

NO. 71050-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARK PHILLIPS,
Defendant/Appellant,

v.

ESTATE OF ROBERT M. ARNOLD,
Plaintiff/Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JOHN ERLICK

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. RESTATEMENT OF ISSUES RELATING TO ASSIGNMENTS OF ERROR	2
III. STANDARD OF REVIEW	2
IV. RESTATEMENT OF THE CASE.....	3
A. Mark Phillips' Technology Companies	3
B. Phillips Solicits a \$5,500,000 Investment in Banana from Arnold	7
C. Mark Phillips' Misuse of Corporate Funds.....	8
1. Phillips Receives \$1,160,000 in Consulting Fees from Banana.....	8
2. Douglas Lower Receives a Large Personal Loan Consulting Fees from Banana	9
3. Phillips Approves a \$2,385,000 Loan from Banana to A- Dot and Then Uses Those Funds for His Own Personal Benefit.....	10
4. Phillips Approves a \$1,000,000 Consulting Fee from Banana to A-Dot and Then Uses Those Funds for His Personal Benefit.....	12
D. Phillips Did Not Institute Any Governance Structure for Banana.....	14
E. Arnold Files a Verified Shareholder Derivative Complaint Against Banana and MOD.....	15
F. Partial Summary Judgment Against Phillips and A-Dot	17

V. ARGUMENT	18
A. Breach of Fiduciary Duty and Unjust Enrichment	18
1. Phillips Failed to Rebut the Evidence of Corporate Malfeasance Presented by Arnold	24
2. Partial Summary Judgment Against A-Dot Was Proper.....	25
B. Finding of Fact 2 Confirms Partial Summary Judgment Was Proper.....	25
C. The Trial Court Did Not Abuse Its Discretion by Entering a Protective Order that Arnold Need Not Attend Trial.....	26
D. Phillips’ Appeal of the Order Denying Motion to Vacate Should Be Rejected Because He Failed to Designate the Record on Review.....	30
E. The Findings of Fact Are Not Based on Inadmissible Hearsay.....	31
F. Finding of Fact 22 Is Not Based on Hearsay	32
G. The Findings of Fact Are Supported by Substantial Evidence	35
1. Substantial Evidence Supports Finding of Fact 16 that Phillips Engineered His Receipt of A-Dot’s \$1,000,000 Consulting Fee	35
2. Finding of Fact 17 that the Million Dollar Payment Was Without Business Justification Is Supported by Substantial Evidence; Likewise Finding of Fact 25 that the Nuevatel Agreement Was Not Entered Into by Banana Is Also Supported by Substantial Evidence	36
3. The Court’s Findings of Fact 18 to 25 that (1) The A-Dot Loan of \$2,385,000, (2) Certain Disbursements to Phillips from Said Loan, and (3) the \$1,160,000 Consulting Fee to Phillips Were Without Business Justification and Not	

Disclosed to Mr. Arnold Are Supported by Substantial Evidence.....	38
a. Finding of Fact 18	38
b. Finding of Fact 19	39
c. Finding of Fact 20	39
d. Finding of Fact 21	39
e. Finding of Fact 22	40
f. Finding of Fact 23.....	43
g. Finding of Fact 24.....	44
h. Finding of Fact 25	44
4. There Is Substantial Evidence that Phillips’ Self-Dealing Caused Banana Damage	44
5. A-Dot’s Breach of the Promissory Note is Supported by Substantial Evidence.....	46
6. Finding of Fact 27 Contains a Scrivener’s Error Which Is Not Reflected in the Conclusion of Law.....	47
7. Banana Did Not Waive Its Right to Recover Funds Paid to Lower	47
8. The Trial Court Did Not Err in Calculating Damages.....	48
VI. ATTORNEYS FEES: RAP 18.1	50
VII. CONCLUSION	50

APPENDIX

- RCW 2.48.170 Only Active Members May Practice Law
- RCW 23B.08.300 General Standards for Directors
- RCW 23B.08.320 Limitations on Liability of Directors
- RCW 23B.08.700 Definitions
- RCW 23B.08.710 Judicial Action
- RCW 23B.08.730 Shareholders' Action
- CR 37 Failure to Make Discovery: Sanctions
- CR 40 Assignment of Cases
- CR 41 Dismissal of Actions
- CR 56 Summary Judgment
- LCR 4 Civil Case Schedule
- RAP 9.2 Verbatim Report of Proceedings
- RAP 18.1 Attorney Fees and Costs
- Answer and Affirmative Defenses
- Plaintiff's Statement in Relation to Pending Motion for Partial Summary Judgment

TABLE OF AUTHORITIES

Federal Cases

<i>Grassmueck v. Barnett</i> , 281 F. Supp.2d 1227, 1230 (W.D. Wash. 2003) 19, 20, 21.....	19, 20, 21
---	------------

State Cases

<i>Alexander v. Food Servs. of Am., Inc.</i> , 76 Wn. App. 425 (1994)	28
<i>Allemeier v. University of Wash.</i> , 42 Wn. App. 465, 472-73 (1985).....	31
<i>Anderson v. Mohundro</i> , 24 Wn. App. 569, 575 (1979).....	28, 29
<i>Barnes v. Treece</i> , 15 Wn. App. 437, 444-45 (1976)	42
<i>Boeing Co. v. Heidy</i> , 147 Wn.2d 78, 87 (2002)	35
<i>Brin v. Stutzman</i> , 89 Wn. App. 809, 824 (1998)	35
<i>Campbell v. A.H. Robins Co.</i> , 32 Wn. App. 98, 101-02 (1982)	29
<i>Chandler v. Wash. Tolling Bridge Auth.</i> , 17 Wn.2d 591, 601 (1943).....	21
<i>Colonial Imports, Inc. v. Carlton Northwest Inc.</i> , 121 Wn.2d 726, 734 (1993).....	47, 48
<i>Cottinger v. State Dep't of Employment Sec.</i> , 162 Wn. App. 782, 787 (2011).....	25
<i>Dunlap v. Wayne</i> , 105 Wn.2d 529, 535 (1986).....	23
<i>Eriksen v. Mobay Corp.</i> , 110 Wn. App. 332 (2002).....	27
<i>First Am. Title Co. v. Liberty Capital Starpoint Equity Fund, LLC</i> , 161 Wn. App. 474 (2011)	21
<i>Fisher Props., Inc. v. Arden-Mayfair, Inc.</i> , 115 Wn.2d 364, 369-70 (1990).....	35

<i>Harbor Enters., Inc. v. Gudjonsson</i> , 116 Wn.2d 283, 293 (1991).....	29
<i>Hegwine v. Longview Fibre Co., Inc.</i> , 132 Wn. App. 546, 555-56 (2006).....	3
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 268 (1992)	27
<i>In re Estate of Jones</i> , 152 Wn.2d 1, 8 (2004).....	3
<i>In re Marriage of Langham</i> , 153 Wn.2d 553, 565 (2005)	20
<i>Intertherm, Inc. v. Olympic Homes Sys., Inc.</i> , 569 S.W.2d 467, 471 (Tenn. App. 1978).....	42
<i>Lang v. Hougan</i> , 136 Wn. App. 708 (2007)	20
<i>Lloyd Enters., Inc. v. Longview Plumbing & Heating Co.</i> , 91 Wn. App. 697, 701 (1998).....	25
<i>Magana v. Hyundai Motor Am.</i> , 167 Wn.2d 570 (2009)	29
<i>Marincovich v. Tarabochia</i> , 114 Wn.2d 271, 274 (1990)	22
<i>Meyer v. Univ. of Wash.</i> , 105 Wn.2d 847, 852 (1986)	22
<i>Northwest Indep. Forest Mfrs. v. Dep’t of Labor & Indus.</i> , 78 Wn. App. 707, 712 (1995).....	46
<i>Nursing Home Bldg. Corp. v. DeHart</i> , 13 Wn. App. 489, 498 (1975)	20
<i>Owen v. Burlington N. & Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 789 (2005).....	22
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 42 (2002)	26
<i>Robinson v. Seattle</i> , 119 Wn.2d 34, 82, cert. denied, 506 U.S. 1028 (1992).....	48
<i>Saviano v. Westport Amusements, Inc.</i> , 144 Wn. App. 72 (2008).....	41, 42
<i>Scott v. Trans-Sys., Inc.</i> , 148 Wn.2d 701, 709 (2003).....	20
<i>Seattle First Nat’l Bank v. Washington Ins. Guar. Assoc.</i> , 116 Wn.2d 398 (1991).....	50

<i>State ex rel. Dean by Mottet v. Dean</i> , 56 Wn. App. 377, 382 (1989).....	31
<i>State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.</i> , 64 Wn.2d 375 (1964).....	41
<i>State v. Atkinson</i> , 19 Wn. App. 107, 113 (1978)	32
<i>State v. Read</i> , 147 Wn.2d 238, 244-45 (2002)	34, 35
<i>State v. Rienks</i> , 46 Wn. App. 537, 544 (1987), <i>remanded on other grounds</i> , 110 Wn.2d 1021 (1988).....	31
<i>Wagner v. McDonald</i> , 10 Wn. App. 213 (1973).....	28
<i>Washburn v. Beatt Equip. Co.</i> , 120 Wn.2d 246 (1992).....	1, 31
<i>Washington Federal Savings & Loan v. Alsager</i> , 165 Wn. App. 10, 13 (2011).....	46
<i>White v. State</i> , 131 Wn.2d 1, 9 (1997)	22
<i>Woodhead v. Discount Waterbeds, Inc.</i> , 78 Wn. App. 125 (1995)	27, 28, 29

Statutes

RCW 4.56.120(3).....	27
RCW 2.48.170	25
RCW 23B.08.300.....	18, 19, 21, 25
RCW 23B.08.310.....	19, 20, 21
RCW 23B.08.320.....	19, 20
RCW 23B.08.700.....	5, 36, 45
RCW 23B.08.710.....	5, 36, 45
RCW 23B.08.720.....	5, 36, 45

RCW 23B.08.730.....5, 36, 45

Rules

CR 3729

CR 4027

CR 4127

CR 4329, 30

CR 43(f)(1).....29, 30

CR 54(d).....26

CR 56(c).....21, 22

CR 56(e).....22, 23

CR 6031

CR 70.128

ER 70233

ER 70333

ER 801(d)(2)33

KCLR 4.....26

KCLR 4(c)27, 28

KCLR 4(d)28

KCLR 4(i)(1)27

RAP 9.1(b)30

RAP 9.2.....	31
RAP 9.2(b).....	31
RAP 9.12.....	22
RAP 18.1	50

Other Authority

Edward Brodsky & M. Patricia Adamski, <u>Law of Corporate Officers & Directors: Rights, Duties & Liabilities</u> § 2:1, at 6 (Oct. 2011 West).....	19
<u>Black's Law Dictionary</u> 1261 (6 th ed. 1990).....	41

I. INTRODUCTION

Mark Phillips induced Robert Arnold to invest \$5.5 million in a company Phillips solely owned called Banana Corporation (“Banana”). Phillips squandered the investment on personal luxuries. Mr. Arnold filed a shareholder derivative lawsuit against Banana and another Phillips-owned entity, MOD Systems, Incorporated (“MOD”). That suit was settled by Banana’s assignment of its claims against Phillips to Arnold, which settlement led to the instant trial and judgment against Phillips.

Phillips now seeks to avoid the multi-million dollar judgment against him and his company A-Dot Corporation (“A-Dot”). His appeal challenges not only the trial court’s detailed findings of fact, but also an interlocutory summary judgment of liability, even though he was ultimately permitted to present evidence regarding his liability at trial without restriction. That interlocutory order was rendered moot by the trial court’s unchallenged finding. *See Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300-01 (1992) (partial grant of summary judgment was not certified as final order; thus trial court had authority to modify it at trial). As a result, the trial court’s carefully reasoned decision, based on the testimony of witnesses whom the court deemed credible and on voluminous detailed financial records illustrating Phillips’ personal use of Banana’s funds, should be affirmed.

II. RESTATEMENT OF ISSUES RELATING TO ASSIGNMENTS OF ERROR

A. Did the trial court act within its sound discretion by refusing to require a disabled party to attend trial or to submit to a deposition after the discovery cut-off when the evidence established that the party was gravely ill and then died during the course of the trial?

B. Are the trial court's findings of fact supported by substantial evidence?

C. Did the trial court err in granting partial summary judgment against Phillips where he presented no evidence of specific facts to rebut plaintiff's proofs and where the court entered an unchallenged finding after trial that the order was supported by substantial evidence in the record?

D. Did the trial court err in granting partial summary judgment against A-Dot Corporation when the company was not represented by an attorney?

E. May this court consider an appeal of a pretrial order when necessary clerk's papers were not designated by appellant and where the record of proceeding has not been transcribed?

III. STANDARD OF REVIEW

Mark Phillips challenges the sufficiency of the evidence to support

Banana's judgment against him, but he disregards the governing standard of review. After a bench trial, appellate review of the court's findings is limited to determining whether substantial evidence supports the findings of fact, and if so, whether the findings support the court's conclusions of law. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8 (2004). Phillips' brief fails to grasp that this court reviews the evidence in the light most favorable to the prevailing party and defers to the trial court regarding witness credibility and any conflicting testimony. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 555-56 (2006). Phillips ignores these principles reciting only those "facts" (often without citation to the record) that favor his legal arguments and urging this court to ignore the evidence that supports the trial court's findings of fact and judgment. The following restatement of the case elucidates the substantial evidence supporting the trial court's findings.

IV. RESTATEMENT OF THE CASE

A. Mark Phillips' Technology Companies

Mark Phillips began launching technology companies in 2003. He formed A-Dot Corporation in 2003, MOD (formerly known as POP Media) in 2005, Banana in 2006, and Metawallet Corporation in 2006.

2/26 RP 8, 15; 2/27 RP 8; FF 11, CP 1152; Ex. 56. Phillips was and is the sole owner, director and officer of A-Dot. FF 8, 9; CP 1151-152; 2/6 RP 105, 154; 2/26 RP 7. A-Dot initially attracted contracts with Microsoft for the development of software and other technology. 2/6 RP 38. As part of those contracts, A-Dot followed detailed metrics and protocols for payments and timing of deliverables. 2/19 RP 81-82; 7/29 RP 13, 62-66. In July 2005, Phillips sold A-Dot's assets to MOD. Ex. 82; FF 10; CP 1152; 2/6 RP 27, 38. A-Dot's employees were shifted to MOD as part of the deal. 2/6 RP 27, 38.

MOD was formed to implement a CD-kiosk burning system for Starbucks. 2/21 RP 9. MOD later shifted its focus to a consumer digital media delivery system. Phillips spent his full time (at least 60 hours a week) seeking investment funds for MOD and working on its technology. 2/19 RP 65-66, 96-97, 155-157; 7/29 RP 84. This was his primary focus in 2006 and 2007. 2/19 RP 65-66, 96-97, 156-57. In 2008, Phillips' efforts resulted in a deal with Toshiba Corporation, NCR and Deluxe for a several million dollar investment in MOD. 2/21 RP 12-13, 37-40.

Phillips incorporated Banana on June 16, 2006, as shown by the company's Articles of Incorporation ("Articles") (Ex. 57) and bylaws (Ex. 58). FF 8; CP 1151; 2/27 RP 14; Ex. 202. Phillips set up Banana to exploit and develop technology for micro-credit transactions in third world

countries using pre-paid cell phone cards. FF 1, CP 1152; 2/6 RP 28. This technology was sometimes called “Metawallet.” FF 9; CP 1151.

