed May 9, 2006.* Judge

Washington was obliged to provide the findings *that Judge Jones failed to include in the order*, not to enter a new order dismissing the complaint based on events that took place *years after* Judge Jones dismissed the complaint in May 2006. Moreover, the trial court declined to allow Stevenson to raise the issue of improper granting of the discovery order filed March 28, 2006.

In *McCausland v McCausland*, 129 Wn App 390, 118 P 3d 944 (2005), *reversed* 159 Wn 2d 607, 152 P 3d 1013 (2007), the appellate court remanded for reconsideration of certain issues in dissolution of marriage; the subsequent appeal challenged the post-mandate judgment as beyond the scope of the mandate. The Court of Appeals held that the trial court misinterpreted the appellate court's prior remand instructions, and reversed. *The trial court may not ignore the appellate court's specific holdings and directions on remand.*

Where it cannot be ascertained from the record whether the trial court exercised its discretion on remand as intended by the appellate court, the remedy is to vacate the trial court's judgment and to remand the case for further proceedings. *Marriage of Rockwell* 157 Wn App 449, ___ P 3d ___ (Div. One July 2010). *Marriage of Rockwell* makes clear the burden of proof to show compliance with the mandate is on Canning in this appeal.

In *Hough v Stockbridge*, 152 Wn. App 328, 216 P 3d 1077_ (Sept. 2009) the appellate court held that its decision “governs all subsequent proceedings in any court once the appellate court issues a mandate.” 152 Wn App at 337. Moreover, in *State v Schwab*, 134 Wn App 635, 141, P 3d 658 (2006), Division One held:

Superior courts must strictly comply with directives from an appellate court which leave no discretion to the lower court. 134 Wn App at 645.

Canning contended in the trial court that the trial judge effectively was not obliged to comply with the mandate, if certain circumstances were present, despite the plain, clear wording of the subject court rule, RAP 12.2, or that Stevenson waived her rights under the mandate. CP 2152-2154. However, a trial court's duty to comply with the mandate cannot be waived by the parties because the duty is owed by the trial court to the higher court that set out the terms of the mandate.

This Court stated as follows in *Optimer Int'l v. RP Bellevue, LLC*, 151 Wn App 954, 214 P 3d 954 (Div. One, 2009):

As our Supreme Court recently emphasized, we may not "excuse an order based on an erroneous view of the law because the trial court considered and rejected an equally erroneous argument. *State v. Quisimundo*, 164 Wn. 2d 499, 505, 192 P. 3d 342 (2008). "A trial court's obligation to follow the law remains the

Same regardless of the arguments raised by the parties before it."
Quisimundo, 164 Wn 2d at 505-06.

Division One recently held that if the record of the case does not demonstrate the mandate was complied with, the trial court must be reversed and the case remanded. *Marriage of Rockwell*, supra 157 Wn App 449, ___ P 3d ___ (July 2010, Div. One)

Recently in the trial court, Canning admitted that he in effect encouraged the trial judge not to comply with the mandate. See Response to Motion to Vacate October 29, 2009 order awarding attorneys' fees. CP 2152-2155.

No. 2. The trial court erred in entering Finding of Fact No. 21 (April 6, 2009 order dismissing the complaint): "Although the dismissal was later reversed because the necessary findings were not stated in the order of dismissal as required by Rivers v. Wash. State Conference of Mason Contractors, 145 Wn. 2d 674, 41 P. 3d 1175 (2002), there was no suggestion that Ms Stevenson should be excused from appearing for her deposition."

This "finding of fact" is in reality an erroneous conclusion of law. This statement is intentionally false and misleading because there clearly is nothing in the mandate to suggest Stevenson's deposition should be taken before the trial judge provided the findings omitted from the May 9, 2006

order dismissing the complaint. The mandate did not provide for the trial court to order Stevenson to appear for a deposition.

No. 3. The trial court erred in entering Finding of Fact No. 21 (April 6, 2009 order dismissing complaint) stating in part that: "Ms. Stevenson has had ample opportunity to comply with her obligations under the Civil Rules and with this Court's order. Her conduct has consumed precious judicial resources, harming not only her party-opponent but the judicial system itself."

This "finding of fact" is obviously untrue, insofar as it is a statement of fact, because Stevenson was denied her right to have the trial court determine her CR 59 motion for reconsideration of the discovery order, before Judge Washington dismissed the complaint for her failure to comply with the challenged order. Moreover, this "finding of fact" is really an erroneous conclusion of law because the mandate did not provide for Canning to engage in discovery, and any "consum[ption of] scarce judicial resources, harming not only [Canning] but the judicial system itself" was caused entirely by Canning himself, who on Hansen's advice decided to try to have the trial court not comply with the mandate because compliance with the mandate would have led to successful appeal by Stevenson. CP 2152-2154.

Canning and his attorneys have breached court rules in their efforts to dismiss my case. Defendant's counsel did not comply with CR 26 (i), LCR 37 (e) or LCR 37 (f) before he filed the motion to compel. Hansen and his client have failed to comply with their obligations under the Civil Rules and Local Rules, consuming precious judicial resources, harming Canning's party-opponent and the judicial system itself. Judge Chris Washington failed to rule on Stevenson's motion for reconsideration of the order compelling discovery, even though it was properly filed and served in early December 2008. Judge Washington also failed to determine Stevenson's motion for reconsideration of the order amending the order compelling discovery filed February 20, 2009. CP 340-348.

No. 4. The trial judge erred when he purported to set up a Status Conference for April 6, 2009 without entering an order as required by CR 16(a), and then employed the Status Conference as a pretext for conducting a hearing on Canning's motion to dismiss the complaint.

No motion seeking a status conference had been filed by either party to the case. No order was filed to report to reflect the results of the Status Conference, as required by CR 16(b). Stevenson had objected to the trial judge's conducting a Status Conference when the trial court had not entered an order as required by CR 16. And she had informed the court that she

could not attend any court matter on the first Monday of any given month. The transcript of the hearing conducted ex parte on April 6, 2009 shows that the trial judge was aware that Stevenson would not be able to be in the trial court that day. In the unnumbered "finding of fact" handwritten by Canning's counsel at the hearing, Hansen stated that the trial judge had attempted to set up a Discovery Conference. No motion for such a conference had been filed by either party. CR 26(f).

No. 5 The trial judge erred by failing to determine Stevenson's CR 59 motion for reconsideration of the February 10, 2009 order amending the order compelling discovery, before he dismissed the complaint for Stevenson's failure to comply with it, and by not deciding Stevenson's timely CR 59 motion for reconsideration of the April 6, 2009 order dismissing the complaint, until October 29, 2009.

"Judges should dispose promptly of the business of the court." CJC(A)(6). The trial judge did not decide Stevenson's December 1, 2008 motion for reconsideration of the discovery order until nearly one year later - October 29, 2009. Stevenson's February 20, 2009 motion for reconsideration of the amended discovery order was not decided until October 29, 2009. The trial judge dismissed the complaint for Stevenson's

failure to comply with discovery order on April 6, 2009. CR 59(b) obliges the trial court to determine the motion in 30 days of the decision challenged by the motion, or soon after if more time is needed and a request is made for a response from the non-moving party. *Singleton v Naegli Reporting*, 142 Wn. App 598, 175 P 3d 574 (2008). Additionally, Judge Washington's personal rules of court (Appendix) clearly show that the trial judge normally decides motions on the hearing date or soon after.

No. 6. The trial court erred by conducting an ex parte oral hearing on Canning's motion to dismiss the complaint on April 6, 2009 without giving prior notice of hearing to Stevenson, and by entering the April 6, 2009 order dismissing the complaint.

- Issues:
1. May a trial judge set up a Status Conference without entering an order as required by CR 16(a)?
 2. May a trial judge set up a Status Conference for a date he knows one party cannot be in court for?
 3. May a trial court set up a Status Conference without entering an order, then on the date of the purported "Status Conference" conduct a hearing on a motion to dismiss the complaint?

4. Was the trial judge obliged to give Stevenson notice of hearing on Canning's motion to dismiss the complaint before oral hearing on that motion?

CR 16(a) requires a court order to set up a Status Conference. None was entered. No report of the results of the Status Conference was filed.