The Banana Articles restricted the company from entering into contracts and other transactions with interested directors and adopted certain limitations contained in the Washington Business Corporation Act. Ex. 57 (Sections 4.8 & 5.3); CP 205, 208. The bylaws contain a similar restriction.¹ Ex. 58 (Secs. 1.8 & 4.1). The cited provisions of the Act, RCW 23B.08.700 through 23B.08.730, define directors’ conflicting interests and provide for disclosure to the shareholders of the conflicting transactions and a shareholder vote of approval. If the conflicted director is also a shareholder, the Act precludes him from voting to approve the conflicting transaction. *See* RCW 23B.08.730. Mr. Phillips was advised by counsel of these restrictions, but he consistently ignored them. 7/29 RP 88.

In consideration for the stock he received in Banana, on June 19, 2006, Phillips assigned certain intellectual property to it. Exs. 61, 203; CP 254, 255. This assignment recited the transfer of “the business plan for Banana Corporation and all related ideas and intellectual property expressed or implied therein, including any and all derivative works arising out of such business plan, ideas, and intellectual property.” *Id.*

¹ The Consent of Directors in Lieu of Organizational Meeting also limited the CEO’s authority to enter into “arrangements or contracts” on behalf of Banana by reference to the “restrictions set forth in the Company’s Bylaws.” Ex. 205; 2/21 RP 22-23.

(emphasis added). Ex. 61. Kenn Gordon, whom Phillips placed in charge of bookkeeping at Banana, described the intellectual property that was assigned as the “the texting system” which was part of Banana’s “core proposition” – “a set of software applications and network structures to facilitate the use of consumer mobile phones to perform financial transactions.” 2/6 RP 23, 24, 28, 29.

One day after Phillips made that assignment, he signed both sides of a *non-exclusive* license agreement with Banana for a future payment to himself of a \$2.5 million dollar license fee for “all intellectual property rights of Phillips as may exist in relation [to] the items identified in Exhibit A, all After-developed Property, and all Confidential Information disclosed by Phillips hereunder.” Ex. 62 (Sec. 1.3). Exhibit A described the Existing Licensing Material as “All materials related to mobile transactions of property, value or virtual currency.” *Id.* In other words, Phillips was granting a non-exclusive license to Banana for the same intellectual property which he earlier assigned to Banana in the Assignment of Property in return for stock. 2/20 RP 54-55, 58.

At trial Gordon testified he also did not understand the purpose of a Service Agreement between Banana and A-Dot whereby A-Dot would provide requested services to Banana. Ex. 207; 7/29 RP 67. Gordon acknowledged that Phillips authorized Banana to pay \$1,000,000 to A-Dot

in consulting fees under that agreement, but because Banana had contracted with others to work on the Metawallet technology, Gordon could not explain any services that A-Dot had actually provided under the Service Agreement. Exs. 77, 103 (RMA 1903); 2/6 RP 45, 49-50, 153-154.

Forensic investigator Guido van Drunen of KPMG LLP testified that the Service Agreement was illusory. 2/19 RP 106. Ultimately, Phillips used these two agreements to pay himself millions of dollars, the sole source of which was investment funds from Robert Arnold.

B. Phillips Solicits a \$5,500,000 Investment in Banana from Arnold

In the spring of 2006, Phillips met Robert M. Arnold, a Seattle philanthropist and well-known angel investor in the technology community. Phillips pitched his companies Banana and MOD to Arnold. 2/21 RP 13. Arnold agreed to invest. He signed a Subscription Agreement with Banana (Ex. 208), which recites that Phillips would have a “substantial degree of control of the Company” and that Phillips might have “potential conflicts of interest” because he had an equity stake in MOD and A-Dot and because MOD was “currently involved in discussions concerning a strategic transaction.” Ex. 208, at A-4.

On June 22, 2006, Arnold wrote his first investment check to Banana for \$500,000. He ultimately invested \$5.5 million, made in

several six-figure tranches over a period of time: from June 2006 to May of 2007. Ex. 55; FF 12; CP 213-214, 1152; 2/6 RP 144; 2/19 RP 15-16; 2/20 RP 165-69. This resulted in Arnold's ownership of 15% in Banana with Phillips retaining 85% ownership. Arnold was the only cash investor in Banana and the majority of its cash resources came from him. 2/6 RP 35.

C. Mark Phillips' Misuse of Corporate Funds.

1. Phillips Receives \$1,160,000 in Consulting Fees from Banana

From July 2006 to February 2007, Phillips caused Banana to pay himself \$1,160,000 in consulting fees. Ex. 76 (*see* entries dated 7/5/2006, 8/15/2006, 9/5/2006, 11/8/2006, 12/26/2006); CP 213-215; 2/6 RP 49. Each payment coincided with an investment made by Arnold. For example, Mr. Arnold initially invested \$500,000 on June 22, 2006. Phillips then paid himself \$200,000 on July 5th (he paid his close friend Douglas Lower \$200,000 the same day). *Id.* On November 8, 2006, Phillips paid himself another \$200,000 after Banana received an investment of \$250,000 from Arnold on November 3, 2006. *Id.*

Phillips did not have a consulting agreement with Banana, and there was no evidence at trial of a written agreement with Banana setting forth the scope of his work, deliverables, action items, deadlines, or rates. 2/19 RP 69-70, 95-98; 2/25 RP 5-6; 7/29 RP 80-81. Nor did Phillips

introduce any corporate records indicating what consulting work he actually performed, which work would have been independent of the duties and obligations he had as CEO and a director and which differed from work he was performing at MOD. 7/29 RP 84. He also failed to present any documentary evidence that he notified Arnold, as the sole disinterested shareholder, of these insider payments. 7/29 RP 92.

2. Douglas Lower Receives a Large Personal Loan and Consulting Fees from Banana

Phillips hired his high school friend Douglas Lower as a consultant in “Operations” for Banana. FF 26; CP 1156; 2/27 RP 97. Lower signed a very general independent contractor agreement on June 28, 2006. Ex. 212. Other than filling in Lower’s title as “consultant” and checking one box “acceptance testing not required” the remainder of the “agreement” was left blank. No services or deliverables were described and no fees or payment schedule were defined. Ex. 212; CP 229; 7/29 RP 109-111. Phillips signed the agreement on behalf of Banana on July 8, 2006. Ex. 212; CP 229. Banana paid Lower \$200,000 in consulting fees on July 5, 2006 (two weeks after Arnold’s first investment). Exs. 76, 77, 103 (RMA 1798, 1857, 1879); CP 213-214; 2/6 RP 48-49. Phillips caused Banana to pay Lower another consulting fee of \$250,000 on August 28, 2006, for a total of \$450,000 in consulting fees, ostensibly earned in only two months.

This equated to approximately \$1,000 per hour.²

Phillips caused Banana to pay Lower another \$200,000 on February 16, 2007, in the form of a “loan.” Exs. 69, 76, 77; FF 26; CP 215, 1156; 2/6 RP 48, 133-134, 161. Lower did not repay this “loan” and Phillips did nothing to seek repayment. *Id.* At trial, Lower’s wife Maureen could not explain the loan’s purpose. She said they already had money from her husband’s family. 2/20 RP 161, 177. Phillips’ only explanation of the business rationale for Banana’s payment of \$650,000 to Lower over only 7 months was “employee retention.” 7/30 RP 24, 63-64. Yet, as Mr. van Drunen testified at trial, there was no tangible benefit received by Banana, and Lower’s education, talents, and experience did not merit payment of such large sums given Banana’s limited resources. 2/19 RP 88-89, 100-102, 110; 7/29 RP 106-107, 109.

3. Phillips Approves a \$2,385,000 Loan from Banana to A-Dot and Then Uses Those Funds for His Own Personal Benefit

On September 1, 2006, Phillips signed a promissory note on behalf of A-Dot for a loan from Banana in the “maximum amount of \$2,500,000.” Ex. 66; 2/6 RP 39, 48-49. He then caused Banana to loan A-Dot the aggregate sum of \$2,385,000 between September 2006 and

² Exs. 76, 77, 103, at RMA 1889, 1903; FF 27; CP 214, 1157; 2/19 RP 100; 7/29 RP 115. In contrast, Kenn Gordon received only \$30,000 in consulting fees for over two years of work. Exs. 76, 77, 103, at 1862; CP 214; 2/6 RP 37.

August 15, 2007. Exs. 103, 107 (noting draws on 9/1/2006, 10/10/2006, 12/18/2006); Ex. 111 (noting draws on 2/13/2007, 2/23/2007, 2/28/2007, 3/22/2007, 4/10/2007, 4/17/2007, 5/17/2007, 6/11/2007, 6/21/2007 and 8/15/2007); 2/6 RP 38-39, 49. A-Dot only repaid \$50,000. Ex. 111 (pp. 5, 42); 2/20 RP17-18. Phillips did not seek or obtain an independent fairness review of the loan or hold a shareholder meeting to approve it consistent with the Articles and bylaws. 2/19 RP 70-71; 7/29 RP 147.

Although the A-Dot note required that the loan be used to provide “operating funds to the Borrower,” Phillips used the funds for his own personal benefit.³ On April 6, 2007, Banana received \$500,000 from Arnold. Exs. 55, 103. On April 17, 2007, Banana loaned A-Dot \$400,000. Exs. 103 (RMA 1836); 111 (p. 2). One day later on April 18, 2007, A-Dot paid Phillips’ personal income taxes for 2006 in the amount of \$515,000. Ex. 111 (pp. 2, 43). This payment was confirmed by an email sent to Kenn Gordon. 2/6 RP 97-98, 101-102; Ex. 39.

On August 15, 2007, A-Dot received \$170,000 from Banana. Phillips used that money to pay another personal tax bill totaling \$190,000. Exs. 39, 111; 2/6 RP 97-98, 101-102. All together, A-Dot paid \$705,000 of Phillips’ personal taxes. 7/29 RP 151-152; 7/30 RP 14, 20.

³ Kenn Gordon testified that some of the loaned funds were also transferred to MOD, but admitted that MOD’s work had nothing to do with Banana. 2/6 RP 46, 47, 62-65.

Phillips also disbursed the loaned funds to himself through shareholder distributions from A-Dot. On October 10, 2006, A-Dot borrowed \$175,000. Phillips received a \$25,000 disbursement on the same day. Ex. 111. On October 11th, Phillips took the remainder of the loaned funds as a shareholder distribution. Ex. 107, at 3, 27.

On February 23, 2007, A-Dot borrowed \$500,000. Phillips then had A-Dot wire this entire amount to his personal account at Citigroup on February 23, 2007. Ex. 111, at 2.

Phillips used these funds to pay for his lavish lifestyle—charged on A-Dot’s American Express card. Ex. 107, at 19-23, 45-47; Exs. 108, 111, at 67-68; 2/20 RP 47, 64-66; 7/30 RP 19, 84-85, 126-127. Phillips knew this was improper. Kenn Gordon testified that he had repeatedly admonished Phillips not to use the company’s money as if it was solely his own. 2/6 RP 102-10, 119-124, 128-129; Exs. 4, 9, 12, 16, 21, 107, 108.

4. Phillips Approves a \$1,000,000 Consulting Fee from Banana to A-Dot and Then Uses Those Funds for His Personal Benefit

On December 13, 2006, Phillips caused Banana to wire \$1,000,000 to A-Dot. FF 15; CP 1153; Ex. 111; 2/6 RP 61-62, 68, 130-131; 2/20 RP 76, 79-80; 7/29 RP 92. The money was booked in Banana’s QuickBooks records as a payment for “Consulting.” Exs. 76, 103 (RMA 1915, RMA 1930). As soon as that money reached A-Dot, it was wired to Phillips’

account at Ameriprise Financial. Ex. 107 (pp. 4, 9, 30); 2/6 RP 60-62; 2/20 RP 96-98. At trial, there were no records admitted justifying this payment to A-Dot, including invoices, and no documentation that Banana ever requested consultation services from A-Dot even though the Service Agreement required invoices as a condition of payment. Ex. 207; FF 15; CP 1153; 2/6 RP 46, 60, 153-154; 2/19 RP 71-72, 81-82, 102-104; 2/20 RP 12-13, 21-23, 62-63; 2/26 RP 29; 7/29 RP 93-95.

Phillip's justification for this "consulting fee" was for work A-Dot supposedly performed on the Metawallet project, which culminated in an agreement with a Bolivian company known as "Nuevatel." Ex. 215; 7/29 RP 98-99. The Metawallet-Nuevatel Agreement (dated Dec. 20, 2006), however, did not involve Banana. 7/30 RP 101. It was entered into with another Phillips' wholly owned company, Metawallet Corporation, formed by Phillips on December 18, 2006. 2/6 RP 164-165; 2/19 RP 85; 7/29 RP 166-167, 172-173. At trial, both Phillips and his expert Dennis Mandell admitted that Metawallet Corporation was a separate entity. 2/21 RP 16; 7/29 RP 167-168. On cross-examination, Phillips also admitted that he tried to sell Metawallet Corporation in 2008. 7/30 RP 10-12. As a result, the trial court found that Banana had no legally enforceable rights in the Nuevatel contract. FF 25; CP 1156; 2/6 RP 36, 165-166; 2/19 RP 85-87; 2/26 RP 49-50; 7/29 RP 167-171; 7/30 RP 7-9, 101, 105; Ex. 96.

Phillips claimed at trial that he intended to assign the Nuevatel Agreement to Banana, but he admitted he never did so, and the Agreement itself could not be assigned without Nuevatel's approval. Ex. 215; 7/30 RP 7-9, 101, 105. He also claimed he did not intend for Metawallet Corp. to be separate from Banana. Yet, he did nothing to merge the two companies. 2/6 RP 36. Phillips, moreover, used an *identical* form of Assignment of Property to that he had executed for Banana in June 2006, to assign the same intellectual property to Metawallet Corporation in December 2006. Ex. 117. Banana thus gained nothing by paying a "consulting fee" to A-Dot, and there was no evidence at trial to show that A-Dot performed services for Banana valued at \$1,000,000.

D. Phillips Did Not Institute Any Governance Structure for Banana

Although the Banana Articles and bylaws laid out a form of governance for Banana, Phillips did not follow it. 8/23 RP 4-5. The evidence established that he used Banana's money as if it was his own without any formal corporate approval. He held no annual shareholder meetings and never notified the only other shareholder (Arnold) of the significant transactions in which he was engaging, and from which he was personally benefiting. FF 22; CP 1155; 2/19 RP 7-10, 13-14, 16-17, 27-36; 58-62, 66-69, 72-73, 86, 150-151, 154. He also never sought any independent oversight or approvals for his actions, despite being advised

by counsel to do so. 7/29 RP 88.

E. Arnold Files a Verified Shareholder Derivative Complaint Against Banana and MOD

In 2007, Arnold hired Cole Younger to manage his extensive investments. Younger reached out to Phillips to learn more about Banana and MOD since the information Arnold had received was sketchy. 2/6 RP 164-165. Phillips was not cooperative. Ex. 120.

In the fall of 2008, MOD alerted Arnold about an impending multi-million dollar investment deal with Toshiba. To better understand that undertaking and to gather the information Younger still needed to assess the investment, Arnold contacted Phillips requesting detailed information about MOD and Banana, including balance sheets, financial statements, corporate tax returns, and employment agreements. Ex. 121; 7/29 RP 128-129, 138. Phillips did not immediately comply. 7/29 RP 123-124. He found the request invasive and required an NDA before he would disclose *any* information. 7/29 RP 129-130. Arnold signed the NDA, but he never received the information and records he had requested, and what he did receive raised only more questions. 2/19 RP 8-9, 12-14, 16-17, 26-28, 33-35; 7/29 RP 134.