In *State v. Napier*, reconsideration denied, 49 Wn App 783, 746 P 2d 832 (1987), the appellate court noted that CR 54 (f)(2) ordains that no order shall be signed or entered until opposing counsel has been given 5 days' notice of presentation, and that the record before the appellate court "does not establish that Mr. Napier or his counsel were given any notice that the February 4 order was to be entered. The order was not approved by Mr. Napier or his counsel." 49 Wn App at 787. Stevenson obviously had no notice the trial judge was going to enter the order dismissing the complaint on April 6, 2009. In *Napier*, the trial court had assumed notice had been given to the opposing party; the appellate court reversed on grounds the record had to establish that notice of entry was given. Canning cannot show such notice was given because it was not given, and Canning does not claim notice of entry was given. Without proof of notice, the order is void.

In *Seattle v. Sage*, 11 Wn App 481, 523 P 2d 942 (1974), the appellate court held that the effect of the failure to give CR 54 (f)(2) notice of

presentment to the opposing party was to void the entry of the judgment [or order] and "to make the action of the trial court ineffectual." 11 Wn App at 482. Again, Canning makes no claim he gave notice of presentment. CR 59 (a)(1) provides that any decision or order may be vacated and reconsideration granted if "irregularity in the proceedings of the court" materially affect the moving party's "substantial rights." Clearly it was an "irregularity for the trial court to hear Canning's March 9, 2009 motion to dismiss the complaint, on an ex parte basis, with no notice to Stevenson, and to dismiss her complaint for failure to comply with a discovery order granted when the trial judge had no authority to consider Canning's motion to compel.

No. 7. The trial court erred in entertaining the October 29, 2008 motion to compel discovery when Canning's counsel had not "met and conferred" with Stevenson prior to the filing of the motion, no case schedule order was in effect, and the mandate did not provide for discovery by Canning.

The trial judge had no authority to entertain the motion to compel. Stevenson had agreed to confer with Canning's counsel regarding discovery matters provided an agenda was agreed beforehand. Local Civil Rule required Canning to seek a court order obliging Stevenson to attend a discovery conference. LCR 37 (e).

Hansen's declaration in support of the motion to compel discovery stated: "Ms. Stevenson failed to provide any prior notification that she would not (or could not) appear for the deposition." In fact, Stevenson had reminded Hansen that she had a motion pending to disqualify him for misconduct, and that in the circumstances he should not be conducting a deposition.

Misconduct in discovery proceedings is routine behavior by Canning's attorneys in this case. Hansen's former law partner, James Hurt, obtained an order compelling discovery on March 28, 2006, without even mentioning CR 26 (i) or LR 37 (e) in his motion. This meant the motion was fatally defective on its face and the trial judge had no authority even to entertain the motion. *Rudolph v. Empirical Research Systems*, 107 Wn. App. 861, 28 P. 3d 813 (2001)

Stevenson was insisting on an enumeration of the numerous discovery issues that she had raised since August 2005; Stevenson had invited Canning to engage in informal discovery, to take her deposition on written questions, to submit more interrogatories and requests for production, and to submit requests for admission. CP 317-328.

In Canning's motion to compel discovery, filed October 29, 2008, the "Authority" section of the motion ignored LCR 37 (e) and LCR 37 (f).

Canning had this whole matter backwards: the compliance with the "meet and confer" requirements of CR 26 (i) and LCR 37 (e) *must precede* the filing of the motion to compel discovery. In his declaration supporting the motion to compel, Hansen conceded he had not "met and conferred" with Stevenson. Hansen argued that he complied with CR 26 (i), by claiming falsely that Stevenson refused to meet and confer with him.

A trial court's authority to entertain a motion, as opposed to its authority to decide that motion, is a question of law. *Clarke v. State Attorney Generals Office*, 133 Wash. App. 767, 138 P. 3d 144, review denied 160 Wash. 2d 1006, 158 P. 3d 614 (2006). Hansen admits that he did not "meet and confer" with Stevenson before he filed the motion to compel discovery. As a result, as a matter of law the trial judge did not have authority to entertain the motion to compel. *Clarke v. State Attorney General*, *supra*.

In *Clarke*, the State argued that the trial court did not have authority to hear Clarke's discovery motions because she failed to conduct the required CR 26(i) prefiling conference. The purpose of CR 26(i) is to facilitate non-judicial solutions to discovery problems by requiring the parties to conduct a conference before attempting to obtain a court order. *Case v. Dundom*, 115 Wn. App. 199, 203, 58 P.3d 919 (2002)

Generally, an appellate court reviews a court's decision regarding noncompliance with court orders for abuse of discretion. *Dundom*, 115 Wn. App. at 201. But if the court does not have the discretion to hear a particular matter and its decision is based on a matter of law, then the appellate court conducts de novo review. *Dundom*, 115 Wn. App. at 201. "A trial court's authority to entertain a motion, as opposed to its authority to decide that motion, is a question of law. *Dundom*, 115 Wn. App. at 201 (quoting *Rudolph v Empirical Research Sys., Inc.*, 107 Wn App. 861, 866, 28 P.3d 813 (2001)). In *Dundom*, the appellate court ruled that CR 26 (i) requires literal compliance and that the trial court lacks the authority to hear a motion to compel when the parties do not certify that they have complied with the conference requirements. 115 Wn. App. At 203.

Stevenson had continuing discovery problems with Canning, well known to Hansen. Hansen refused even to discuss having an agenda because an agenda would have revealed Canning was knowingly ignoring the mandate. Canning asked the trial court to apply Local Rule 37 (d) to pursue the relief he obtained for Defendant Canning by flouting Local Rules 37 (e) and 37 (f)! By not requesting a response from Canning to Stevenson's December 1, 2008 motion for reconsideration of the order compelling discovery, the trial judge enabled Hansen to conceal his non-compliance with

Local Rules 37 (e) and 37 (f). The trial judge waited until March 13, 2009, to deny Stevenson's December 1, 2008 motion for reconsideration of the order denying her motion to strike offending portions of Hansen's declaration in support of the motion to compel.

No. 8. The trial court erred by not enforcing the order filed September 16, 2008, "Order Revoking/Lifting Stay; Clerk to Issue New Scheduling Order and Assign Judge".

Canning's stratagem of arranging for the trial judge not to comply with the mandate depended for its success on the trial court's failure to enforce the court order filed before Judge Washington was assigned to the case, in which the Superior Court Clerk was directed to enter a scheduling order. This order would have provided for the date the findings were to be returned to the appellate court, and it would have prevented Canning from arguing that he needed to prepare for "trial" when there obviously would be no trial at that time or in the fairly near term, given that the matter would be back in the appellate court for further review pursuant to the mandate.

No. 9. The trial court erred in denying Stevenson's April 16, 2009 CR 60 motion to vacate the April 6, 2010 order dismissing the complaint.

Issues: 1. Should the trial judge have denied Stevenson's CR 60 motion to vacate the April 6, 2009 order dismissing the complaint without providing grounds or reasons?

2. May a trial judge entertain defendant's motion to dismiss a complaint without giving prior notice to the plaintiff?

Stevenson was not given notice of hearing prior to the April 6, 2009 hearing. CR 60(b)(1) allows vacation of a judgment for irregularities. "Irregularities pursuant to CR 60 (b)(1) occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted. . ." *Kennewick Irrig. Dist. v. Real Property*, 70 Wn App 368, 853 P 2d 488 (1993), review denied, 866 P 2d 40. Staging an ex parte hearing on a motion to dismiss the complaint, with no notice to Stevenson, was an irregularity.

In *Estate of Treadwell ex rel. Neil v. Wright*, 115 Wn App 238, 61 P 3d 1214 (Div. One, 2003), review denied, 149 Wn 2d 1035, 75 P 3d 969, this Court noted that a trial court's decision to grant or deny a motion to vacate will not be overturned on appeal absent an abuse of discretion; discretion is abused if it is exercised on untenable grounds for untenable reasons. CR 60 (b). This Division reversed the trial court's errors of law, in

the alternative since the trial court did not specify which grounds it relied on in deciding the CR 60 motion.

No. 10. The trial court erred in entering the Omnibus Order October 29, 2009 with no notice of presentation to Stevenson, so that the order is void.

CR 54(f)(2) provides that: “No order or judgment shall be signed or entered until opposing counsel have been given 5 days’ notice of presentation and served with a copy of the proposed *order*...” Canning failed to provide any notice of presentation. In *State v Napier*, supra, 49 Wn. App 783, the appellate court ruled an order void because the appellate record failed to show opposing counsel received five days’ notice of presentation. See also *Seattle v Sage*, supra, 11 Wn App 481.