Arnold filed a verified shareholder derivative lawsuit on February 18, 2009. The complaint made allegations substantially identical to those

for which the trial court in this matter ultimately found Phillips liable. Arnold alleged that Phillips breached his fiduciary duty by committing corporate waste, and was unjustly enriched by paying himself \$1,160,000 in consulting fees, by loaning A-Dot over two million dollars, and by paying A-Dot a consulting fee of \$1,000,000 at time when Phillips owned 100% of A-Dot and was in control of Banana. CP 37, 177-194; 2/26 RP 7, 14, 37-38.

Both Banana and MOD initiated independent investigations of the complaint's allegations. Banana appointed two independent directors, who in turn retained the Seattle law firm of Smith & Hennessey, which hired KPMG LLP to perform a forensic investigation. 2/19 RP 47. KPMG's Guido van Drunen conducted four interviews with Phillips and also interviewed other key personnel such as Kenn Gordon and Douglas Lower, and completed an analysis of company documents, including accounting records. CP 42, 45, 52-54; 2/19 RP 47-48, 50, 53, 56, 75, 109-111. The KPMG investigative results confirmed Arnold's allegations and are memorialized in the lengthy KPMG report. Ex. 54; CP 37-38, 41-194. Phillips, unsatisfied with the report, personally retained Dennis Mandell, who issued his own contradictory findings about "Metawallet" (not Banana) in his "MAKO" report. Ex. 228; 2/21 RP 155.

Arnold ultimately settled with both MOD and Banana. As part of

his settlement with Banana, Banana assigned its claims against Phillips to Arnold. Ex. 113; 7/30 RP 58-59. Arnold then filed this lawsuit on behalf of Banana Corporation against Phillips and A-Dot seeking damages. CP 1-20. He passed away before the trial was complete. His Estate was then substituted as the plaintiff. FF3; CP 769-772, 848-850, 1150.

F. Partial Summary Judgment Against Phillips and A-Dot

Before trial the court considered a motion for partial summary judgment of liability as to Phillips and A-Dot. CP 21-280, 433-435. The motion claimed Phillips was liable for breach of fiduciary duty and related wrongdoing. The motion also claimed A-Dot was liable for failure to repay the \$2,385,000 loan from Banana. Phillips submitted responsive briefing, but did not rebut the examples of corporate waste recited. At the July 20, 2012 hearing, the court gave Phillips, who appeared pro se (A-Dot not appear through counsel) a liberal opportunity to explain his large expenditures, payments, and loans. The court also questioned Phillips as to if and when he notified shareholder Arnold of the transactions. Phillips stated that he relied solely on a general disclosure in Banana's Articles "for the authority to spend money as I saw fit." 7/20/12 RP 27. He did not dispute that he caused the various transactions to occur, and he conceded he did not give Arnold contemporary notice of the conflicting interest transactions in which he engaged. 7/20/12 RP 21-24, 26. Instead,

he admitted he only gave information to Arnold in 2008, well after the transactions had occurred. 7/20/12 RP 26. When asked how Banana benefitted from anything A-Dot had done with the money it had received, his only response was that A-Dot developed hardware for a kiosk system to be used *by MOD*, not Banana. 7/20/12 RP 32. He also admitted that he made “millions” from Banana after Arnold became shareholder, but that neither Banana nor Arnold made any money or enjoyed profits. 7/20/12 RP 34-35.

Based on these admissions and the lack of evidentiary support to counter that presented in the motion, the court granted the motion. 7/20/12 RP 40; CP 436-48. Because the order was never certified as a final judgment, Phillips was permitted to re-litigate the merits of his liability at trial. The trial court found Phillips and A-Dot liable based on substantial evidence.

V. ARGUMENT

A. Breach of Fiduciary Duty and Unjust Enrichment

In Washington, a statutory duty of care requires a director to act on behalf of the corporation in good faith and on an informed basis. RCW 23B.08.300 states in pertinent part as follows:

“(1) A director shall discharge the duties of a director . . . :

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the director reasonably believes to be in the best interests of the corporation.”

This duty of care “includes the responsibility of the director to oversee the activities of the corporation by attending directors’ meetings, by requiring that the company provide adequate information upon which to make decisions, by carefully reviewing the documentation which is provided, and through general oversight and monitoring of management.” Edward Brodsky & M. Patricia Adamski, Law of Corporate Officers & Directors: Rights, Duties & Liabilities § 2:1, at 6 (Oct. 2011 West). A director also has a duty to prevent corporate waste and unnecessary expense. *Grassmueck v. Barnett*, 281 F. Supp.2d 1227, 1230 (W.D. Wash. 2003).

Although a director’s liability can be limited by a corporation’s articles of incorporation, if a director breaches his duty intentionally, knowingly, or in bad faith, the director is not shielded from liability. *Id.* at 1232; RCW 23B.08.320 (providing that director liability to corporation cannot be eliminated “for acts or omissions that involve intentional misconduct by a director or a knowing violation of law by a director, for conduct violating RCW 23B.08.310, or for any transaction from which the director will personally receive a benefit in money, property, or services to

which the director is not legally entitled.”).

Nor does the business judgment rule protect the director. Under that rule, an officer or director is immunized from liability in a corporate transaction where “(1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) a reasonable basis exists to indicate the transaction was made in good faith.” *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 709 (2003) (quoting *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 498 (1975)). But the business judgment rule does not apply if a director breaches “the duty of care intentionally, knowingly, or in bad faith” *Grassmueck*, 281 F. Supp.2d at 1232.

When a director converts corporate property, for example, he has breached his duty to act in good faith and can be held liable for that breach. *Lang v. Hougan*, 136 Wn. App. 708 (2007) (citing *In re Marriage of Langham*, 153 Wn.2d 553, 565 (2005)). Conversion is the “unjustified, willful interference with a chattel which deprives a person entitled to the property of possession.” *Id.* “Chattel” includes both “tangible and intangible goods, such as corporate property.” *Id.*

In sum, to establish a breach of fiduciary duty, a plaintiff must show that the director’s acts or omissions involved (1) “intentional misconduct;” (2) a “knowing violation of the law;” (3) conduct violating

RCW 23B.08.310 (which includes compliance in good faith with the duties in RCW 23B.08.300); or (4) “any transaction from which the director will personally receive a benefit in money, property, or services to which the director is not legally entitled.” *Grassmueck*, 281 F. Supp.2d at 1230.

With regard to unjust enrichment, a person or company is unjustly enriched when he or it profits or enriches himself or itself at the expense of another contrary to equity. *First Am. Title Co. v. Liberty Capital Starpoint Equity Fund, LLC*, 161 Wn. App. 474 (2011). The doctrine applies if the circumstances of the benefits received or retained make it unjust for the defendant to keep the benefit without paying. *Id.* (citing *Chandler v. Wash. Tolling Bridge Auth.*, 17 Wn.2d 591, 601 (1943)).

Based on these laws, the court entered judgment against Phillips finding he had improperly engaged in related party transactions, self-dealing, and corporate waste in violation of his duties as a director of Banana.

On appeal Phillips challenges both the interlocutory order of partial summary judgment and Findings of Fact Nos. 16 to 25. Phillips asks this court to reverse the partial summary judgment, arguing that the court was presented with a genuine issue of material fact as to his corporate malfeasance. Summary judgment is appropriate where “the

pleadings, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c); *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274 (1990). “A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789 (2005). Although on summary judgment the court must construe all facts and evidence in the light most favorable to the nonmoving party (Phillips), it was Phillips’ obligation to submit adequate affidavits and to set forth sufficient facts to rebut the moving party’s contentions and to disclose the existence of a genuine issue as to a material fact. *White v. State*, 131 Wn.2d 1, 9 (1997) (citing *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852 (1986)); CR 56(e). This he did not do.

Phillips challenges the order based on the MAKO report. However, at the time of summary judgment, the MAKO report was not made part of the court record.⁴ RAP 9.12. Although Phillips referenced the report generally in a declaration and in his opposition, the Clerks Papers establish that he did not file a copy of the report with the court. CP 281-299 (*see* Para. 8). Even if he had, Phillips attempt to authenticate the MAKO report does not comply with CR 56(e), which provides that

⁴ Phillips’ brief on page 13 cites to Exhibit 228, and not a declaration submitted at the time of the summary judgment motion, authenticating the MAKO report.

“[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” [Emphasis added] Mr. Phillips’ declaration (CP 281, 283) states only “see MAKO Strategy Report ‘MSR,’ Exhibit “B” p. 12 ¶ 1.” Arnold objected and moved to strike Phillips’ hearsay declaration. CP 271-274, 276-277; 7/20/12 RP 15. Because this court reviews the entry of summary judgment de novo, Arnold reasserts his objections. *Dunlap v. Wayne*, 105 Wn.2d 529, 535 (1986) (“A court cannot consider inadmissible evidence when ruling on a motion for summary judgment.”).

Whether the MAKO report is considered by this court, its impact on the summary judgment proceedings is de minimis because the report’s conclusions are about Phillips’ separate company, Metawallet. For example, the report states: “All funds were accounted for in the MetaWallet books. We found no misrepresentation as to payments or loans and no false employees or vendors.” Ex. 228 (emphasis added). But as the KPMG Report observes and other documents in the record confirm, Metawallet Corporation was an independent corporation formed and wholly owned by Phillips. Exs. 54, 76. As such, the MAKO report’s

conclusions did not rise to the level of disclosing the existence of a genuine issue of material fact.

1. Phillips Failed to Rebut the Evidence of Corporate Malfeasance Presented by Arnold

Phillips could not rebut the specific evidence of breach of fiduciary duty to Banana proffered by Arnold including the large loans to Douglas Lower and A-Dot and large consulting fees paid to Lower, A-Dot, and Phillips. In fact, he did not dispute that these transactions had occurred. Thus, the trial court had prima facie substantial evidence of a breach of fiduciary duty. Phillips acted with knowing disregard of the standards of care he owed to Banana and its shareholder: standards of care that were set forth in Banana's Articles and bylaws. He repeatedly engaged in transactions in which he had a self-interest without seeking a fairness opinion or reasonableness opinion to support his actions and without notifying the only disinterested shareholder, Mr. Arnold. He authorized Banana to pay himself a consulting fee of \$1,160,000, at a time when he was spending all his time acting as CEO for a different company (MOD). He billed and received payment from Banana for unjustifiable travel and entertainment expenses, and then loaned and paid "fees" in the millions of dollars to his other company A-Dot, which funds he then immediately transferred to himself. There was no business justification for these

transactions and Phillips did not offer one. In sum, it was proper for the court to enter summary judgment finding that, as to liability only, Phillips had violated RCW 23B.08.300 and breached his fiduciary duties to Banana, causing it financial loss, which loss he reaped for his own benefit.

2. Partial Summary Judgment Against A-Dot Was Proper

The trial court granted partial summary judgment against A-Dot Corporation because it was not represented by legal counsel, as the law requires with respect to any limited liability entity in Washington State.⁵ *Lloyd Enters., Inc. v. Longview Plumbing & Heating Co.*, 91 Wn. App. 697, 701 (1998); *Cottinger v. State Dep't of Employment Sec.*, 162 Wn. App. 782, 787 (2011); RCW 2.48.170; *see also* CP 444-48. A-Dot now asks that this “default judgment” be set aside as a “technicality.” But that order was based upon an unpaid promissory note which was overdue and owing to Banana at the time of the hearing. CP 236-39. Summary judgment as to A-Dot’s liability on that note was therefore proper.

B. Finding of Fact 2 Confirms Partial Summary Judgment Was Proper

At the trial’s conclusion, the court affirmed the previous entry of summary judgment of liability in Finding of Fact 2, stating:

“On August 22, 2012, this court entered summary judgment

⁵ A-Dot was initially represented by counsel at the onset of the case. *See* Answer (attached to appendix). That attorney withdrew prior to the hearing on summary judgment, but with ample time for A-Dot & Phillips to retain counsel to respond to the motion. *See, e.g.*, Plaintiff’s Statement (filed 5/14/12) (attached to Appendix).

of liability with regard to Claims I, II, III, VI, and IX of the complaint, and in doing so entered findings under Civil Rule 54(d) with regard to material facts which exist without substantial controversy. The court incorporates the summary judgments by reference herein, and it adopts the fact findings in the summary judgments as set forth therein and below. The evidence presented at trial corroborates and supports the summary judgments.”

CP 1150. Because this finding was not challenged, it is a verity on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42 (2002). The court made this finding after Phillips’ re-litigated his liability at trial. *See, e.g.*, CP 457, 529-30, 533, 535, 745; 2/20 RP 91; 2/21 RP 140-49. As a result, Phillips cannot claim prejudice from entry of the order. *See* CP 843-47.

C. The Trial Court Did Not Abuse Its Discretion by Entering a Protective Order that Arnold Need Not Attend Trial

Trial began on February 5, 2013. Mr. Arnold, who was 84 years old, did not attend. He was gravely ill. CP 727-728, 1180. His attorneys of record, however, did appear and indicated that they were ready to proceed. 2/5 RP 2-3. Phillips objected, requesting dismissal under King County Local Rule 4, or alternatively, for the opportunity to interview or depose Arnold. 2/5 RP 2. Arnold moved for a protective order, which the court granted. CP 688-729, 744-49, 1173-1192; 2/19 RP 3-4. Arnold died on February 27, 2013, before the presentation of evidence was closed. 2/27 RP 2. Given the circumstances, the court’s decision was not unreasonable and did not constitute an abuse of discretion.

A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 131 (1995) (citing *Hizey v. Carpenter*, 119 Wn.2d 251, 268 (1992)). In *Eriksen v. Mobay Corp.*, 110 Wn. App. 332 (2002), for example, the court held that the trial court abused its discretion by dismissing a landowner's negligence and strict liability suit for nonappearance at trial where plaintiff was represented by counsel, who appeared for the first day of trial, and who indicated he was ready to proceed with his first witness. *Id.* at 338-41. The court relied on Civil Rules 40, 41, and RCW 4.56.120(3), which states: states: “An action in the superior court *may be dismissed* by the court and a judgment of nonsuit rendered in the following cases: . . . (3) When the plaintiff fails to appear at the time of trial and the defendant appears and asks for a dismissal.” (emphasis added). Civil Rule 41 also allows for involuntary dismissal for want of prosecution. Notably, neither requires mandatory dismissal. When King County Local Rule 4(i)(1), relied upon by Phillips, is read in this context, the court did not abuse its discretion.⁶

⁶ This local rule states: “The failure of a party seeking affirmative relief or asserting an affirmative defense to appear for trial on the scheduled trial date will result in dismissal of the claims or affirmative defenses without further notice.” The word “party” (uncapitalized) is used throughout the Local Rules but is not defined. Its use, however, makes clear that it is a generic term used to address the person or his legal representative. *Compare* KCLR 4(c) (“The party filing the initial pleading shall promptly provide a copy of the Case Schedule to

By contrast, the court found no abuse of discretion in *Alexander v. Food Servs. of Am., Inc.*, 76 Wn. App. 425 (1994), cited by Phillips. There, after a child was severely injured after being struck by an automobile, the father filed suit. The mother also sought to join the action, but when the matter went to trial, she failed to attend or appear in any way. She then filed a separate negligence lawsuit. The court dismissed that action because of her failure to appear at the earlier one month long trial. The court of appeals affirmed, citing to *Wagner v. McDonald*, 10 Wn. App. 213 (1973), where a lawsuit was dismissed because neither the plaintiff nor a representative of the plaintiff appeared. *Alexander*, 76 Wn. App. at 429-430.

These cases illustrate that it is the general policy of Washington courts not to resort to dismissal lightly. *Woodhead*, 78 Wn. App. at 129-30 (citing *Anderson v. Mohundro*, 24 Wn. App. 569, 575 (1979) (noting that because dismissal is the most severe sanction which courts may apply, its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited)). Only where a court has “found that a party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice and has

all other parties...”; KCLR 4(d) (“The court, either on motion of a party . . . may modify any date in the Case Schedule”) with Civil Rule 70.1 (“An attorney admitted to practice in this state may appear for a party by service a notice of appearance.”); see also CP 1175-1177.

prejudiced the other side by doing so, dismissal has been upheld as justified.” *Id.* (citing *Anderson*, 24 Wn. App. at 575).

Here, Arnold violated no court orders and did not act in wilful regard to any court orders. Banana was the plaintiff and appeared through counsel and then prosecuted the matter diligently and fully even though Arnold, the assignee, was too frail and dying at the time of trial and could not testify. CP 688-724, 727-28, 744-49, 1173-1192, 1180. The court therefore did not abuse its discretion in ruling that dismissal was inappropriate and that Mr. Arnold need not attend trial. As the trial court noted, it is “very customary” in the King County Superior Court to excuse the absence of a party. 2/5 RP 14. This custom is consistent with the Civil Rules that provide the courts the authority to act with discretion. *Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 293 (1991).

Mr. Phillips’ reliance on Civil Rules 37 and 43 does not change this result. First, there was no discovery dispute. Second, the Washington Supreme Court has recognized that in the context of discovery dismissal is a last resort. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570 (2009).

Phillips also did not serve Arnold with a CR 43 Notice to Attend Trial. CP 693, 1173; 2/5 RP 3. His reliance on *Campbell v. A.H. Robins Co.*, 32 Wn. App. 98, 101-02 (1982), as a basis for dismissal or sanctions against Arnold, is misplaced. Even if CR 43 were applicable, that rule

provides for use of a protective order upon a showing of good cause, the very method used by Arnold to excuse his absence. CR 43(f)(1). Finally, Phillips argues that he was prejudiced by the court's failure to dismiss the lawsuit. The court, however, found no prejudice and Phillips did not re-raise the issue again before he rested. 2/5 RP 14-15; 7/30 RP 151. Put simply, the court did not abuse its discretion and its decision should be affirmed.

D. Phillips' Appeal of the Order Denying Motion to Vacate Should Be Rejected Because He Failed to Designate the Record on Review

Phillips argues that the trial court erred by rejecting his motion to vacate the summary judgment orders. Brief, at 15-18. Phillips, however, has failed to designate the records necessary for the court to review this order.⁷ Phillips also failed to provide a verbatim transcript of the hearing on the motion to vacate as required by RAP 9.1(b) ("The report of any oral proceedings must be transcribed in the form of a typewritten report of proceedings."). In sum, there is no record before this court of what the trial court considered and reviewed, much less a signed order from the

⁷ Phillips did not designate: (1) Defendants' Motion to Vacate or Clarify (filed Jan. 8, 2013); (2) Defendants' Motion for Order to Show Cause (filed Jan. 2, 2013); (3) Order to Show Cause dated Jan. 3, 2013); (4) Defendants' Motion to Vacate or Clarify dated Jan. 2, 2013); (5) Declaration of Mark Phillips with Exhibits A through X thereto (dated Jan. 28, 2013); (6) Defendants' Reply to Plaintiff's Response in Opposition to Defendants' Motion to Reconsider; (7) Plaintiffs' Response in Opposition to Defendants' Motion to Reconsider; or (8) Declaration of Jeff Smyth re Plaintiff's Opposition to Motion to Vacate (dated Jan. 16, 2013).

court denying the CR 60 motion.⁸ Consequently, this court has not been apprised of the arguments and evidence before the court on that motion, making the record on appeal insufficient. As the appellant, Phillips bore the burden “of perfecting the record so that the court has before it all evidence relevant to the issue on appeal. RAP 9.2(b).”⁹ *State ex rel. Dean by Mottet v. Dean*, 56 Wn. App. 377, 382 (1989) (citing RAP 9.2(b)); *State v. Rienks*, 46 Wn. App. 537, 544 (1987), *remanded on other grounds*, 110 Wn.2d 1021 (1988); *Allemeier v. University of Wash.*, 42 Wn. App. 465, 472-73 (1985)). Because he failed to do so, the court should reject this basis for appeal.¹⁰

E. The Findings of Fact Are Not Based on Inadmissible Hearsay

Phillips argues that the court impermissibly relied on inadmissible hearsay from the KPMG report, and that its findings of fact (specifically Finding of Fact 22) are not supported by substantial evidence. Phillips’ argument disregards much of the record before the trial court. He also

⁸ Phillips initially attempted to appeal this order by filing a Notice of Discretionary Review. CP 449-56. The order attached to that Notice is unsigned. *Id.* Phillips also did not notify appellee that he had designated less than all of the verbatim report of proceedings as required by RAP 9.2.

⁹ RAP 9.2(b) provides in pertinent part, “A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review.”

¹⁰ In any case, a CR 60 motion is not the proper vehicle to challenge a motion to vacate. *Washburn*, 120 Wn.2d at 300-301.

appears to argue that the court should not have considered the testimony of investigator Guido van Drunen, at all. But Phillips did not object to van Drunen's testimony, 2/20 RP 99, and, hence, has waived any objections he may now advocate. Additionally, although Phillips objected to the use of the KPMG report at trial, he cannot now challenge oral testimony about that report because he questioned van Drunen at length about the report, including reading portions of it into the record. *See, e.g.*, 2/19 RP 154-156; 2/20 RP 6, 10, 15, 22-23, 25-26, 29-30, 48-50, 54, 56-58, 63-64, 69-71, 74-75. Any objections that he has to that testimony, whether elicited by him or Banana, are waived. *State v. Atkinson*, 19 Wn. App. 107, 113 (1978).

F. Finding of Fact 22 Is Not Based on Hearsay

Phillips argues this finding is based on the KPMG report, but the finding itself (CP 1155) clearly states otherwise:

“According to the testimony of Mr. van Drunen, none of the above disbursements, consulting fees, and loans from Banana to A-Dot and from A-Dot to Phillips and others were disclosed in advance or contemporaneously to or approved by Mr. Arnold. This testimony was credible, and was corroborated by the testimony of Mr. Cole Younger and Ms. Julia de Haan, both of whose testimony the court found credible, documentary evidence, and admissions made by Mark Phillips to Mr. van Drunen. Mr. Phillips' testimony to the contrary was not credible.”

The source documents supporting the KPMG investigative

conclusions, moreover, were admitted at trial and supported by testimony. For example, van Drunen identified several trial exhibits as those which he reviewed during his investigation. 2/20 RP 54-63. He also affirmatively identified the questionable transactions engaged in by Phillips. *See, e.g.*, 2/20 RP 76-79. And, he testified that Phillips admitted during an interview that he had not told Arnold of his self-dealing in advance. 2/19 RP 61-62. Because Phillips' admissions to van Drunen fall within a hearsay exception, *see* ER 801(d)(2), and other witnesses and documents confirmed Van Drunen's conclusions, it is clear that Finding of Fact 22 is not based exclusively on the KPMG report.

The court also ruled that it would not admit the KPMG report as a stand-alone substantive exhibit:

“So the report itself is not admissible as an exhibit. . . . However, the court believes that it can consider the contents of the reports, both through the testimony of Mr. van Drunen, as well as certain aspects of the report, to the extent that the information came from the business records of Banana, A-Dot, or MetaWallet. The court can also consider part of the contents of the report to the extent that they contain statements of a party opponent, Mr. Phillips, to the extent that they contained statements of party opponent, A-Dot, through its authorized representatives, specifically, the court is considering Appendix B in Exhibit 54. Those are part of voluminous documents that have been collected by Mr. van Drunen.

The court will also note that Mr. van Drunen was not offered as an expert by either side, under Evidence Rule 702 and 703, and therefore, the document does not come in

as an expert report. For those reasons, the Exhibit 54 is not admitted, but the court may consider some of the contents contained therein, based upon the exceptions to the hearsay rule, as noted.”

2/20 RP 81-83; *see also* 7/31 RP 10-11.¹¹ The court also reiterated its position as to the testimony of Mr. van Drunen during the hearing on the presentation of the findings of fact.

“On twenty-two, let me state a couple of things: First of all, the defense, Mr. Kimble is correct that, to a certain extent, Mr. van Drunen’s testimony did rely on hearsay, and the extent it relied on hearsay, this court should not consider it or reply on it.

* * * *

With regard to notice to Mr. Arnold, obviously, again, the defense is correct that I can’t rely upon Mr. van Drunen’s conclusions based upon what others told him, other than Mr. Phillips. And to the extent that Mr. Phillips gave him adverse testimony against himself, or any type of admission or statement against his interest, obviously that falls outside of the hearsay rule.

* * * *

So as far as the testimony of Mr. van Drunen, I gave it the weight it was due. But I also found – bless you – that there was sufficient corroborative evidence with respect to his testimony in supporting my findings through the testimony of Ms. de Haan, Mr. Younger, as well as the documentation and the admissions of Mr. Phillips himself.”

9/17 RP 3-5. Given these statements by the court and the documents in evidence supporting Finding of Fact 22, as well as testimony elicited at trial, this court may presume that the trial court did not consider any

¹¹ The court admitted the KPMG Report as an illustrative exhibit because the report was also an exhibit to the MAKO report. Phillips argues that there was no basis for the court to conclude that the MAKO report “was prepared as a critique of the KPMG report” but Mandell himself stated this was the case. 2/21 RP 55.

inadmissible evidence in rendering its decision. *State v. Read*, 147 Wn.2d 238, 244-45 (2002) (presumption is that trial judges in bench trials do not consider inadmissible evidence).

G. The Findings of Fact Are Supported by Substantial Evidence

Phillips challenges several of the court's findings arguing that they are not supported by substantial evidence. As discussed above, Phillips does not apply that standard correctly. He fails to discuss the evidence in the record which is sufficient to persuade a fair-minded person of the truth of the matter. *Brin v. Stutzman*, 89 Wn. App. 809, 824 (1998). He also fails to recognize that the evidence is reviewed in the light most favorable to the prevailing party and that the appellate court will not substitute its judgment for that of the trial court and hence must defer to the trial court for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87 (2002); *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-70 (1990).

1. Substantial Evidence Supports Finding of Fact 16 that Phillips Engineered His Receipt of A-Dot's \$1,000,000 Consulting Fee

Phillips challenges Finding of Fact 16 on two bases. He argues that the following statement is not supported by the record: "Phillips has claimed that the \$1,000,000 'consulting fee' fee payment from Banana to

A-Dot was actually for ‘license fees,’ and not pursuant to the Service Agreement but at the time of the payment and the consulting fee, the intellectual property allegedly licensed had already been assigned by Phillips to Banana in return for stock.”

Phillips’ challenge appears to be not as to the fact of the million dollar payment to A-Dot or that it was then transferred to his account, but to the court’s characterization of the basis for the transfer. That characterization, however, is immaterial because the court found substantial evidence to support its findings and conclusions that the payment was a related party transaction not ratified by Banana’s disinterested shareholders as required both by Banana’s Articles and bylaws and RCW 23B.08.700 to .730. FF 15; CP 1153, 1160-163; Ex. 107; 2/6 RP 61-62; 2/19 RP 75; 2/20 RP 26, 54-55, 76-80. Moreover, van Drunen’s testimony supports the finding.¹² 2/19 RP 92.

2. Finding of Fact 17 that the Million Dollar Payment Was Without Business Justification Is Supported by Substantial Evidence; Likewise Finding of Fact 25 that the Nuevatel Agreement Was Not Entered Into by Banana Is Also Supported by Substantial Evidence

¹² Phillips also makes a confusing argument that there was evidence in the record to show that he received the A-Dot payment for “consulting fees.” At trial, however, Phillips admitted that the \$1,000,000 was paid to A-Dot as a “consulting fee,” 7/29 RP 76-77, and that the \$1,000,000 A-Dot transfer to himself was a shareholder disbursement. 7/29 RP 96-104. He also admitted under cross examination that A-Dot did not have sufficient funds to pay him such a large disbursement absent the money from Banana. 7/29 RP 102-104.

Phillips challenges Finding of Fact 17, which states: “The self-payment of the \$1,000,000 ‘consulting fee’ was without business justification, constituting a related party transaction without an independent board review or approval, self-dealing, and a breach of Phillips’ fiduciary duty owed to Banana Corporation.” Phillips argues that there was evidence that A-Dot incurred expenses for services related to “Banana/Metawallet intellectual property,” so that the consulting fee was warranted.

Phillips’ argument is flawed and does not correctly apply the substantial evidence rule. As an initial matter, Phillips did not assign error to Finding of Fact 15, which specifically found that there were no records justifying such a large payment, including no request by Banana for A-Dot to perform services, no written documentation described the scope of services or deliverables, or compensation rates. FF15; CP 1153. Phillips’ “evidence” is also not compelling for several reasons. There is no evidence to support this new allegation that the items he lists for prototyping, hardware engineering and the like, were specifically for Banana. Indeed, page 28 of Exhibit 107 shows that the prototyping expense was for MOD, not Banana.

The court also found in Finding of Fact 25 that the Nuevatel contract, on which Phillips justifies the \$1,000,000 payment to A-Dot,

did not involve Banana. Without the Nuevatel deal, Phillips' claim of business justification falls flat. Consequently, the court had substantial evidence on which to base its finding that "[e]fforts expended by Phillips and others in obtaining the Nuevatel contract did not inure, legally or otherwise, to the benefit of either Banana Corporation or Robert Arnold." FF 25; CP 1156.

3. The Court's Findings of Fact 18 to 25 that (1) the A-Dot Loan of \$2,385,000, (2) Certain Disbursements to Phillips from Said Loan, and (3) the \$1,160,000 Consulting Fee to Phillips Were Without Business Justification and Not Disclosed to Mr. Arnold Are Supported by Substantial Evidence

Phillips challenges Findings of Fact 18 to 25 by arguing that there is evidence in the record to support contrary findings. He challenges the testimony of Mr. van Drunen, Mr. Younger, and Ms. de Haan, each of whom the court found credible, while championing his own testimony (which the court found not credible) and that of Mr. Mandell, his personally retained and highly biased¹³ expert. Again, his analysis is flawed because he fails to discuss the evidence supporting the findings or to recognize that credibility determinations are left to the discretion of the trial court.

- a. Finding of Fact 18: Finding of Fact 18 addresses the

¹³ Mr. Mandell conceded on cross-examination that Phillips owes him \$100,000 in fees, and that he accompanied Phillips to MOD's bank when Phillips attempted to take over MOD's accounts, for which Phillips was federally indicted. 2/21 RP 158-160; 2/25 RP 12-19.