No. 11. The trial judge erred by denying Stevenson's motion for a change of judges and by not deciding such motion until after he dismissed the complaint.

Issue: Did the trial judge fail to meet the test of impartiality?

See discussion under **No. 46**, infra.

No. 12. The trial court erred by entering its order February 10, 2009 granting Canning's motion to amend the order compelling discovery.

The trial court had no authority to consider a motion to compel discovery, given that no case schedule order was on file at the time Canning filed the motion to compel discovery, and no case schedule order was in effect at the time the order granting the subject motion was filed.

No. 13. The trial judge erred in entering "findings of fact and conclusions of law 1 thru 7, in "Order Awarding Reasonable Attorneys' Fees and Costs to Defendant" filed October 29, 2009.

More specifically, in #7 the subject order states: "The Court concludes that the total hours expended by Kevin B. Hansen, James E. Hurt, John J. White, Jr., and Livengood, Fitzgerald & Alskog, PLLC in this lawsuit were reasonable and necessary and that the total amount of fees requested by Mr. Canning for the legal services, \$8,013.50, and that the total amount of costs requested by Mr. Canning, \$1,013.00, are reasonable." As detailed elsewhere in this brief, Hurt colluded with an attorney pretending to represent Stevenson in order to get the case dismissed by an order the Livengood law firm had reason to know was fatally defective. Since reversal and remand - - requested by Canning - - the Livengood law firm essentially has been engaged in a scam, to see if they are able to arrange for the trial court not to comply with the subject mandate. None of these actions can be deemed

"reasonable" for the Estate of Mary Canning, of which Canning is the Personal Representative.

No. 14. The trial judge erred in denying Stevenson's March 9, 2009 CR 60 motion to vacate the discovery order of March 28, 2006.

Statement of Issues

- D. Did Judge Jones lack legal authority to entertain the motion to compel, when the motion failed to meet the requirements of CR 26 (i) and LR 37 (e)?
- E. Given the obvious collusion of Bittner with opposing counsel, to enable the trial judge to entertain a motion he lacked legal authority to consider, should the order have been vacated?
- F. Did Bittner's intentional failure to provide even minimally competent representation to his client, Stevenson, in an obviously collusive scheme with opposing counsel, meet one or more of the tests set out in CR 60 (b) (4) allowing relief from a court order on grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party"?

By order entered March 28, 2006, Judge Jones directed Stevenson to appear for a deposition even though the motion filed by Canning seeking to compel discovery failed to comply with the "meet and confer" requirement of

CR 26 (i) and LR 37 (e). Hurt had not met with Bittner, Stevenson's attorney, regarding discovery issues prior to the filing of the motion on March 16, 2006, and the motion failed even to mention CR 26 (i) or LR 37 (e).

Bittner obviously was aware Hurt had not "met and conferred" with him as required by CR 26 (i) and LR 37 (e), and Bittner, equally obviously, was well aware his duty, in representing Stevenson, was to file a response to the motion to compel, pointing out to Judge Jones the failure of opposing counsel to comply with mandatory court rules (CR 26 (i), LR 37 (e)) before Hurt filed the motion to compel discovery.

Bittner was an experienced trial lawyer, well aware the moving party had to satisfy the "meet and confer" requirement of CR 26 (i), by an affirmative statement in the motion itself, otherwise the trial judge lacked authority even to consider the motion. Bittner was Stevenson's attorney until March 28, 2006, when the order authorizing his withdrawal was entered by the trial judge (Sub # 41). Bittner failed to inform the trial court it lacked authority to consider the motion to compel discovery, both before the order was considered (on March 24, 2006), and after it had been ruled on but before he had withdrawn as Stevenson's counsel.

Hurt would not have filed the motion to compel discovery, if he was not already aware opposing counsel was a participant in a scheme intended to enable the trial judge to entertain a motion to compel discovery when the trial judge lacked legal authority to entertain the subject motion. *Rudolph v Empirical Research Systems*, 107 Wn. App. 861, 28 P. 3d 813 (2001). Hurt clearly knew he could rely on the dishonesty of Bittner in intentionally failing to respond appropriately to Hurt's motion to compel by calling Judge Jones' attention to the fact Hurt failed to comply with CR 26 (i) and LR 37 (e) before Hurt filed the motion to compel discovery. By encouraging dishonesty on Bittner's part, and by exploiting that dishonesty to gain unfair advantage in the litigation, Hurt clearly engaged in misrepresentation to the Court of the relevant law and engaged in misconduct with opposing counsel. Therefore, CR 60 (b) (4) allows this Court to vacate the order of Judge Jones filed March 28, 2006, compelling discovery (Sub. No. 42).

Clearly, Mr. Bittner had colluded with "opposing" counsel to provide the false evidence to be used against Stevenson in this case. An attorney who deliberately fabricates evidence, or knowingly permits fabricated evidence to be entered in court record without informing the court of that fact, is guilty of

perpetrating a fraud on the court and is subject to disbarment or suspension.
In re Kerr, 86 Wn 2nd 655, 548 P 2nd 297 (1976)]

Canning, in his response to Stevenson's motion to vacate the March 28, 2006 discovery order, argued that the order was moot because a new discovery order had been filed. However, the trial court under the mandate had not authority to enter a new discovery order. Canning also argued that it was too late for Stevenson to challenge the March 28, 2006 discovery order, but this was specious because the appellate court specifically allowed the challenge in the subject mandate.

No. 15. The trial court erred in entering Finding of Fact No. 19 (April 6, 2009 order dismissing complaint) : "Ms. Stevenson has now refused to obey two separate discovery orders from this Court. She has provided no reasonable excuse or justification for failing to comply."

The discovery order signed March 24, 2006 was, pursuant to the mandate, subject to challenge by Stevenson. CR 54(6)(2) provides that : "No order or judgment shall be signed or entered until opposing counsel have been given five days' notice of presentation and served with a copy of the proposed order..." The trial court denied Stevenson's challenge, apparently on grounds it had been filed "too late" or was "moot." Canning's

response had conceded the motion was meritorious. CP 372-378, 393-397. No case schedule was in effect at the time Canning filed his motion to compel discovery (September 29, 2008), and no case schedule order was in effect at the time the order was entered. Moreover, Stevenson had CR 59 motions for reconsideration pending, for both the original order compelling discovery, and the amended order compelling discovery.

In Blair v. TA-Seattle E. #176, 150 Wn App 904, 210 P 3d 326 (2006), the Court stated:

A violation of a court order without reasonable excuse will be deemed willful. Here, Blair failed to comply with the trial court's discovery orders and was unable to provide any legitimate reason for that failure. Therefore, Blair's violation of discovery orders is deemed willful. 150 Wn App 904, at 909.

Stevenson had challenged both the discovery order and the amended discovery order, and those challenges were still undetermined. Clearly she had a legitimate reason not to comply with orders that were under challenge. Moreover, the trial judge had no authority under the mandate even to order Stevenson to be deposed.

No. 16. The trial court erred in entering Finding of Fact No. 19 (April 6, 2009 order dismissing complaint): "Ms. Stevenson has established a clear pattern of following the Civil Rules when it benefits her (and

demanding that others follow the Civil Rules) and ignoring the Civil Rules and this Court's orders when it does not. Her refusal to obey the February 10 discovery order was willful and deliberate."

The trial court had no authority to consider the original motion to compel, filed September 29, 2008, or the order seeking to amend the order compelling discovery, because no case schedule order had been filed at the time of entry of the discovery order and there was no provision in the mandate for Canning to engage in discovery on remand; therefore, Stevenson's "refusal to obey" the February 10, 2009 amended discovery order was not "willful" or "deliberate" because Canning in effect was trying to force Stevenson to waive her CR 59 motions challenging both the original discovery order and the amended discovery order, and Canning was also improperly seeking to coerce a "waiver" of Stevenson's rights under the mandate.

No. 17. The trial court erred in entering Finding of Fact No. 2, of the subject order dismissing the complaint, which states that "Ms. Stevenson did not appear for her deposition on November 30 [2005]."

This "finding of fact" is untrue. This deposition had been stricken by agreement of counsel for Defendant David Canning. See Sub #58 "Notice to Strike Amended Notice Deposition of Plaintiff." CP 238-240

No. 18. The trial court erred in entering Finding of Fact No. 3 (April 6, 2009 order dismissing complaint) stating that: “Mr. Canning re-noted Ms. Stevenson’s deposition for January 12, 2006. Ms. Stevenson failed to appear.” Stevenson stated in her April 16, 2009 declaration:

In fact, James Hurt cancelled the deposition after I informed him I was still trying to retain counsel. There was no “deposition” at which I failed to appear, and Hansen and David Canning are obviously aware of that fact. CP _____

No. 19. The trial court erred in entering Finding of Fact No. 3 (April 6, 2009 order dismissing complaint) stating that: “Mr. Canning then filed a motion to compel Ms. Stevenson to appear for her deposition. The Notice of Hearing and Motion to Compel were mistakenly filed [in a different case].”

This "finding of fact" is untrue because CR 6 requires all motion papers to be filed no later than five court days before the subject hearing. Here, the motion and notice of hearing *were not filed in the court file for this case*. Thus, they were not filed as a matter of law and this “finding of fact” that they were filed in this case is a conclusion of law that is manifestly erroneous.

No. 20. The trial court erred in entering Finding of Fact No. 4 stating that: “Prior to the hearing, attorney James U. Bittner served a Notice of

Appearance on behalf of Ms. Stevenson and requested that the motion to compel be stricken.”

This “finding of fact” is untrue. There was no hearing to be stricken because the motion and notice of hearing had not been filed in the court file for this case. There was no stipulation by Bittner and Hurt regarding discovery, and no basis for such an agreement. Bittner did not file his Notice of Appearance until February 14, 2006, when he informed Stevenson he *could not* represent her.

No. 21. The trial court erred in entering Finding of Fact No. 5 stating that: “On March 2, 2006, while still representing Ms. Stevenson, Mr. Bittner appeared for Ms. Stevenson’s deposition. Ms. Stevenson again failed to appear.”

This finding is knowingly false. The “again failed to appear” is based on the false statements noted above, that Stevenson had not appeared at depositions for November 30, 2005 and January 12, 2006 when both had been stricken. Moreover, Bittner had informed Stevenson in writing that he could not represent her, two weeks before he purported to appear at the “deposition” March 2, 2006. Stevenson had spoken to Mr. Bittner only once in late January 2006. Bittner did not let Stevenson know he was going to

appear at Hurt's law offices to pretend to be ready to represent her in a deposition. CP _____.

No. 22. The trial court erred in entering Finding of Fact No. 6 stating that: "Mr. Canning filed a second motion to compel on March 16, 2006. Ms. Stevenson submitted a response in opposition to the motion."

This "finding of fact" is untrue because the March 16th motion was the first motion to compel in this case. Bittner filed the Response to the Motion to Compel, (Sub # 35 on the docket, filed March 22, 2006) and failed to mention that Hurt had not complied with CR 26 (i) or LR 37 (e) and (f). Bittner also failed to mention Hurt had not "met and conferred" with him as required by CR 26 (i).

No. 23. The trial court erred in entering Finding of Fact No. 10 stating as follows: "After the mandate was issued, Mr. Canning served a notice of deposition on Ms. Stevenson to appear at her deposition on Friday, October 24, 2008. Ms. Stevenson did not appear."

This "finding of fact" in effect conceals a false legal conclusion that the trial court had filed a case schedule order authorizing discovery; Canning had no right to serve a notice of deposition. Moreover, the mandate did not provide for Canning to take Stevenson's deposition.

No. 24. The trial court erred in entering Finding of Fact No. 10 stating: “Her response [to the motion to compel] did not identify a reason that she should not attend her deposition.”

This statement is false. Stevenson reminded Hansen that she had a motion to disqualify him pending. The trial court had not filed a case schedule order authorizing discovery.

No. 25. The trial court erred in entering Finding of Fact No. 10 stating in part that: “Mr. Canning then filed a third motion to compel Ms. Stevenson to appear for her deposition.”

This statement is false. Hurt filed one motion to compel discovery, on March 16, 2006. Hansen’s motion to compel was the second such motion, not the third.

No. 26. The trial court erred in entering Finding of Fact No. 10 stating in part that: “Ms. Stevenson responded [to the second motion to compel, falsely described as the third motion to compel] by filing a motion to strike the declaration of Mr. Canning’s counsel”.

This “finding of fact” is not true. Stevenson moved to strike *two small portions* of Hansen’s declaration in support of the motion to compel discovery, *on grounds they were materially false and misleading*. The precise segments she asked be stricken were identified in the motion.

No. 27. The trial court erred in entering Finding of Fact No. 12 stating that: “Although the hearing [on the motion to amend the discovery order] was noted for December 10, 2008, the order granting the motion to amend was not signed and filed until February 10, 2009.”

This “finding of fact” is untrue. Reference to the subject order (Sub # 125) shows it was signed on December 17, 2008, the date noted for hearing the two motions for reconsideration Stevenson filed December 1, 2008 (Subs # 116 & 117).

No. 28. The trial court erred in entering Finding of Fact No. 14 stating that: “Ms. Stevenson failed to comply with the Court’s February 10 [2009] order [compelling discovery].”

This finding of fact conceals an erroneous legal conclusion of law that the discovery order was valid. Stevenson’s motion for reconsideration of the order compelling discovery (filed December 1, 2008) was pending, as was her motion for reconsideration of the order amending the discovery order. Moreover, the mandate did not provide for Canning to engage in discovery, and the November 19, 2008 discovery order was entered when there was no scheduling order in effect providing for discovery.

No. 29. The trial court erred in entering Finding of Fact No. 15 stating that: “James Canning, who was at that time a licensed attorney,

represented both himself and Ms. Stevenson [in the Kevin Delany, Bernard Krisher and Avelin P. Tacon III v. James Canning and Karen Stevenson case].”

Stevenson stated in her April 16, 2009 declaration supporting her motion to vacate that:

In fact, the law firm of Witherspoon, Kelley, Davenport & Toole represented James Canning and Karen Stevenson in that case until Robert H. Lamp of that firm withdrew after arranging for the intervention of Avelin P. Tacon III as an additional plaintiff. Tacon denied that a partnership existed, and the purported basis of Delany’s case was to obtain a partnership accounting. David Canning and Paul Canning regarded themselves as partners in the same partnership, but they were not parties in the action.

Canning has not responded to this sworn statement.

No. 30. The court erred in entering Finding of Fact No. 15 stating that: “The court of appeals subsequently sanctioned Ms. Stevenson and James Canning for their appeal, which it characterized as ‘totally without merit’ and ‘frivolous.’”

Finding of Fact No. 15 not only fails to mention the fact Keyes represented me and James Canning in the “frivolous appeal” of the Delany and Tacon judgments, it also fails to mention that the trial judge entered an order forbidding James Canning and me from appearing in court or from

filing any motions, until James Canning complied with Tacon's discovery demands, directed solely to James Canning, to Tacon's satisfaction.

Stevenson stated in her April 16, 2009 declaration supporting her motion to vacate that:

In fact, the appeal was handled by Michael F. Keyes, an experienced appellate lawyer, who was himself a former appellate court commissioner and candidate for the appellate bench. Keyes refused to let me or James Canning know what issues he intended to raise on appeal, and filed the appeal brief without letting me see it or even know about it until months later. Keyes refused to raise the issue of lack of jurisdiction over the subject matter because all the partners were not joined to the action. Keyes also concealed from the appellate court the fact the trial judge, Michael Donahue, granted judgment to Tacon on the basis there was no partnership, and then in a subsequent trial conducted without notice to me or to James Canning, determined that there was in fact a partnership. Again, the trial judge was well aware that all necessary parties had not been joined to the action, and that these necessary parties included David D. Cullen and Avelin P. Tacon III, both experienced trial lawyers from Olympia, Washington and a third lawyer, Peter J. Shutz of Virginia. Tacon had been dismissed from the case before trial, even though he was a necessary party. See my declaration filed March 18, 2009. This is Sub # 162 on the docket for this case. However, on the SCOMIS docket for this case, Sub # 162 appeared on March 24, 2009 but was removed on March 25, 2009, and it has remained removed from the SCOMIS docket for this case, up to April 15, 2009.