\$2,385,000 loan to A-Dot. It is undisputed that Phillips caused Banana to loan that money beginning in September 2006, and that a review of the QuickBooks records shows the percentage of money flowing into A-Dot from Banana. CP 1153.

b. Finding of Fact 19: This finding states that Phillips signed the loan documents on behalf of both A-Dot and Banana and that there was no evidence that either company formally approved the loan through company resolutions. CP 1153-54. As discussed above, there is clear evidence to support the finding. Phillips also admitted at trial that he was advised by legal counsel “to avoid conflicted transactions unless an independent board approved the transaction.” CP 1154; 7/29 RP 147-48.

c. Finding of Fact 20: Finding of Fact 20 merely recites that A-Dot only repaid \$50,000 of the loan and that loan bears interest at the rate of five percent. CP 1154; Exs. 66, 77; 2/19 RP 70, 91, 94; 2/20 RP 17; 7/29 RP 77, 78; 7/30 RP 15, 16. It then calculates the interest owed on the loaned amount through September 16, 2013, which calculations are based on evidence presented at trial. Ex. 125; 7/30 RP 16. It also notes that Phillips did nothing to obtain repayment of the substantial amount owed to Banana. 2/19 RP 92. The finding is therefore supported by substantial evidence.

d. Finding of Fact 21: Finding of Fact 21 concerns

distributions made on Phillips behalf from the loan proceeds, including \$150,000 paid on October 11, 2006, \$500,000 wired to Phillips on February 23, 2007, \$25,000 wired to Phillips on June 22, 2007, tax payments made on Phillips' behalf, and a shareholder disbursement of \$50,000 on September 21, 2007. CP 1154-55. Phillips does not challenge, nor can there be any legitimate dispute, that these payments were in fact made. Phillips instead takes umbrage with the finding that there was no business justification for these disbursements. This argument ignores that the promissory note required the funds to be used for operating expenses. Phillips' discussion also ignores that there is substantial evidence in the record to show that there was no benefit received by Banana for the loan and that Phillips used the loan proceeds for his own personal benefit. Accordingly, Phillips cannot show that this finding is not supported by substantial evidence in the record.

e. Finding of Fact 22: This finding concerns Phillips' failure to disclose the various self-dealing transactions to Arnold and is supported by substantial evidence. It is based on the testimony of Mr. van Drunen, Mr. Younger and Ms. de Haan, whom the court found credible. FF 7, 22; CP 1151, 1155. Mr. van Drunen's testimony was based on Phillips admissions to him as to the timing of any disclosures. 2/19 RP 61-62. Likewise, Mr. Younger and Ms. de Haan, both testified

as to the lack of information Arnold had about his investment in Banana. 2/19 RP 26-29, 33-36; 2/25 RP 62-75, 83-85. Phillips' angry reaction to Mr. Younger's requests for information can also not be ignored. *See, e.g.*, Exs. 120, 121.

Phillips argues that Arnold ratified each transaction. His expert Mr. Mandell unconvincingly echoed this position. 2/21 RP 173-181; 7/29 RP 70. Ratification is the "affirmance by the person of a prior act which did not bind him, but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Black's Law Dictionary 1261 (6th ed. 1990).

State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co., 64 Wn.2d 375 (1964), cited by Phillips, is not inconsistent. There, the court agreed that a release was not binding because a "corporation cannot ratify the breach of fiduciary duties unless full and complete disclosure of all facts and circumstances is made by the fiduciary and an intentional relinquishment by the corporation of its rights." *Id.* at 385-86.

Phillips also relies on *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72 (2008). In *Saviano*, the court of appeals affirmed the lower court's ruling invalidating a promissory note for a loan the majority shareholder made to the company where the majority shareholder argued that because he was the sole director, he had the authority to incur debt

and to execute the note. *Id.* at 79-81. The court noted that while directors can lend money to a corporation, the courts will closely scrutinize such transactions and that the burden of proving good faith is on the director because of his fiduciary capacity: “As a fiduciary, the officer or director has a strong influence on how the corporation conducts its affairs, and a correspondingly strong duty not to conduct those affairs to the unfair detriment of others, such as minority shareholders or creditors, who also have legitimate interests in the corporation but lack the power of the fiduciary.” *Id.* at 79-80 (quoting *Intertherm, Inc. v. Olympic Homes Sys., Inc.*, 569 S.W.2d 467, 471 (Tenn. App. 1978)).

Because of these fiduciary duties, a showing of ratification requires more than Phillips’ self-serving testimony, which the court rejected as not credible:¹⁴

“A ratification by acquiescence cannot arise where the party supposed to acquiesce has not a full knowledge of the facts, or unless he occupies such a relation that knowledge of it must be imputed to him. Moreover, silence and failure to repudiate which does not harm the opposite party does not constitute ratification by estoppel. Where such ratification is sought to be established by a third person, it must clearly appear that he has been misled thereby, or induced to forego some advantage he would have otherwise enjoyed.”

Barnes v. Treece, 15 Wn. App. 437, 444-45 (1976).

Phillips did not meet this stringent burden of proof. The evidence

¹⁴ See, e.g., 7/31 RP 82-83.

is uncontroverted that Phillips did not follow Banana's Articles and bylaws, both of which address ratification. Those provisions and state law require written notice of the director's conflicting interest transaction before ratification can occur. At trial, there was no evidence of any notices to Arnold or shareholder meeting minutes, although it was evident that Phillips was well aware of such requirements through his position at MOD. These facts coupled with the testimony at trial provide substantial evidence to support this finding.

f. Finding of Fact 23: This finding concerns the excessive \$1,160,000 in consulting fees received by Phillips. CP 1155. Phillips argues that there is evidence in the record that he performed work for Banana. He also relies on Mandell's questionable conclusion that the fee was proper and had a business purpose. This "evidence" does not change the standard of review or require reversal. The trial court was entitled to view all evidence and to weigh that evidence in making its findings. In this case, the finding is supported by the lack of any documentation as to a consulting agreement, a description of the assignments or tasks that Phillips was to perform, the metrics and pay schedule for his work, or that he was even asked to do work by Banana other than what was required of him as an officer and director. Nor was there any evidence that any work performed by Phillips inured to the benefit of Banana since the Nuevatel

contract did not involve Banana.¹⁵ There was also no evidence that Phillips gave Arnold an opportunity to ratify the consulting payments. Given this evidence along with the QuickBooks records, there is substantial evidence to support this finding and the related conclusion of law that Phillips breached his fiduciary duty and in so doing was unjustly enriched at the expense of Banana.

g. Finding of Fact 24: This finding of fact repeats the court's findings in Finding of Fact 22. CP 1155-56. We will therefore not repeat that analysis here.

h. Finding of Fact 25: This finding addresses Phillips' rationale for his and A-Dot's receipt of "consulting fees": that is, the signing of the Nuevatel agreement. CP 1156. As discussed above, there is substantial evidence that Banana received no benefit whatsoever given that Phillips negotiated the contract for Metawallet Corporation.

4. There Is Substantial Evidence that Phillips' Self-Dealing Caused Banana Damage

Phillips challenges the court's findings (unspecified by him) that Banana was damaged by his conduct. Phillips argues that because Arnold ratified each of the transactions, including the loan and consulting fees

¹⁵ Phillips relies on Exhibit 253, a letter from attorney Ronald Braley, to support his contention that he "intended" to transfer the ownership of Metawallet to Banana. This exhibit was admitted as an illustrative only such that its contents cannot be relied upon by Phillips now for the truth of the matter asserted. CP 874; 7/30 RP 145-151.

paid to Lower, that there can be no damage. As explained above, however, there is substantial evidence that ratification did not occur.

Phillips also argues that the court impermissibly shifted the burden of proof in proving damages from Banana to him. He argues that any duty of reimbursement is limited to those losses that were proximately caused by the fiduciary's conduct. He then claims that Arnold presented no evidence that the expenditures constituted corporate waste. None of these arguments were persuasive to the trial court. *See, e.g.*, 2/20 RP 102-110.

Phillips personally squandered Banana's improper "loan" to A-Dot at a time when he dominated both Banana and A-Dot. 2/6 RP 162-63. He entered into the "loan" on behalf of both companies without approving the loan by resolution, without obtaining an independent fairness evaluation and without seeking out an independent director to approve the transaction. In doing so, he violated Banana's Articles, which require compliance with "RCW 23B.08.700 through 23B.08.730" as to contracts with interested directors.

Mr. van Drunen testified as to how Phillips' conduct injures a start-up company, stating: "So a startup runs on cash. If this cash has been used for something else, there is damage to the company because they're short of cash, right? You're always trying to manage a burn right at the start. So if you're using cash for one thing, that means you're robbing Peter to pay

Paul. So to say there's no damage, this creates another need for funding, right?" 2/20 RP 44-45. There is substantial evidence in the record for a rational trier fact to conclude that Banana was damaged by Phillips' conduct. Phillips assertion that the trial court imposed the incorrect burden is not justified by the record. See 7/31 RP 142-43.

5. A-Dot's Breach of the Promissory Note Is Supported by Substantial Evidence

A-Dot argues that the court erred in finding it liable to Banana for breach of the promissory note. He argues that the loan somehow benefited Banana (which argument is not supported by substantial evidence), and hence, that there was no breach. This is not the test, however. The claim against A-Dot on the promissory note was one for breach of contract.

A promissory note defines the terms and conditions of a loan. *Washington Federal Savings & Loan v. Alsager*, 165 Wn. App. 10, 13 (2011). A borrower's failure to repay the loan entitles the lender to judgment for breach. See *id.*; *Northwest Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712 (1995). It is undisputed that A-Dot signed a promissory note that was due and payable on September 1, 2011, and that A-Dot did not repay it. Banana was entitled to a judgment for breach of the promissory note.

6. Finding of Fact 27 Contains a Scrivener's Error Which Is Not Reflected in the Conclusions of Law

Phillips argues that the court erred in finding that the Lower consulting fee was a related party transaction.¹⁶ However, the court's conclusions of law show that it did not in fact identify the Lower consulting fee as a related party transaction. CP 1160-1161. Additionally, at the hearing on the presentation of the findings of fact, the court stated it did not intend to make such a finding. 9/17 RP 6-7.

7. Banana Did Not Waive Its Right to Recover Funds Paid to Lower

Phillips argues the court should not have included in its damages amounts loaned or paid to Doug Lower because Arnold settled with him before trial started. The Complaint does not seek, however, enforcement of the Lower promissory note. CP 1-20 (¶¶ 59-62, 102-105, 123). Rather, Banana alleged that the Lower loan was part of Phillips' practice of diverting corporate assets to insiders in breach of his fiduciary duties.

Banana was not estopped from asserting that the loan to Lower was a breach of fiduciary duty by Phillips. The elements of equitable estoppel are: "(1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance

¹⁶ Phillips argues that there is no credible evidence that Lower received finder's fees. This is incorrect. A-Dot's financial records state that Lower received two payments in June 2006 for "fund raising." Ex. 107, at 36; *see also* 2/19 RP 62, 89-90.

upon that act, statement or admission; and (3) injury which would result to the relying party if the first party were allowed to contradict or repudiate the prior act, statement or admission.” *Colonial Imports, Inc. v. Carlton Northwest Inc.*, 121 Wn.2d 726, 734 (1993) (citing *Robinson v. Seattle*, 119 Wn.2d 34, 82, cert. denied, 506 U.S. 1028 (1992)). The burden of proof to establish estoppel is clear, cogent and convincing evidence. *Id.* Phillips did not meet this burden.

There is no evidence that Banana made any admission, statement or acted inconsistently. There is no evidence that Phillips took any action or refrained from acting because of the settlement. Finally, there is no evidence that Phillips experienced any “unjust injury.”

8. The Trial Court Did Not Err in Calculating Damages

Phillips argues the findings and conclusions entered by the trial court allow Arnold to double dip and collect against both himself and A-Dot for the funds loaned to A-Dot by Banana. This is inaccurate. 8/23 RP

6. Conclusion of Law 10 states in its entirety as follows:

“Based on the foregoing, Judgment shall be entered in the principal amount of \$2,335,000 and \$760,709.58 in accrued pre-judgment interest against A-Dot Corporation. Post-judgment interest shall accrue at the promissory note rate of five percent (5%). Should A-Dot make payments on this judgment, such payments shall first be applied to accrued and accruing interest, and then against the principal judgment. Phillips shall be entitled to an offset of the judgment against him for such principal payments (set forth

in Conclusion 9 above), but not against line items set forth in Conclusions 2.a. and b. above and the amounts set forth in Conclusion 5 above.” [Emphasis added]

See also 9/17 RP 8, 10. This court should affirm the court’s ruling.

Finally, Phillips argues that the judgment against him should be reduced by the amounts of \$150,000 and \$500,000, which amounts were wired from A-Dot to Phillips. He argues that there was evidence in the record that these monies did not come from Banana. This is not accurate. Exhibit 111 shows that on February 23, 2007, A-Dot received a loan from Banana in the amount of \$500,000 and on the same day that \$500,000 was wired to Phillips’ Smith Barney account. A-Dot’s bank account balance before and after those two transfers was \$47,304.14. Accordingly, it was reasonable for the court to infer in the light most favorable to Banana, that Phillips’ transfer to himself of the \$500,000 could not have occurred absent the loaned funds from Banana.

As to the \$150,000 payment to himself from A-Dot, Exhibit 107 shows that on October 10, 2006, A-Dot received a loan in the amount of \$175,000 and that the next day Phillips transferred \$150,000 of that loaned money to himself. Ex. 107. The account balance prior the loan was \$48,872.14. It was reasonable for the court to find that this loaned money was used by Phillips for his own personal benefit. Phillips’ argument, moreover, that he should be entitled a credit for the \$2.5 million signing

fee for the licensing agreement is also without merit, as the court found based on substantial evidence that the intangible property transferred by the licensing fee had previously been transferred by Phillips to Banana in accordance with the Assignment of Property. FF 16, CP 1153. There is no basis to reduce the judgment amount.

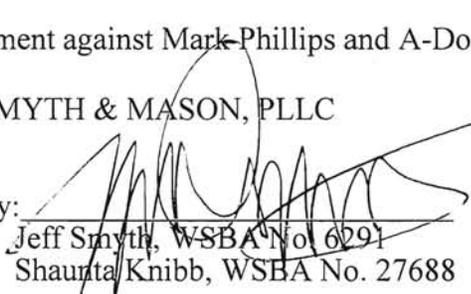
VI. ATTORNEYS FEES: RAP 18.1

The A-Dot promissory note contains an attorney fee clause. A-Dot has attempted to appeal judgment against it based on this note, and the note was found to be a basis for judgment against Phillips for breach of fiduciary duty. Pursuant to RAP 18.1, both A-Dot and Phillips should pay respondent's attorneys fees and costs on appeal. *See Seattle First Nat'l Bank v. Washington Ins. Guar. Assoc.*, 116 Wn.2d 398 (1991).

VII. CONCLUSION

For the reasons set forth above, this court should affirm the lower court's rulings and judgment against Mark Phillips and A-Dot.

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CERTIFICATE OF SERVICE

Cheryl Spangler makes the following statement under penalty of perjury under the laws of the State of Washington:

1. I am a legal assistant at the law firm of Smyth & Mason, PLLC. I make this declaration of my own personal knowledge about matters of which I am competent to testify.

2. On July 30, 2014, I caused a true and correct copy of the foregoing *Brief of Respondent* to be served on the following at the address and in the manner indicated below:

Mark Phillips, Pro Se
2801 1st Avenue, Suite 102
Seattle, WA 98102

- Via Facsimile Transmission
- Via Email Transmission (per agreement)
- Via U.S. Mail
- Via Legal Messenger

Reed Yurchak, Esq.
40 Lake Bellevue Drive, #100
Bellevue, WA 98005

- Via Facsimile Transmission
- Via Email Transmission
- Via U.S. Mail
- Via Legal Messenger

DATED at Seattle, Washington, this 30th day of July, 2014.



Cheryl Spangler, Legal Assistant

Appendix

West's Revised Code of Washington Annotated
Title 2. Courts of Record (Refs & Annos)
Chapter 2.48. State Bar Act (Refs & Annos)

West's RCWA 2.48.170

2.48.170. Only active members may practice law

Effective: July 22, 2011

Currentness

No person shall practice law in this state subsequent to the first meeting of the state bar unless he or she shall be an active member thereof as hereinbefore defined: PROVIDED, That a member of the bar in good standing in any other state or jurisdiction shall be entitled to appear in the courts of this state under such rules as the board of governors may prescribe.

Credits

[2011 c 336 § 67, eff. July 22, 2011; 1933 c 94 § 13; RRS § 138-13.]

Notes of Decisions (38)

West's RCWA 2.48.170, WA ST 2.48.170

Current with 2014 Legislation effective on June 12, 2014, the General Effective Date for the 2014 Regular Session, and 2014 Legislation effective July 1, 2014

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West's Revised Code of Washington Annotated
Title 23B. Washington Business Corporation Act (Refs & Annos)
Chapter 23B.08. Directors and Officers (Refs & Annos)

West's RCWA 23B.08.300

23B.08.300. General standards for directors

Currentness

(1) A director shall discharge the duties of a director, including duties as member of a committee:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the director reasonably believes to be in the best interests of the corporation.

(2) In discharging the duties of a director, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(b) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or

(c) A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

(3) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.

(4) A director is not liable for any action taken as a director, or any failure to take any action, if the director performed the duties of the director's office in compliance with this section.

Credits

[1989 c 165 § 97.]

Notes of Decisions (14)

West's RCWA 23B.08.300, WA ST 23B.08.300

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West's Revised Code of Washington Annotated Title 23B. Washington Business Corporation Act (Refs & Annos) Chapter 23B.08. Directors and Officers (Refs & Annos)

West's RCWA 23B.08.320

23B.08.320. Limitation on liability of directors

Currentness

The articles of incorporation may contain provisions not inconsistent with law that eliminate or limit the personal liability of a director to the corporation or its shareholders for monetary damages for conduct as a director, provided that such provisions shall not eliminate or limit the liability of a director for acts or omissions that involve intentional misconduct by a director or a knowing violation of law by a director, for conduct violating RCW 23B.08.310, or for any transaction from which the director will personally receive a benefit in money, property, or services to which the director is not legally entitled. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective.

Credits

[1989 c 165 § 99.]

Notes of Decisions (1)

West's RCWA 23B.08.320, WA ST 23B.08.320

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West's Revised Code of Washington Annotated Title 23B. Washington Business Corporation Act (Refs & Annos) Chapter 23B.08. Directors and Officers (Refs & Annos)

West's RCWA 23B.08.700

23B.08.700. Definitions

Effective: July 26, 2009

Currentness

For purposes of RCW 23B.08.710 through 23B.08.730:

(1) "Conflicting interest" with respect to a corporation means the interest a director of the corporation has respecting a transaction effected or proposed to be effected by the corporation, or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest, if:

(a) Whether or not the transaction is brought before the board of directors of the corporation for action, the director knows at the time of commitment that the director or a related person is a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the director or a related person that the interest would reasonably be expected to exert an influence on the director's judgment if the director were called upon to vote on the transaction; or

(b) The transaction is brought, or is of such character and significance to the corporation that it would in the normal course be brought, before the board of directors of the corporation for action, and the director knows at the time of commitment that any of the following persons is either a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the person that the interest would reasonably be expected to exert an influence on the director's judgment if the director were called upon to vote on the transaction: (i) An entity, other than the corporation, of which the director is a director, general partner, agent, or employee; (ii) a person that controls one or more of the entities specified in (b)(i) of this subsection or an entity that is controlled by, or is under common control with, one or more of the entities specified in (b)(i) of this subsection; or (iii) an individual who is a general partner, principal, or employer of the director.

(2) "Director's conflicting interest transaction" with respect to a corporation means a transaction effected or proposed to be effected by the corporation, or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest, respecting which a director of the corporation has a conflicting interest.

(3) "Related person" of a director means (a) the spouse, or a parent or sibling thereof, of the director, or a child, grandchild, sibling, parent, or spouse of any thereof, of the director, or an individual having the same home as the director, or a trust or estate of which an individual specified herein is a substantial beneficiary; or (b) a trust, estate, incompetent, conservatee, or minor of which the director is a fiduciary.

(4) "Required disclosure" means disclosure by the director who has a conflicting interest of (a) the existence and nature of the director's conflicting interest, and (b) all facts known to the director respecting the subject matter of the transaction that

an ordinarily prudent person would reasonably believe to be material to a judgment about whether or not to proceed with the transaction.

(5) "Time of commitment" respecting a transaction means the time when the transaction becomes effective or, if made pursuant to contract, the time when the corporation, or its subsidiary or the entity in which it has a controlling interest, becomes contractually obligated so that its unilateral withdrawal from the transaction would entail significant loss, liability, or other damage.

Credits

[2009 c 189 § 30, eff. July 26, 2009; 1989 c 165 § 116.]

West's RCWA 23B.08.700, WA ST 23B.08.700

Current with 2014 Legislation effective on June 12, 2014, the General Effective Date for the 2014 Regular Session, and 2014 Legislation effective July 1, 2014

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West's Revised Code of Washington Annotated Title 23B. Washington Business Corporation Act (Refs & Annos) Chapter 23B.08. Directors and Officers (Refs & Annos)

West's RCWA 23B.08.710

23B.08.710. Judicial action

Currentness

(1) A transaction effected or proposed to be effected by a corporation, or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest, that is not a director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because a director of the corporation, or any person with whom or which the director has a personal, economic, or other association, has an interest in the transaction.

(2) A director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because the director, or any person with whom or which the director has a personal, economic, or other association, has an interest in the transaction, if:

(a) Directors' action respecting the transaction was at any time taken in compliance with RCW 23B.08.720;

(b) Shareholders' action respecting the transaction was at any time taken in compliance with RCW 23B.08.730; or

(c) The transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation.

Credits

[1989 c 165 § 117.]

West's RCWA 23B.08.710, WA ST 23B.08.710

Current with 2014 Legislation effective on June 12, 2014, the General Effective Date for the 2014 Regular Session, and 2014 Legislation effective July 1, 2014

West's Revised Code of Washington Annotated Title 23B. Washington Business Corporation Act (Refs & Annos) Chapter 23B.08. Directors and Officers (Refs & Annos)

West's RCWA 23B.08.720

23B.08.720. Directors' action

Currentness

(1) Directors' action respecting a transaction is effective for purposes of RCW 23B.08.710(2)(a) if the transaction received the affirmative vote of a majority, but no fewer than two, of those qualified directors on the board of directors or on a duly empowered committee of the board who voted on the transaction after either required disclosure to them, to the extent the information was not known by them, or compliance with subsection (2) of this section, provided that action by a committee is so effective only if:

(a) All its members are qualified directors; and

(b) Its members are either all the qualified directors on the board or are appointed by the affirmative vote of a majority of the qualified directors on the board.

(2) If a director has a conflicting interest respecting a transaction, but neither the director nor a related person of the director specified in RCW 23B.08.700(3)(a) is a party to the transaction, and if the director has a duty under law or professional canon, or a duty of confidentiality to another person, respecting information relating to the transaction such that the director may not make the disclosure described in RCW 23B.08.700(4)(b), then disclosure is sufficient for purposes of subsection (1) of this section if the director (a) discloses to the directors voting on the transaction the existence and nature of the director's conflicting interest and informs them of the character and limitations imposed by that duty before their vote on the transaction, and (b) plays no part, directly or indirectly, in their deliberations or vote.

(3) A majority, but no fewer than two, of all the qualified directors on the board of directors, or on the committee, constitutes a quorum for purposes of action that complies with this section. Directors' action that otherwise complies with this section is not affected by the presence or vote of a director who is not a qualified director.

(4) For purposes of this section "qualified director" means, with respect to a director's conflicting interest transaction, any director who does not have either (a) a conflicting interest respecting the transaction, or (b) a familial, financial, professional, or employment relationship with a second director who does have a conflicting interest respecting the transaction, which relationship would, in the circumstances, reasonably be expected to exert an influence on the first director's judgment when voting on the transaction.

Credits

[1989 c 165 § 118.]

Notes of Decisions (8)

West's RCWA 23B.08.720, WA ST 23B.08.720

Current with 2014 Legislation effective on June 12, 2014, the General Effective Date for the 2014 Regular Session, and 2014 Legislation effective July 1, 2014

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West's Revised Code of Washington Annotated Title 23B. Washington Business Corporation Act (Refs & Annos) Chapter 23B.08. Directors and Officers (Refs & Annos)

West's RCWA 23B.08.730

23B.08.730. Shareholders' action

Currentness

(1) Shareholders' action respecting a transaction is effective for purposes of RCW 23B.08.710(2)(b) if a majority of the votes entitled to be cast by the holders of all qualified shares were cast in favor of the transaction after (a) notice to shareholders describing the director's conflicting interest transaction, (b) provision of the information referred to in subsection (4) of this section, and (c) required disclosure to the shareholders who voted on the transaction, to the extent the information was not known by them.

(2) For purposes of this section, "qualified shares" means any shares entitled to vote with respect to the director's conflicting interest transaction except shares that, to the knowledge, before the vote, of the secretary, or other officer or agent of the corporation authorized to tabulate votes, are beneficially owned, or the voting of which is controlled, by a director who has a conflicting interest respecting the transaction or by a related person of the director, or both.

(3) A majority of the votes entitled to be cast by the holders of all qualified shares constitutes a quorum for purposes of action that complies with this section. Subject to the provisions of subsections (4) and (5) of this section, shareholders' action that otherwise complies with this section is not affected by the presence of holders, or the voting, of shares that are not qualified shares.

(4) For purposes of compliance with subsection (1) of this section, a director who has a conflicting interest respecting the transaction shall, before the shareholders' vote, inform the secretary, or other officer or agent of the corporation authorized to tabulate votes, of the number, and the identity of persons holding or controlling the vote, of all shares that the director knows are beneficially owned, or the voting of which is controlled, by the director, or by a related person of the director, or both.

(5) If a shareholders' vote does not comply with subsection (1) of this section solely because of a failure of a director to comply with subsection (4) of this section, and if the director establishes that the director's failure did not determine and was not intended by the director to influence the outcome of the vote, the court may, with or without further proceedings respecting RCW 23B.08.710(2)(c), take such action respecting the transaction and the director, and give such effect, if any, to the shareholders' vote, as it considers appropriate in the circumstances.

Credits

[1989 c 165 § 119.]

West's RCWA 23B.08.730, WA ST 23B.08.730

Current with 2014 Legislation effective on June 12, 2014, the General Effective Date for the 2014 Regular Session, and 2014 Legislation effective July 1, 2014

West's Revised Code of Washington Annotated
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
5. Depositions and Discovery (Rules 26-37)

Superior Court Civil Rules, CR 37

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

Currentness

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, and upon a showing of compliance with rule 26(i), may apply to the court in the county where the deposition was taken, or in the county where the action is pending, for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under rules 30 or 31, or a corporation or other entity fails to make a designation under rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under rule 33, or if a party, in response to a request for inspection submitted under rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, any party may move for an order compelling an answer or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this section an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) *Sanctions by Court in County Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under rule 35(a) requiring him to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being

served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c). For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

(e) Failure to Participate in the Framing of a Discovery Plan. If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

Credits

[Amended effective July 1, 1972; September 1, 1985; September 1, 1992; September 1, 1993.]

Notes of Decisions (153)

CR 37, WA R SUPER CT CIV CR 37

Current with amendments received through 5/1/14

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West's Revised Code of Washington Annotated
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
6. Trials (Rules 38-53.4)

Superior Court Civil Rules, CR 40

RULE 40. ASSIGNMENT OF CASES

Currentness

(a) Notice of Trial--Note of Issue.

(1) *Of Fact.* At any time after the issues of fact are completed in any case by the service of complaint and answer or reply when necessary, as herein provided, either party may cause the issues of fact to be brought on for trial, by serving upon the opposite party a notice of trial at least 3 days before any day provided by rules of court for setting causes for trial, which notice shall give the title of the cause as in the pleadings, and notify the opposite party that the issues in such action will be brought on for trial at the time set by the court; and the party giving such notice of trial shall, at least 5 days before the day of setting such causes for trial, file with the clerk of the court a note of issue containing the title of the action, the names of the attorneys and the date when the last pleading was served; and the clerk shall thereupon enter the cause upon the trial docket according to the date of the issue.

(2) *Of Law.* In case an issue of law raised upon the pleadings is desired to be brought on for argument, either party shall, at least 5 days before the day set apart by the court under its rules for hearing issues of law, serve upon the opposite party a like notice of trial and furnish the clerk of the court with a note of issue as above provided, which note of issue shall specify that the issue to be tried is an issue of law; and the clerk of the court shall thereupon enter such action upon the motion docket of the court.

(3) *Adjournments.* When a cause has once been placed upon either docket of the court, if not tried or argued at the time for which notice was given, it need not be noticed for a subsequent session or day, but shall remain upon the docket from session to session or from law day to law day until final disposition or stricken off by the court.

(4) *Filing Note by Opposite Party.* The party upon whom notice of trial is served may file the note of issue and cause the action to be placed upon the calendar without further notice on his part.

(5) *Issue May Be Brought to Trial by Either Party.* Either party, after the notice of trial, whether given by himself or the adverse party, may bring the issue to trial, and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

(b) Methods. Each superior court may provide by local rule for placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deems expedient.

(c) Preferences. In setting cases for trial, unless otherwise provided by statute, preference shall be given to criminal over civil cases, and cases where the defendant or a witness is in confinement shall have preference over other cases.

(d) Trials. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance. The court may in a proper case, and upon terms, reset the same.

(e) Continuances. A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and address of the witness or witnesses. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain; and if the adverse party admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. The court, upon its allowance of the motion, may impose terms or conditions upon the moving party.

(f) Change of Judge. Any right under RCW 4.12.050 to seek disqualification of a judge will be deemed waived unless, in addition to the limitations in the statute, the motion and affidavit is filed with the court no later than thirty days prior to trial before a pre-assigned judge. For purposes of this rule, "trial" includes any review or appeal from an administrative body. If a case is reassigned to a different judge less than forty days prior to trial, a party may then move for a change of judge within ten days of such reassignment, unless the moving party has previously made such a motion.

Credits

[Amended effective October 19, 1999.]

Notes of Decisions (123)

CR 40, WA R SUPER CT CIV CR 40

Current with amendments received through 5/1/14

West's Revised Code of Washington Annotated
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
6. Trials (Rules 38-53.4)

Superior Court Civil Rules, CR 41

RULE 41. DISMISSAL OF ACTIONS

Currentness

(a) Voluntary Dismissal.

(1) *Mandatory.* Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By Stipulation. When all parties who have appeared so stipulate in writing; or

(B) By Plaintiff Before Resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

(2) *Permissive.* After plaintiff rests after his opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

(3) *Counterclaim.* If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(4) *Effect.* Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

(1) *Want of Prosecution on Motion of Party.* Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

(2) *Dismissal on Clerk's Motion.*

(A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

(B) Mailing Notice; Reinstatement. The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.

(C) Discovery in Process. The filing of a document indicating that discovery is occurring between the parties shall constitute action of record for purposes of this rule.