Finding of Fact No. 15 not only fails to mention the fact Keyes represented me and James Canning in the "frivolous appeal" of the Delany and Tacon judgments, it also fails to mention that the trial judge entered an order forbidding James Canning and me from appearing in court or from filing any motions, until James Canning complied with Tacon's discovery demands, directed solely to James Canning, to Tacon's satisfaction. This finding also does not mention that Paul J. Allison of the Randall & Danskin Law Firm in Spokane,

Washington arranged for James Canning and me to be represented by Keyes in the appeal, and that Allison himself was active in framing the issues to be raised in the appeal brief (which neither James Canning nor I saw until months after it had been filed). Allison has represented David Canning in various matters for many years, including David Canning's attempt to gain control of the numerous real properties involved in the Delany, Krisher & Tacon v. Canning & Stevenson litigation. In this effort, David Canning concealed from me and James Canning the fact Allison was representing David Canning in the effort to gain legal rights to properties subject to the void judgments.

Canning has not responded to this sworn statement of Stevenson.

No. 31. The trial court erred in entering Finding of Fact No. 16 stating that "James Canning is currently suspended from the practice of law".

In fact, James Canning has never practiced law, although he had membership in the state bar association as a requirement for employment with the Federal Government in Washington, D. C. Clearly this "finding of fact" was included in the subject order to defame defendant Canning's brother. No evidence was provided to suggest a disciplinary issue existed regarding James Canning.

No. 32. The trial court erred in entering Finding of Fact No. 15.

Stevenson stated in her April 16, 2009 declaration:

I reply that I lived alone in Spokane for nearly twenty years on E. 65th Ave, which leads directly into Westminster Lane. David Canning is very well aware that James Canning lived on Sumner Avenue in Spokane for most of the 1980s before he moved to Seattle. The

numerous properties involved in the Kevin Delaney litigation are located on or near Westminster Lane.

Finding of Fact No. 15 apparently is intended to create the false impression James Canning is engaged in a meretricious relationship with me. James Canning and his mother lived on Sumner Avenue in Spokane in a very large house that formerly belonged to David M. Canning. Defendant Canning knew very well that his mother lived with James Canning on Sumner Avenue. After Mary L. Canning moved to Seattle in 1989, for the next nine years she often stayed with me at my house in Spokane while visiting her friends and relatives in Spokane and North Idaho.

Canning has not responded to this sworn statement of Stevenson.

No. 33. The trial court erred in entering Finding of Fact No. 18 stating that: “Ms. Stevenson has made full use of the discovery process for her own benefit. She served two sets of requests for admissions on Mr. Canning. . . Mr. Canning timely responded to her discovery and her concerns about earlier discovery requests.”

This “finding of fact” conceals a false legal conclusion that the discovery engaged in by Canning was not voluntary. No schedule order had been filed authorizing discovery. Stevenson adds here that the fact Canning voluntarily engaged in some discovery with Stevenson is irrelevant to the issue of what the mandate obliged the trial court to do with the case upon remand. Moreover, Stevenson still has discovery issues with Canning that

Gayle Brenchley refused to address and instead withdrew as counsel for plaintiff.

No. 34. The trial court erred in entering Finding of Fact No. 19 stating that: “Ms. Stevenson has now refused to obey two separate discovery orders from this Court. She has provided no reasonable excuse or justification for failing to comply.”

The latter statement is false. In fact, the first discovery order was obtained in direct contravention of CR 26 (i) and LR 37 (e) and (f). The trial judge, Richard A. Jones, had no authority even to entertain the motion to compel because the motion did not contain a statement that the “meet and confer” requirements of CR 26 (i) had been complied with, and counsel for the parties had not “met and conferred” as required by CR 26 (i). There was no compliance with Local Rule 37 (e) or LR 37 (f). Motions for reconsideration of the discovery order were pending. See argument under

No. 35. The trial court erred in entering Finding of Fact No. 20 stating that: “Ms. Stevenson’s claim is based on eight promissory notes allegedly signed by the decedent, Mary Canning, in favor of Ms. Stevenson over a period of eighteen years, from 1982 until 2000.”

This “finding of fact” creates the false impression that all of the subject promissory notes bear signatures challenged by Canning. In fact, Canning agreed to provide Stevenson with a copy of the handwriting report by his expert witness, but then he refused to do so. Canning has not identified any of the promissory notes as having a suspect nature. Stevenson’s declaration of April 16, 2009 stated:

In fact all but the first note arose during the period 1994 to 2000 during which Bank of America, as Trustee of the two Canning trusts (of which Mary L. Canning was sole income beneficiary), cut the income of the widow of Thomas E. Canning, M. D., to a total of \$500 (five hundred dollars) per month. The widow’s income from social security was \$300 (three hundred dollars) per month during this period. Defendant Canning to this day has refused to answer the interrogatory served on him in June 2005, asking him which of the promissory notes bore a signature by the decedent that he believed was not genuine. Rather than answer the interrogatory, James E. Hurt stated in writing that Defendant Canning would have his expert witness review the promissory notes and that she would identify which notes, if any, appeared to bear signatures that were not genuine. The handwriting expert examined all of the signatures on the notes, but that report was never delivered to me, nor were the ostensibly suspect signatures ever identified.

As Trustee of the Canning Trusts, Bank of America brought extended litigation against the sole income beneficiary of those trusts, Mary L. Canning. David M. Canning encouraged the Trustee to initiate the suit and to prosecute it for years even though it largely destroyed his own mother’s life. While the suit was being pursued by the Trustee against the sole income beneficiary, the Trustee cut off almost entirely the income of those trusts from the income beneficiary.

Canning did not respond to this statement.

No. 36. The court erred in entering Finding of Fact No. 20 stating that: “Mr. Canning cannot obtain meaningful information about and defend against the claim without taking Ms. Stevenson’s deposition.”

This “finding of fact” is in reality a concealed erroneous conclusion of law. The mandate did not provide for Canning to take Stevenson’s deposition but instead for the court to supply the findings of fact omitted by Judge Jones in his May 9, 2006 order dismissing the complaint.

No. 37. The trial court erred by entering Finding of Fact (unnumbered but would have been No. 23 at page 9 of the April 6, 2009 order dismissing the complaint).

This “finding” was handwritten by Hansen at the hearing (conducted ex parte April 6, 2009.) The subject finding falsely states that Stevenson received notice of the hearing for April 6, 2009. In *Discipline of Carmick*, 146 Wn. 2d 582, 48 P 3d 311 (2002), the Supreme Court stated: "In an ex parte proceeding, an attorney is required to inform the tribunal of all relevant facts known to the attorney that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse * *

* These rules are designed to protect the integrity of the legal system and the ability of courts to function as courts. An attorney's duty of candor is at its highest when opposing counsel is not present to disclose contrary facts or

expose deficiencies in legal argument." *Carmick*, 146 Wn 2d 582, at 595. Even a quick reading of the transcript of the ex parte hearing conducted by Judge Washington on April 6, 2009 reveals that the proceeding was set up deliberately, to enable "hearing" on Canning's motion to dismiss the complaint without prior notice to Stevenson. The notice of hearing set the hearing for March 19, 2009. CP 2335-2336.

CR 26 (f) Discovery Conference allows the court to direct the parties or attorneys to appear before it for a "conference on the subject of discovery." The court responds to a motion by the attorney for any party, with specific information required in that motion including "the issues as they then appear." Objections or additions to the matters set out in the motion must be served not later than 10 days after service of the motion. Here, there was no motion by Hansen for a discovery conference, and obviously no compliance with CR 26(e) or CR 26 (f). Stevenson was afforded no opportunity to object or provide additions to the matters set out in the motion. Moreover, the mandate did not provide for a trial or for Canning to prepare for trial by taking Stevenson's deposition. See also argument under No. 38.

No. 38. The trial court erred in its Finding of Fact No. 22: "Although the dismissal was later reversed because the necessary findings were not

stated in the order of dismissal. . .there was no suggestion that Ms. Stevenson should be excused from appearing for her deposition.”

This “finding of fact” is in reality an erroneous conclusion of law. This statement is intentionally false and misleading because there clearly is nothing in the mandate to suggest Stevenson’s deposition should be taken before the trial judge provided the findings omitted from the May 9, 2006 order dismissing the complaint. The mandate did not provide for the trial court to order Stevenson to appear for a deposition.

No. 39. The trial court erred by denying Stevenson’s motion to vacate the April 6, 2009 order dismissing the complaint.