(D) Other Grounds for Dismissal and Reinstatement. This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.

(3) *Defendant's Motion After Plaintiff Rests.* After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross Claim, or Third Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Notice of Settlements. If a case is settled after it has been assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court *promptly* of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk.

Credits

[Amended effective September 1, 1997.]

Notes of Decisions (256)

CR 41, WA R SUPER CT CIV CR 41

Current with amendments received through 5/1/14

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West's Revised Code of Washington Annotated
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
7. Judgment (Rules 54-63)

Superior Court Civil Rules, CR 56

RULE 56. SUMMARY JUDGMENT

Currentness

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or

as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

Credits

[Amended effective September 1, 1978; September 1, 1985; September 1, 1988; September 1, 1990; September 1, 1993.]

Notes of Decisions (821)

CR 56, WA R SUPER CT CIV CR 56

Current with amendments received through 5/1/14

West's Revised Code of Washington Annotated

King County

Superior Court

Local Rules of the Superior Court for King County

Local Rules Conforming to CR Rules as Required by CR 83

II. Commencement of Action: Service of Process, Pleadings, Motions and Orders

King County Superior Court LCR 4

LCR 4. Civil Case Schedule

Currentness

(a) Case Schedule. Except as otherwise provided in these rules or ordered by the Court, when an initial pleading is filed and a new civil case file is opened, the Clerk will prepare and file a scheduling order (referred to in these rules as a “Case Schedule”). When an initial pleading is filed electronically the Clerk will provide an electronic copy to the party filing the initial pleading. When an initial pleading is filed in paper form the Clerk will provide two copies to the party filing the initial pleading.

(b) Cases not Governed by a Case Schedule. Unless otherwise ordered by the Court, the following cases will not be issued a Case Schedule on filing:

(1) Change of name;

(2) Domestic violence protection (RCW chapter 26.50);

(3) Anti-harassment protection (RCW chapter 10.14);

(4) Uniform Reciprocal Enforcement of Support Act (URESAs) and Uniform Interstate Family Support Act (UIFSA). See LFLR 5;

(5) Unlawful detainer;

(6) Foreign judgment;

(7) Abstract or transcript of judgment;

(8) Petition for Writ of Habeas Corpus, Mandamus, Restitution, or Review, or any other Writ;

(9) Civil commitment;

- (10) Proceedings under RCW chapter 10.77;
- (11) Proceedings under RCW chapter 70.96A;
- (12) Proceedings for isolation and quarantine;
- (13) Vulnerable adult protection (RCW 74.34);
- (14) Proceedings referred to referee under RCW 4.48. See LCR 53.1;
- (15) Adoptions;
- (16) Sexual Assault protection (RCW 7.90)
- (17) Emancipation of a Minor. See LFLR 18;
- (18) Will Contests, Probate and TEDRA Matters;
- (19) Marriage Age Waiver Petitions. See LFLR 19;
- (20) Receivership Proceedings (filed as an independent action and not under an existing proceeding);
- (21) Work Permits;
- (22) Small Claims Appeals;
- (23) Petition to Approve Minor/Incapacitated Adult Settlement (when filed as an independent action and not under an existing proceeding).

(c) Service of Case Schedule on Other Parties.

(1) The party filing the initial pleading shall promptly provide a copy of the Case Schedule to all other parties by (a) serving a copy of the Case Schedule on the other parties along with the initial pleading, or (b) serving the Case Schedule on the other parties within 10 days after the later of the filing of the initial pleading or service of any response to the initial pleading, whether that response is a notice of appearance, an answer, or a CR 12 motion. The Case Schedule may be served by regular mail, or electronically when the party being served has agreed to accept electronic service pursuant to GR 30(b)(4), with proof of service to be filed promptly in the form required by CR 5.

(2) A party who joins an additional party in an action shall serve the additional party with the current Case Schedule together with the first pleading served on the additional party.

(d) Amendment of Case Schedule. The Court, either on motion of a party or on its own initiative, may modify any date in the Case Schedule for good cause, except that the trial date may be changed only as provided in LCR 40(e). If a party by motion requests an amendment of the Case Schedule, that party shall prepare and present to the Court for signature an Amended Case Schedule, which upon approval of the Court shall be promptly filed and served on all other parties. The motion shall include a proposed Amended Case Schedule. If a Case Schedule is modified on the Court's own motion, the Court will prepare and file the Amended Case Schedule and promptly issue it to all parties. Parties may not amend a Case Schedule by stipulation without approval of the assigned Judge, except as provided below:

(1) The Deadline for Disclosure of Possible Primary Witnesses and/or the deadline for Disclosure of Additional Witnesses (LCR 26 (b)) may be extended by written stipulation of all parties without the necessity of a court order for an additional period not to exceed 14 days without first applying for approval of the assigned judge, provided that the stipulation contains the following provision: "No party may assert this delay in the Disclosure of Witnesses as a basis for a continuance of the established trial date".

(2) The Discovery Cutoff (LCR 37(g)) may be extended by written stipulation of all parties without the necessity of a court order for an additional period not to exceed 14 days without first applying for approval of the assigned judge, provided that the stipulation contains the following provision: "No party may assert this extension of the Discovery Cutoff as a basis for a continuance of the established trial date".

(e) Form of Case Schedule.

(1) *Case Schedule.* A Case Schedule for each type of case, which will set the time period between filing and trial and the scheduled events and deadlines for that type of case, will be established by the Court by General Order, based upon relevant factors including statutory priorities, resources available to the Court, case filings, and the interests of justice.

(2) A Case Schedule, which will be customized for each type of case, will be in generally the following form:

Filing:	0
Confirmation of Issues (LFLR 4(c) for dissolution and modification cases):	F+16
Status Conference, if needed (Domestic Relations cases only-see LFLR 4(e)):	F+20
Confirmation of Joinder (LCR 4.2(a) for civil cases):	F+23
Last Day for Filing Statement of Arbitrability without a Showing of Good Cause for Late Filing (LMAR 2.1):	F+23
Confirmation of Completion of Genetic Testing (LFLR 4(d) for paternity cases):	F+34
Disclosure of Possible Primary Witnesses (LCR 26(b)):	T-22
Disclosure of Possible Additional Witnesses (LCR 26(b)):	T-16

Final Date to Change Trial and to File Jury Demand (non-family law civil cases)(LCR 38(b) (2)):	T-14
Discovery Cutoff (LCR 37(g)):	T-7
Deadline for Engaging in Alternative Dispute Resolution:	T-4
Deadline for filing "Joint Confirmation Regarding Trial Readiness" (LCR 16):	T-3
Exchange of Witness and Exhibit Lists and Documentary Exhibits(LCR 4(j)):	T-3
Deadline for Hearing Dispositive Pretrial Motions (LCR 56, CR 56):	T-2
Deadline for filing Trial Briefs, Proposed Findings of Fact and Conclusions of Law and Jury Instructions:	T-1
Joint Statement of Evidence (LCR 4(k)):	T-1
Trial:	T

IT IS ORDERED that all parties shall comply with the foregoing schedule and that sanctions, including but not limited to those set forth in CR 37, may be imposed for noncompliance. IT IS FURTHER ORDERED that the party filing this action must serve this Order Setting Case Schedule on all other parties.

Dated:

Judge

I understand that a copy of this document must be given to all parties: _____ (Signature)

Note: a number in the right column preceded by an "F" refers to the number of weeks after filing; a number in the right column preceded by a "T" refers to the number of weeks before trial.

(f) Monitoring. At such times as the Presiding Judge may direct, the Clerk will monitor cases to determine compliance with these rules.

(g) Enforcement; Sanctions; Dismissal; Terms.

- (1) Failure to comply with the Case Schedule may be grounds for imposition of sanctions, including dismissal, or terms.
- (2) The Court, on its own initiative or on motion of a party, may order an attorney or party to show cause why sanctions or terms should not be imposed for failure to comply with the Case Schedule established by these rules.
- (3) If the Court finds that an attorney or party has failed to comply with the Case Schedule and has no reasonable excuse, the Court may order the attorney or party to pay monetary sanctions to the Court, or terms to any other party who has incurred expense as a result of the failure to comply, or both; in addition, the Court may impose such other sanctions as justice requires.

(4) As used with respect to the Case Schedule, “terms” means costs, attorney fees, and other expenses incurred or to be incurred as a result of the failure to comply; the term “monetary sanctions” means a financial penalty payable to the Court; the term “other sanctions” includes but is not limited to the exclusion of evidence.

(h) Failure to Follow Schedule. The court may enter an order of dismissal without prejudice and without further notice for failure to attend a status conference required by these rules as designated on the Case Schedule or to appear in response to the order to show cause issued for failure to appear for a status conference. In family law cases where the parties have agreed upon a final disposition, the dismissal may be set aside by an Ex Parte Commissioner.

(i) Failure to Appear on Scheduled Trial Date.

(1) The failure of a party seeking affirmative relief or asserting an affirmative defense to appear for trial on the scheduled trial date will result in dismissal of the claims or affirmative defenses without further notice.

(2) If the party against whom claims are asserted fails to appear, the party seeking relief must proceed with the trial on the record. Unless final orders are entered at the time of trial, the party shall file their proposed final documents within thirty days of the trial decision.

(j) Exchange of Witness and Exhibit Lists. In cases governed by a Case Schedule pursuant to LCR 4, the parties shall exchange, no later than 21 days before the scheduled trial date: (A) lists of the witnesses whom each party expects to call at trial; (B) lists of the exhibits that each party expects to offer at trial, except for exhibits to be used only for impeachment; and (C) copies of all documentary exhibits, except for those to be used only for illustrative purposes. In addition, non-documentary exhibits, except for those to be used only for illustrative purposes, shall be made available for inspection by all other parties no later than 14 days before trial. Any witness or exhibit not listed may not be used at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires. See LCR 26 (witness disclosure requirements.)

(k) Joint Statement of Evidence. In cases governed by a Case Schedule pursuant to LCR 4 the parties shall file, no later than 5 court days before the scheduled trial date, a Joint Statement of Evidence, so entitled, containing (A) a list of the witnesses whom each party expects to call at trial and (B) a list of the exhibits that each party expects to offer at trial. The Joint Statement of Evidence shall contain a notation for each exhibit as to whether all parties agree as to the exhibit's authenticity or admissibility.

(l) Non-dispositive Pretrial Motions. All non-dispositive pretrial motions and supporting materials, including but not limited to motions to exclude evidence, shall be served and filed pursuant to the requirements of LCR 7(b). Responsive documents shall also be served and filed pursuant to the requirements of LCR 7(b). In addition, working copies of all motion documents shall be provided pursuant to the requirements of LCR 7(b).

(m) Trial Briefs, Proposed Findings of Fact and Conclusions of Law, and Jury Instructions. Except as otherwise ordered by the Court, parties shall serve copies of the trial brief or memorandum of authorities, proposed findings of fact and conclusions of law in non-jury cases, and proposed jury instructions for jury cases, upon opposing parties, with a working copy submitted to the assigned Judge, no later than five court days before the scheduled trial date.

Credits

[Adopted effective January 1, 1990; amended effective September 1, 1992; September 1, 1993; September 1, 1996; September 1, 2001; September 1, 2002; September 1, 2003; September 1, 2004; September 1, 2008; June 1, 2009; September 1, 2010; amended on an emergency basis, effective December 1, 2010; March 1, 2011; June 1, 2011; amended on a permanent basis, effective September 1, 2011; September 1, 2012; September 2, 2013.]

Editors' Notes

OFFICIAL COMMENT

1. Time Standards. The Court has adopted the following time standards for the timely disposition of cases. In view of the backlog of cases and the scarcity of judicial resources, it may take some time before these standards can be met.

(a) General Civil. Ninety percent of all civil cases should be settled, tried, or otherwise concluded within 12 months of the date of case filing; 98 percent within 18 months of filing; and the remainder within 24 months of filing, except for individual cases in which the Court determines that exceptional circumstances exist and for which a continuing review should occur.

(b) Summary Civil. Proceedings using summary hearing procedures, such as those landlord-tenant and replevin actions not requiring full trials, should be concluded within 30 days of filing.

(c) Family Law. Ninety percent of all family law matters should be settled, tried, or otherwise concluded within nine months of the date of case filing, with custody cases given priority; 98 percent within 12 months and 100 percent within 15 months, except for individual cases in which the Court determines that exceptional circumstances exist and for which a continuing review should occur.

(d) Criminal and Juvenile. Criminal and juvenile cases should be heard within the times prescribed by CrR 3.3 or JuCR 7.8.

2. Case Schedule. The term "plaintiff" throughout these rules is intended to include a "petitioner" if that is the correct term for the party initiating the action.

If there is more than one plaintiff, it is the responsibility of each plaintiff to see that the Case Schedule is properly served upon each defendant. This does not mean that multiple copies of the Case Schedule must be served upon each defendant, only that every plaintiff will be held accountable for a failure to serve a copy of the Case Schedule upon a defendant. Multiple plaintiffs should decide among themselves who will serve the Case Schedule upon each defendant.

3. Attorneys and parties are expected to exercise good faith in complying with this rule--for example, by not listing a witness or exhibit that the attorney or party does not actually expect to use at trial.

4. A party wishing to present the testimony of a witness who has been listed by another party may not rely on the listing party to obtain the witness's attendance at trial. Instead, a subpoena should be served on the witness, unless the party is willing to risk the witness's failure to appear.

5. All witnesses must be listed, including those whom a party plans to call as a rebuttal witness. The only exception is for witnesses the need for whose testimony cannot reasonably be anticipated before trial; such witnesses obviously cannot be listed ahead of time.

6. The deadlines in the Case Schedule do not supplant the duty of parties to timely answer interrogatories requesting the names of individuals with knowledge of the facts or with expert opinions. Disclosure of such witnesses known to a party should not be delayed to the deadlines established by this rule.

King County Superior Court LCR 4, WA R KING SUPER CT LCR 4
Current with amendments received through 4/1/14

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West's Revised Code of Washington Annotated
Part III Rules on Appeal
Rules of Appellate Procedure (Rap)
Title 9. Record on Review

Rules Of Appellate Procedure, RAP 9.2

RULE 9.2 VERBATIM REPORT OF PROCEEDINGS

Currentness

(a) Transcription and Statement of Arrangements. If the party seeking review intends to provide a verbatim report of proceedings, the party should arrange for transcription of and payment for an original and one copy of the verbatim report of proceedings within 30 days after the notice of appeal was filed or discretionary review was granted. If the proceeding being reviewed was recorded on videotape, transcription of the videotapes shall be completed by a court-approved transcriber in accordance with procedures developed by the Office of the Administrator for the Courts. Copies of these procedures are available at the court administrator's office in each county where there is a courtroom that videotapes proceedings or through the Office of the Administrator for the Courts. The party seeking review must file with the appellate court and serve on all parties of record and all named court reporters a statement that arrangements have been made for the transcription of the report and file proof of service with the appellate court. The statement must be filed within 30 days after the notice of appeal was filed or discretionary review was granted. The party must indicate the date that the report of proceedings was ordered, the financial arrangements which have been made for payment of transcription costs, the name of each court reporter or other person authorized to prepare a verbatim report of proceedings who will be preparing the transcript, the hearing dates, and the trial court judge. If the party seeking review does not intend to provide a verbatim report of proceedings, a statement to that effect should be filed in lieu of a statement of arrangements within 30 days after the notice of appeal was filed or discretionary review was granted and served on all parties of record.