CR 60 (b)(1) allows the trial court to vacate the order dismissing the complaint "for surprise, excusable neglect or irregularity in obtaining a judgment or order;" while CR 60 (b)(4) allows vacation for "Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Hansen knowingly wrote in the "finding of fact" stating that Stevenson had received notice of the hearing on the motion to dismiss the complaint, when *Hansen knew no such notice had been given to Stevenson*. Call it surprise, call it irregularity, or call it fraud by Hansen, Stevenson was entitled as a matter of law to the vacation of the order

dismissing the complaint. The setting up of a Status Conference for April 6th, and then “hearing” the motion to dismiss the complaint when Stevenson, *as expected*, did not appear for the status conference, is an “irregularity” per CR 60 (b)(1) requiring vacation of the order dismissing the complaint.

The trial judge’s bailiff communicated numerous times with Stevenson, regarding a *status conference* on April 6, 2009. What concept of fairness includes intentionally deceiving a litigant about the nature of an important proceeding? The trial judge should have stated that Stevenson had been informed of a status conference set for April 6, 2009 and that she had informed the court she could not attend a status conference on that date, and that she objected to any Status Conference that was not set up by a court order per CR 16. The trial court’s actions were not reasonable when it dismisses a complaint as sanctions for failure to comply with a discovery order when the trial judge had lacked authority as a matter of law to entertain the motion to compel discovery.

No. 40. The trial court erred in entering Conclusion of Law No. 1 stating that: “King County Local Rule 37 (d) provides that when a party fails to appear for her deposition, this Court is authorized to ‘make such orders in

regard to the failure as are just,' including 'any action authorized under CR 37.'”

The mandate had no provision for Stevenson’s deposition. Also, the trial judge had failed to determine Stevenson’s motions for reconsideration of the discovery order and the amended discovery order. Clearly it was not “just” for the trial judge to dismiss the complaint for failure to comply with discovery orders the trial judge had no authority to enter before the court ruled on those motions. Moreover, the trial judge breached his duty to rule on motions in a logical and efficient order. A trial court, as a general rule, has discretion to rule on motions in *whatever order the judge believes is most logical and efficient*, and this action is reviewable for abuse of discretion only. *State ex rel. Keeler v Port of Peninsula*, 89 Wash. 2d 764, 575 p 2nd 713 (1978). Here, the trial judge failed entirely to rule on the motions challenging the discovery orders.

No. 41. The trial court erred in entering Conclusion of Law #3 of order dismissing the complaint: “Ms. Stevenson’s pattern of misconduct and refusal to obey the February 10 [2009] discovery order was willful and deliberate, and her conduct has substantially prejudiced defendant David Canning’s ability to prepare for trial.”

This statement is untrue. Canning was well aware the mandate did not provide for a trial, but instead for a return of the case to the appellate court after the omitted “findings of fact” were provided (and after the other issues raised by Stevenson and specifically authorized to be raised on remand, were considered by the trial court). The mandate had no provision for a trial and Canning had no need to “prepare for trial.”

No. 42. The trial judge erred by failing to meet the test of impartiality and violated the appearance of fairness doctrine.

The trial judge stalled, delayed ruling on the motions for reconsideration of the discovery order and the amended discovery order, and ultimately failed to decide the motions until six months after he dismissed the complaint for failure to comply with the amended discovery order. The trial judge dismissed the case without having determined either motion. This is clear evidence of bias and prejudice against Stevenson. Due process, the appearance of fairness doctrine, and the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. *Fertilizer Corp. v. Martin*, 103 Wash. App. 836, 14 P. 3d 877 (2000). Where a reasonable man might question a trial judge’s impartiality, recusal is mandatory. *Sherman v. State*, 128 Wash. 2d 164, 905 P. 2d 355, reconsideration denied, amended, 128 Wash. 2d 164,

905 P. 2d 355 (1995). *State v Perada*, 132 Wn. App. 99, ___ P 3d ___ (2006). More recently, the trial judge has failed to determine Stevenson's October 4, 2010 CR 59 motion for reconsideration of the judgment entered September 22, 2010. The trial judge also has failed to determine Stevenson's January 11, 2011 CR 59 motion for reconsideration of the judgment entered January 3, 2011. The trial judge failed to request responses from Canning to either CR 59 motion even though Local Rule prohibits granting such a motion when a response has not been requested. LCR 59.

No. 43. The trial court erred by failing to determine Stevenson's April 8, 2009 motion for the trial court to produce a copy of the notice of hearing that trial court bailiff claimed Stevenson had received for the April 6, 2009 hearing on Canning's motion to dismiss the complaint.

Issues pertaining to Assignment of Error :

3. Should the trial court have decided Stevenson's April 8, 2009 motion for the trial court to produce a copy of the notice of hearing (for the April 6, 2009 hearing on Canning's motion to dismiss the complaint) before the trial judge denied Stevenson's CR 60 motion to vacate the April 6, 2009 order dismissing the complaint?
4. Should the trial court have determined Stevenson's April 8, 2009 motion?

Clearly, the trial court should have decided Stevenson's April 8, 2009 motion before he decided other motions filed subsequently. If the trial court was unable to produce a copy of the alleged notice of hearing Stevenson ostensibly received, this fact bore directly on the issue of vacating the order dismissing the complaint.

No. 44. The trial court erred by granting Canning's October 29, 2008 motion to compel discovery by order filed November 19, 2008.

The trial court lacked authority to consider Canning's motion to compel discovery, when no Case Schedule Order had been filed, the mandate did not provide for Canning to engage in discovery, Canning's counsel had not "met and conferred" with Stevenson prior to the filing of the motion, and the motion to compel did not state that Canning's counsel had "met and conferred" with Stevenson prior to the filing of the motion, for the simple reason Kevin Hansen had not met or conferred with Stevenson. See **No. ____** supra.

No. 45. The trial judge erred by failing to rule on Stevenson's objection to a status conference, prior to his hearing Canning's motion to dismiss the complaint and by confusing CR 16(a) and CR 26(f).

It was self-evidently unfair for the trial judge to ignore Stevenson's objection to a status conference when the trial court obviously had failed to comply with CR 16(a) because he had not filed an order. Canning argued that the bailiff's email to Hansen and Stevenson was a court order. See May 22, 2009 Response. CP 501-539. The trial judge erred by confusing CR 16(a) and CR 26(f) in the order dismissing the complaint. The trial judge's bailiff attempted to set up a CR 16 Status Conference, but the order dismissing the complaint refers to a Discovery Conference (in the unnumbered handwritten "finding of fact" on page 9.)

No. 46. The trial judge erred by determining Canning's March 9, 2009 motion to dismiss the complaint, before he determined Stevenson's February 20, 2009 motion for reconsideration of the amended order compelling discovery, when the dismissal of the complaint was on grounds Stevenson had not complied with the amended order compelling discovery.

CR 59(e) provides that, after a CR motion for reconsideration is filed, the judge on his own motion or on application must determine whether the motions or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, "shall fix the time within which the briefs shall be served and filed." The trial court did not respond to Stevenson's CR 59 motion for reconsideration of the February 10, 2009 order

amending the order compelling discovery, and arranged for an ex parte hearing on Canning's March 9, 2009 motion to dismiss the complaint. See Nos. ____ and _____

No. 47. The trial court erred by failing to determine Stevenson's timely-filed motion for reconsideration of the May 9, 2006 order dismissing the complaint.

Court rule required determination of the CR 59 motion within 30 days of the decision challenged by it, unless the court stated it needed more time and requested a response from the non-moving party. CR 59(b). The trial judge was obliged to determine the motion by June 8, 2006. In fact, he never decided it. This failure substantially injured the plaintiff.

No. 48. The trial judge erred when he granted Canning's motion to dismiss the complaint, by order filed May 9, 2006, when Canning's counsel failed to state in the motion to dismiss, that he had "met and conferred" with Stevenson prior to filing the motion.

See discussion under No. ____ supra.

No. 49. The trial judge erred by failing to determine motions in a timely, logical and fair manner.

The trial court failed to determine Stevenson's April 8, 2009 motion for the trial court to produce a copy of the supposed notice of hearing the bailiff

stated on the record (at the ex parte hearing conducted April 6, 2009) Stevenson had received, before he denied Stevenson's CR 59 motion for reconsideration of the order dismissing the complaint - an action done on October 29, 2009!

No. 50. The trial court erred by refusing to enter an order to show cause after Stevenson filed her April 16, 2009 CR 60 motion to vacate the order dismissing the complaint, by declining to conduct an oral hearing on the motion, by declining to request further briefing from the parties, and by not deciding the motion until October 29, 2009.

On April 6, 2009, the trial court conducted the hearing on Canning's motion to dismiss the complaint *without giving any notice to Stevenson prior to the hearing*. At the hearing, conducted on an *ex parte* basis, the trial court's bailiff stated on the record that Stevenson had received notice of the hearing, and three times during the hearing, the trial judge commented on the record that Stevenson had received notice of the hearing and had not appeared. On April 8, 2009, Stevenson filed a motion asking the trial court to produce a copy of the notice of hearing that she supposedly had received. *The trial judge never decided this motion.*

In his response to Stevenson's CR 59 motion, Canning argued that Stevenson had received notice of hearing for March 19, 2009, and *that the*

trial court was not obliged to provide the date at which the hearing actually took place even though that was more than two weeks later. CP 501-539.

The trial court, at the time of the ex parte hearing April 6, 2009, had not yet determined Stevenson's December 1, 2008 CR 59 motion for reconsideration of the order compelling discovery filed by the trial judge November 19, 2008 - - before he had entered a Case Schedule Order establishing the time period for discovery. Nor had the trial judge decided Stevenson's CR 59 motion for reconsideration of the order denying her motion to strike a portion of Hansen's declaration supporting the motion to compel discovery. Moreover, the trial court as of April 6, 2009 had not ruled on Stevenson's timely CR 59 motion for reconsideration of the amended order compelling discovery, filed February 10, 2009. CR 59 (b) required the trial judge to determine the motions within 30 days of the decision challenged by the motions. Stevenson obviously had a right to expect rulings on the three motions before any hearing would take place on a motion to dismiss based on failure to comply with the orders challenged by the subject CR 59 motions.

As of October 29, 2009, the trial judge still had not determined Stevenson's April 8, 2009 motion requesting that the trial court produce a copy of the notice of hearing that trial judge's bailiff claimed had been

received by Stevenson prior to the April 6, 2009 hearing. Clearly, if the trial judge was not able to show that Stevenson had received notice, her CR 60 motion to vacate should have been granted, and it was reversible error for the court to delay ruling on the motion for six months.

The trial court did not decide the motions until October 29, 2009, and gave no reason for the delay or for his refusal to enter an order to show cause. A trial judge may deny a CR 60 motion to vacate, without oral argument, when the non-moving party has responded to the motion, neither party's affidavits raise disputed issues of fact, and the motion itself raises issues that could have been raised at trial, *Stoulil v Epstein*, 101 Wn App 294, 3 P 3d 764 (2000); none of these conditions was present when Judge Washington declined to enter the order to show cause or to hold oral hearing of the CR 60 motions Stevenson filed in April 2009. Stevenson clearly was prejudiced by the trial judge's failure to enter an order to show cause because a hearing would have required Canning to demonstrate that Stevenson received notice of hearing (for April 6, 2009 hearing) –something Canning obviously could not do.

No. 51. The trial court erred by not determining motions in a logical, fair manner.

“A trial court, as a general rule, has the discretion to rule on motions in whatever order the judge believes is most logical and efficient.” *State v. Port of Peninsula*, 89 Wn. 2d 764, 575 P. 2d 713 (1978). Here, the trial judge failed to determine Stevenson’s April 8, 2009 motion for the court to produce a copy of the notice of hearing the bailiff stated on the record (at the ex parte hearing April 6, 2009) was supposedly received by Stevenson. CR 59 (b) obliged Judge Washington to determine Stevenson’s two December 1, 2008 CR 59 motions by late December 2008; and to determine Stevenson’s February 20, 2009 CR 59 motion of the amended discover order by March 9, 2009. The trial court abused its discretion by granting Canning’s motion to dismiss when it had not determined Stevenson’s motions for reconsideration of the discovery orders.

Recently, Canning explained that his attorneys in effect arranged for the trial judge not to comply with the mandate. CP 2152-2160. As experienced appellate lawyers, Canning’s counsel were aware that a decision on the discovery orders could be taken to this Court on a Notice of Discretionary Review, at which the failure of the trial court to comply with the subject mandate could have been raised. To prevent appellate review of the mandate issue, the trial judge apparently intentionally failed to comply with the time limits set in CR 59 (b), and decided Canning’s motion to

dismiss for failure to comply with discovery orders when those orders were under challenge by Stevenson.

On January 3, 2011, Judge Washington filed a further judgment in favor of Canning. The subject judgment, for CR 11 sanctions, was filed despite the fact the trial court has not ruled on Stevenson's November 29, 2010 motion for reconsideration of the order imposing sanctions. CP 2234-2245. Clearly, the trial court's disinclination to determine motions in a logical, fair order - - mandatory under the clear Supreme Court precedent set in *State v. Port of Peninsula, supra* - - is an ongoing problem. Stevenson notes that the trial judge has failure to determine her October 4, 2010 motion for reconsideration of the re-instated sanctions order filed September 22, 2010 (after the judge had stricken those sanctions by order filed August 5, 2010 - - though no approval had been obtained from this Court).

No. 52. The trial court erred when the trial judge failed to determine Stevenson's motion seeking a change of judges before he dismissed the complaint.

Case law is clear that a motion for a change of judges must be decided before the judge determines the action. [cite]

No. 53. The trial judge erred when he denied Stevenson's CR 59 motion for reconsideration of the order dismissing the complaint, and

Stevenson's CR 60 motion to vacate the order dismissing the complaint, without providing any grounds or reasons for his decisions.

In *Wilcox v Lexington Eye Institute*, 130 Wn App 234 (2005), the court noted that a reviewing court "will not reverse a trial court's ruling [denying CR 59 motion for reconsideration] absent a showing of manifest abuse of discretion" which exists "when its decision is based on untenable grounds or reasons." 130 Wn App at 241. The trial court's failure to provide grounds or reasons may well be because the trial judge had none to supply.

In *Beers v Ross*, 137 Wn App 566, 154 P 3d 277 (2007), the appellate court held that a trial court abuses its discretion when its decision is based on untenable grounds or reasons, and that an untenable ground or reason *includes a decision made summarily for no apparent reason*. A proper exercise of discretion requires some stated reason supporting the decision.

In *State v Parada*, 75 Wn App 224, 877 P 2nd 231 (1994), after the appellant filed its brief, arguing that the trial court's denial of appellant's motion for reconsideration without in effect giving any reasons for doing so, was a reversible abuse of discretion, the trial court entered an order giving its reason. "Thus, the trial court specified its reasons for denying the [CR 59] motion and there was no abuse of discretion." *State v Parada*, supra, 75 Wn App at 235.

No. 54. The trial judge erred in entering the November 30, 2009 judgment in favor of Canning.

All of the actions of Canning's attorneys prior to the reversal of the trial judge, on Canning's own motion, obviously should not be payable by Stevenson. The actions by Canning's attorneys after remand were clearly intended to prevent Stevenson from enjoying the outcome of the first appeal, by arranging for the trial judge not to comply with the mandate. Canning's attorneys were paid for engaging in a scam.

CONCLUSION

Relief Requested

Stevenson asks this court to remand the case to the trial court, for the implementation of the mandate issued in No. 58341-7-I, with vacation of all actions of the trial court, by Judge Washington, including reversal of the judgment filed November 30, 2009.

Stevenson asks this court to sanction Canning for gross discovery abuse, by declaring that Stevenson's claims should be approved by default.

Stevenson, in the alternative, asks that this court remand the case to the trial court for entry of judgment in favor of plaintiff on all claims, as sanctions for gross discovery abuse by the defendant.

Stevenson asks for an award of attorney's fees and costs.

Stevenson asks this court to vacate March 28, 2006 order compelling discovery.

Stevenson asks this court to vacate November 19, 2008 order compelling discovery.

Stevenson asks this court to vacate February 10, 2009 amended order compelling discovery.

Respectfully submitted, February 14, 2011



Karen A. Stevenson, pro se
424 21st Avenue, Seattle WA 98122
Ph: 206-860-3701
Kas416@msn.com

DECLARATION OF SERVICE:

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on February 14, 2011, I filed this document with Division I of the Court of Appeals. Also on February 14, 2011, I delivered a copy of this document to: Kevin B. Hansen, 121 Third Avenue, P.O. Box 908, Kirkland, WA 98083-0908.



Karen A. Stevenson

APPENDIX I



Judge Chris Washington

Mailing Address:

King County Superior Court
516 3rd Ave, Room C-203
Seattle, WA 98104
Mailstop: KCC-SC-0203

Courtroom Number: W-905

Phone: 206-296-9111

Fax: Please contact the bailiff regarding fax transmissions.

Judicial Assignment: Criminal

Email: washington.court@kingcounty.gc

Department Number: 42

Working Papers: Use mailing address or d King County Courthouse, Room C-203

Bailiff: Mary Radley

mary.radley@kingcounty.gov
206-296-9111

Visit this webpage BEFORE CONTACTING THE COURT.

RULES TO REVIEW BEFORE CALLING

- Motions Without Argument: Local Rule 7(b); Trial Continuances: Local Rule 40; Summary Judgment: Local Rule 56 & Civil Rule 56;
- Change of case assignment, consolidation of cases, or reactivation of cases with new judge and case schedule: direct to the Chief Civil Judge, per Local Rule 40

ADDITIONAL RULES OF THIS COURT

- Please email the bailiff to schedule motions requiring oral argument.
- DO NOT confirm motions without oral argument; these motions may be set for any day which meets service requirements of the rule.
- Please notify the bailiff by email to strike a motion; always provide case name and cause no. and the date for which the motion is noted.
- Copies of orders will not be mailed if pre-addressed stamped envelopes are not provided pursuant to KCLR 7; copies of orders may be obtained through the Clerk's Office approximately 5 days after a ruling has been issued if no envelopes are provided.
- DO NOT call the bailiff regarding the status of a ruling within 48 hours of the day the motion is noted to allow receipt of a conformed copy of the order in envelopes that were provided.
- Motions not in compliance with local rules will be stricken without prejudice.
- Always provide case name, cause no., your name and phone number, and the nature of your inquiry when calling/emailing the bailiff; otherwise, you may not receive a response.
- Highlight pertinent portions of any case authority submitted to the court for both the court and opposing council.
- Requests for oral argument on motions that are heard without oral argument: please note your motion without oral argument and indicate next to the date of the motion

"ORAL ARGUMENT REQUESTED." Judge Washington will review the motion on the date it is noted without oral argument and decide whether it is necessary for oral argument. If he finds it is necessary, his bailiff will contact all parties to schedule a new date and time for oral argument on the motion. If he finds it is not necessary for oral argument, you will not be contacted by the court and you will receive a copy of the order if preaddressed, stamped envelopes were provided pursuant to KCLR 7.

- Email inquiries usually receive a more prompt response than phone messages.

SETTLEMENT CONFERENCES

- Judge Washington will conduct settlement conferences. Contact the bailiff to schedule conferences and for further information.

WEDDINGS

- Weddings can be performed at the Courthouse Monday through Friday after 4:30 PM. Weddings may also be scheduled for evenings and weekends outside the Courthouse. Please contact the bailiff for more information. You must have a marriage license that is valid for the date of the ceremony.

[Home](#) | [Privacy](#) | [Accessibility](#) | [Terms of use](#) | [Search](#)

Links to external sites do not constitute endorsements by King County. By visiting this and other King County web pages, you expressly agree to be bound by terms and conditions of the site

© 2009 King County

APPENDIX II

STATEMENT OF THE CASE

(Taken from Stevenson's Motion to Modify/Contingent Brief Filed November 15, 2006 in COA No. 58341-7)

According to the case docket maintained by the Superior Court Clerk, on January 25, 2006, Mr. Hurt filed a declaration in support of a motion to compel my attendance at a deposition. (CP 32). However, Mr. Hurt did not file the actual motion with the Clerk, nor did he file a Notice of Hearing. LR 7 mandates that the motion and the notice be filed with the Clerk not later than six court days before the hearing. (Attached as Exhibit A is a copy of the letter dated July 18, 2006 that I received from the Records Services Supervisor confirming that there is no record of any filing by Mr. Hurt of the motion or the notice of hearing.) Mr. Hurt provided a "copy" of the motion to compel to Judge Jones on January 25, 2006. The "copy" falsely represented that it had been filed with the Clerk. See Exhibit E to Declaration of James E. Hurt in Support of Motion to Dismiss Complaint of Karen Stevenson (Sub No. 47, CP pp. 112-115.) [CP 1821-1858]. The "copy" also falsely represented that the motion was set for "hearing" February 6, 2006.

On February 2, 2006, James Bittner executed a Notice of Appearance for the Plaintiff, and transmitted a copy to Mr. Hurt. Despite his contractual agreement with me to file his appearance "immediately", Mr. Bittner did not file it until February 14, 2006. (CP 47.)

According to Mr. Hurt's sworn declaration dated April 19, 2006, "the original Motion to Compel Karen Stevenson to Attend Deposition was stricken at the request of Mr. Bittner who I allowed to become acquainted with the facts of the case and then rescheduled the deposition." Declaration of James Hurt in Support of Motion to Dismiss Complaint. (CP at 92) [CP 1821-1858]. Please note that Mr. Hurt did not claim that he agreed to the striking of a hearing; none was scheduled. Please further note that no deposition was scheduled, so that "rescheduling" could not have taken place.

Without any advance notice to me, Mr. Bittner agreed to my being deposed on March 2, 2006. On February 14, 2006, before he filed his

Notice of Appearance, Mr. Bittner informed me that he could not represent me unless I agreed to a material unilateral revision to the agreement by which he represented me. I refused.

On February 23, 2006, Mr. Bittner filed his Notice of Intent to Withdraw. (CP at 50-52.). I agreed to the appropriateness of the withdrawal, given Mr. Bittner's tacit admission that an actual or likely conflict of interest existed. I told Mr. Bittner I would need at least three weeks to obtain replacement counsel. CP 66. . I also told him I obviously could not be deposed without counsel present⁵, and he could not represent me.

Without my knowledge, and despite his admission he had an actual or possible conflict of interest, Mr. Bittner "appeared" at the "deposition" March 2, 2006. Mr. Bittner concealed his spurious "appearance" from me, and when I filed my objection to his withdrawal (within the ten-day period required), I did so without any awareness a "deposition" had been staged. (CP at 92.)

On March 20, 2006, Mr. Hurt served a "renewed" motion to compel on me. Given that the motion had not been filed previously, the description of it as being a "renewed" motion was intentionally deceptive. The motion to compel had a "hearing" date of March 27, 2006. This motion provided me with my only knowledge that Mr. Bittner had pretended to "appear" at the so-called "deposition." I say "pretended" because Mr. Bittner had tacitly conceded to me that he was disqualified from appearing due to conflict of interest problems.

Also on March 20, 2006, Mr. Bittner served me with his Motion to Withdraw, with a "hearing" date of March 24, 2006. LR 7 requires the motion and the notice of hearing to be served six court days before the scheduled "hearing" date.

When I was served with the deceptively entitled "renewed" motion to compel, on March 20, 2006, I learned to my astonishment that when Mr. Bittner had "appeared" at the "deposition", he had communicated to Mr. Hurt the message that he intended to withdraw as my attorney because I had failed to appear. This factual representation by Mr. Bittner was materially false. Moreover, Mr. Hurt was aware of this material falsity because Mr. Bittner had served the notice of intent to withdraw on Mr.

Hurt ten days earlier. CP 65. Clearly, Mr. Bittner had colluded with “opposing” counsel to provide the false evidence to be used against me in this case. An attorney who deliberately fabricates evidence, or knowingly permits fabricated evidence to be entered in court record without informing the court of that fact, is guilty of perpetrating a fraud on the court and is subject to disbarment or suspension. *In re Kerr*, 86 Wn 2nd 655, 548 P 2nd 297 (1976), cited in 7 Am Jur 2nd, para. 50, Suppression or fabrication of papers or evidence.

Mr. Bittner’s motion to withdraw as my attorney was set for “hearing” March 24, 2006, with Mr. Hurt’s motion to compel set for “hearing” March 27, 2006. CP 65. The “hearing” for the motion to compel was stricken from the court clerk’s docket on March 22nd. CP 66 . I had informed Judge Jones that I did not object to the granting of the motion to withdraw, provided I was not prejudiced by the “hearing” of the motion to compel three days later because I needed time to obtain replacement counsel. CP 65-67.

On the afternoon of March 24th, Judge Jones “heard” both motions, and granted them. CP 77-80. I had not opposed the granting of the motion to withdraw provided that no action was taken on the motion to compel until a later date yet to be determined. Any waiver on my part of sufficient notice for the “hearing” on the motion to withdraw specifically excluded the “hearing” on the deceptively entitled “renewed” motion to compel.