(b) Content. A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review. A verbatim report of proceedings provided at public expense will not include the voir dire examination or opening statement unless so ordered by the trial court. If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding. If the party seeking review intends to urge that the court erred in giving or failing to give an instruction, the party should include in the record all of the instructions given, the relevant instructions proposed, the party's objections to the instructions given, and the court's ruling on the objections.

(c) Notice of Partial Report of Proceedings and Issues. If a party seeking review arranges for less than all of the verbatim report of proceedings, the party should include in the statement of arrangements a statement of the issues the party intends to present on review. Any other party who wishes to add to the verbatim report of proceedings should within 10 days after service of the statement of arrangements file and serve on all other parties and the court reporter a designation of additional parts of the verbatim report of proceedings and file proof of service with the appellate court. If the party seeking review refuses to provide the additional parts of the verbatim report of proceedings, the party seeking the additional parts may provide them at the party's own expense or apply to the trial court for an order requiring the party seeking review to pay for the additional parts of the verbatim report of proceedings.

(d) Payment of Expenses. If a party fails to make arrangements for payment of the costs of the verbatim report of proceedings at the time the verbatim report of proceedings is ordered, the party may be subject to sanctions as provided in rule 18.9.

(e) Title Page and Table of Contents. The court reporter or other authorized transcriber shall include at the beginning of each volume of the verbatim report of proceedings a title page and a table of contents.

(1) The title page should include the following:

(A) Case name,

(B) Trial court and appellate cause numbers,

(C) Date(s) of hearings,

(D) Trial court judge(s),

(E) Names of attorneys at trial,

(F) Name, business address and telephone number of each court reporter or other authorized transcriber.

(2) The table of contents shall follow the title page and shall indicate, under the headings listed below, the pages where the following appear:

(A) Proceedings. The beginning of each proceeding and the nature of that proceeding;

(B) Testimony. The testimony of each witness, the page where it begins, and the type of examination, i.e., direct, cross, re-direct, re-cross, and the page where the plaintiff rests and the defendant rests;

(C) Exhibits. The admission into evidence of exhibits and depositions;

(D) Argument. The pages where opening statements occur, except as otherwise provided in rule 9.2(b) for verbatim reports of proceedings provided at public expense, and the pages where closing arguments occur;

(E) Instructions. All instructions proposed and given. Any other events should be listed under a suitable heading which would help the reviewing court locate separate parts of the verbatim report of proceedings.

(F) Multiple Days. If a volume includes hearings from more than one day, there shall be a separate table of contents for each day.

(f) Form.

(1) *Generally.* The verbatim report of proceedings shall be on 8-1/2-by 11-inch paper. Margins shall be lined 1-3/8 inches from the left and 5/8 inches from the right side of each page. Indentations from the left lined margin should be: 1 space for “Q” and “A”; 5 spaces for the body of the testimony; 8 spaces for commencement of a paragraph; and 10 spaces for quoted authority. Typing should be double spaced except that comments by the reporter should be single spaced. The page should have 25 lines of type. Type must be pica type or its equivalent with no more than 10 characters an inch.

(A) *Witnesses Designated/Examination.* Indicate at the top or bottom of each page the name of the witness and whether the examination is on direct, cross, re-direct, re-cross, or rebuttal.

(B) *Jury In/Out.* Indicate when the jury is present, when the jury leaves, and when the jury returns.

(C) *Bench/Side Bar Conferences.* Designate whether a bench/side bar conference is on or off the record.

(D) *Chamber Conferences.* If the conference is recorded, note the presence or absence of persons participating in chamber conferences.

(E) *Speaker/Event Identification.* Identify speakers and events that occur throughout the proceedings in capital letters centered on the appropriate line. For example: recess/court reconvene; direct examination, cross examination, re-direct examination, re-cross examination, plaintiff rests; defendant's evidence: direct examination, cross examination, re-direct examination, re-cross examination, defense rests; instructions, conference, closing arguments: for plaintiff, for defense, and rebuttal.

(2) *Volume and Pages.*

(A) Pages in each volume of the verbatim report of proceedings shall be numbered consecutively.

(B) Each volume shall include no more than 200 pages. The volumes shall be either bound or fastened securely.

(3) *Copies.* The verbatim report of proceedings should be legible, clean and reproducible.

Credits

[Amended effective July 2, 1976; September 1, 1985; September 1, 1993; December 10, 1993; September 1, 1994; September 1, 1998; December 24, 2002; September 1, 2010.]

Notes of Decisions (30)

RAP 9.2, WA R RAP 9.2

Current with amendments received through 5/1/14

West's Revised Code of Washington Annotated
Part III Rules on Appeal
Rules of Appellate Procedure (Rap)
Title 18. Supplemental Provisions

Rules Of Appellate Procedure, RAP 18.1

RULE 18.1 ATTORNEY FEES AND EXPENSES

Currentness

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Award Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses, including interest from the date of the award by the appellate court, may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

Credits

[Amended effective July 2, 1976; September 1, 1990; September 1, 1994; December 29, 1998; December 24, 2002; September 1, 2003; September 1, 2006; September 1, 2010.]

Notes of Decisions (218)

RAP 18.1, WA R RAP 18.1

Current with amendments received through 5/1/14

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7 **SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR THE COUNTY OF KING**

9
10 ROBERT ARNOLD, a single man, on behalf
11 of BANANA CORPORATION, a
12 Washington corporation, assignee,

13 Plaintiff,

14 v.

15 MARK PHILLIPS, KENNETH GORDON,
16 JANE DOE GORDON, and the marital
17 community composed thereof; DOUG
18 LOWER AND MAUREEN LOWER,
19 husband and wife and the marital community
20 composed thereof, A-DOT Corporation, a
21 Washington corporation,

22 Defendants.

NO. 10-2-10227-2 SEA

**ANSWER AND AFFIRMATIVE
DEFENSES**

23 Defendants MARK PHILLIPS ("Phillips") and A DOT CORPORATION ("A
24 Dot") (together, "Defendants") answer Plaintiff Robert Arnold's Complaint for Damages
25 for Corporate Looting and Waste, Embezzlement/Conversion, Breach of Fiduciary Duty,
26 Breach of Corporate Opportunities, Breach of Contract, and Fraud ("Complaint") and
27 asserts affirmative defenses as follows.
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I. ANSWER

1. Defendants refuse to answer the allegations in Paragraph 1 of Plaintiff's Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution. Phillips is currently a defendant in a criminal case, U.S. v. Phillips, U.S.D.C. W.D. Wash. Case No. 2:10-MJ-00135-JPD-1.

2. Defendants admit Phillips is a single man residing in King County, Washington. Defendants refuse to answer the remaining allegations in Paragraphs 2.1-2.4 of Plaintiff's Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

3. The allegations in Paragraph 3 of Plaintiff's Complaint contain legal allegations to which no response is necessary. To the extent a response is necessary, Defendants deny those allegations.

4. Defendants refuse to answer the allegations in Paragraph 4 of Plaintiff's Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

5. Defendants refuse to answer the allegations in Paragraph 5 of Plaintiff's Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

6. Defendants refuse to answer the allegations in Paragraph 6 of Plaintiff's Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

7. Defendants refuse to answer the allegations in Paragraph 7 of Plaintiff's Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

8. Defendants refuse to answer the allegations in Paragraph 8 of Plaintiff's Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

9. Defendants refuse to answer the allegations in Paragraph 9 of Plaintiff's Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

10. Defendants refuse to answer the allegations in Paragraph 10 of Plaintiff's Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

11. Defendants refuse to answer the allegations in Paragraph 11 of Plaintiff's Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

1 12. Defendants refuse to answer the allegations in Paragraph 12 of Plaintiff's
2 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

3 13. Defendants refuse to answer the allegations in Paragraph 13 of Plaintiff's
4 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

5 14. Defendants refuse to answer the allegations in Paragraph 14 of Plaintiff's
6 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

7 15. Defendants refuse to answer the allegations in Paragraph 15 of Plaintiff's
8 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

9 16. Defendants refuse to answer the allegations in Paragraph 16 of Plaintiff's
10 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

11 17. Defendants refuse to answer the allegations in Paragraph 17 of Plaintiff's
12 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

13 18. Defendants refuse to answer the allegations in Paragraph 18 of Plaintiff's
14 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

15 19. Defendants refuse to answer the allegations in Paragraph 19 of Plaintiff's
16 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

17 20. Defendants refuse to answer the allegations in Paragraph 20 of Plaintiff's
18 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

19 21. Defendants refuse to answer the allegations in Paragraph 21 of Plaintiff's
20 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

21 22. Defendants refuse to answer the allegations in Paragraph 22 of Plaintiff's
22 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

23 23. Defendants refuse to answer the allegations in Paragraph 23 of Plaintiff's
24 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

25 24. Defendants refuse to answer the allegations in Paragraph 24 of Plaintiff's
26 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

27 25. Defendants refuse to answer the allegations in Paragraph 25 of Plaintiff's
28 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

1 26. Defendants refuse to answer the allegations in Paragraph 26 of Plaintiff's
2 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

3 27. Defendants refuse to answer the allegations in Paragraph 27 of Plaintiff's
4 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

5 28. Defendants refuse to answer the allegations in Paragraph 28 of Plaintiff's
6 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

7 29. Defendants refuse to answer the allegations in Paragraph 29 of Plaintiff's
8 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

9 30. Defendants refuse to answer the allegations in Paragraph 30 of Plaintiff's
10 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

11 31. Defendants refuse to answer the allegations in Paragraph 31 of Plaintiff's
12 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

13 32. Defendants refuse to answer the allegations in Paragraph 32 of Plaintiff's
14 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

15 33. Defendants refuse to answer the allegations in Paragraph 33 of Plaintiff's
16 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

17 34. Defendants refuse to answer the allegations in Paragraph 34 of Plaintiff's
18 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

19 35. Defendants refuse to answer the allegations in Paragraph 35 of Plaintiff's
20 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

21 36. Defendants refuse to answer the allegations in Paragraph 36 of Plaintiff's
22 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

23 37. Defendants refuse to answer the allegations in Paragraph 37 of Plaintiff's
24 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

25 38. Defendants refuse to answer the allegations in Paragraph 38 of Plaintiff's
26 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

27 39. Defendants refuse to answer the allegations in Paragraph 39 of Plaintiff's
28 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

1 40. Defendants refuse to answer the allegations in Paragraph 40 of Plaintiff's
2 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

3 41. Defendants refuse to answer the allegations in Paragraph 41 of Plaintiff's
4 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

5 42. Defendants refuse to answer the allegations in Paragraph 42 of Plaintiff's
6 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

7 43. Defendants refuse to answer the allegations in Paragraph 43 of Plaintiff's
8 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

9 44. Defendants refuse to answer the allegations in Paragraph 44 of Plaintiff's
10 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

11 45. Defendants refuse to answer the allegations in Paragraph 45 of Plaintiff's
12 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

13 46. Defendants refuse to answer the allegations in Paragraph 46 of Plaintiff's
14 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

15 47. Defendants refuse to answer the allegations in Paragraph 47 of Plaintiff's
16 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

17 48. Defendants refuse to answer the allegations in Paragraph 48 of Plaintiff's
18 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

19 49. Defendants refuse to answer the allegations in Paragraph 49 of Plaintiff's
20 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

21 50. Defendants refuse to answer the allegations in Paragraph 50 of Plaintiff's
22 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

23 51. Defendants refuse to answer the allegations in Paragraph 51 of Plaintiff's
24 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

25 52. Defendants refuse to answer the allegations in Paragraph 52 of Plaintiff's
26 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

27 53. Defendants refuse to answer the allegations in Paragraph 53 of Plaintiff's
28 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

1 54. Defendants refuse to answer the allegations in Paragraph 54 of Plaintiff's
2 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

3 55. Defendants refuse to answer the allegations in Paragraph 55 of Plaintiff's
4 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

5 56. Defendants refuse to answer the allegations in Paragraph 56 of Plaintiff's
6 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

7 57. Defendants refuse to answer the allegations in Paragraph 57 of Plaintiff's
8 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

9 58. Defendants refuse to answer the allegations in Paragraph 58 of Plaintiff's
10 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

11 59. Defendants refuse to answer the allegations in Paragraph 59 of Plaintiff's
12 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

13 60. Defendants refuse to answer the allegations in Paragraph 60 of Plaintiff's
14 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

15 61. Defendants refuse to answer the allegations in Paragraph 61 of Plaintiff's
16 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

17 62. Defendants refuse to answer the allegations in Paragraph 62 of Plaintiff's
18 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

19 63. Defendants refuse to answer the allegations in Paragraph 63 of Plaintiff's
20 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

21 64. Defendants refuse to answer the allegations in Paragraph 64 of Plaintiff's
22 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

23 65. Defendants refuse to answer the allegations in Paragraph 65 of the U.S.
24 Constitution.

25 66. Defendants refuse to answer the allegations in Paragraph 66 of Plaintiff's
26 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

27 67. Defendants refuse to answer the allegations in Paragraph 67 of Plaintiff's
28 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

1 68. Defendants refuse to answer the allegations in Paragraph 68 of Plaintiff's
2 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

3 69. Defendants refuse to answer the allegations in Paragraph 69 of Plaintiff's
4 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

5 70. Defendants refuse to answer the allegations in Paragraph 70 of Plaintiff's
6 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

7 71. Defendants refuse to answer the allegations in Paragraph 71 of Plaintiff's
8 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

9 72. Defendants refuse to answer the allegations in Paragraph 72 of Plaintiff's
10 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

11 73. Defendants refuse to answer the allegations in Paragraph 73 of Plaintiff's
12 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

13 74. Defendants refuse to answer the allegations in Paragraph 74 of Plaintiff's
14 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

15 75. Defendants refuse to answer the allegations in Paragraph 75 of Plaintiff's
16 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

17 76. Defendants refuse to answer the allegations in Paragraph 76 of Plaintiff's
18 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

19 77. Defendants refuse to answer the allegations in Paragraph 77 of Plaintiff's
20 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

21 78. Defendants refuse to answer the allegations in Paragraph 78 of Plaintiff's
22 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

23 79. Defendants refuse to answer the allegations in Paragraph 79 of Plaintiff's
24 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

25 80. Defendants refuse to answer the allegations in Paragraph 80 of Plaintiff's
26 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

27 81. Defendants refuse to answer the allegations in Paragraph 81 of Plaintiff's
28 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

1 82. Defendants refuse to answer the allegations in Paragraph 82 of Plaintiff's
2 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

3 83. Defendants refuse to answer the allegations in Paragraph 83 of Plaintiff's
4 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

5 84. Defendants refuse to answer the allegations in Paragraph 84 of Plaintiff's
6 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

7 85. Defendants refuse to answer the allegations in Paragraph 85 of Plaintiff's
8 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

9 86. Defendants refuse to answer the allegations in Paragraph 86 of Plaintiff's
10 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

11 87. Defendants refuse to answer the allegations in Paragraph 87 of Plaintiff's
12 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

13 88. Defendants refuse to answer the allegations in Paragraph 88 of Plaintiff's
14 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

15 89. Defendants refuse to answer the allegations in Paragraph 89 of Plaintiff's
16 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

17 90. Defendants refuse to answer the allegations in Paragraph 90 of Plaintiff's
18 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

19 91. Defendants refuse to answer the allegations in Paragraph 91 of Plaintiff's
20 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

21 92. Defendants refuse to answer the allegations in Paragraph 92 of Plaintiff's
22 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

23 93. Defendants refuse to answer the allegations in Paragraph 93 of Plaintiff's
24 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

25 94. Defendants refuse to answer the allegations in Paragraph 94 of Plaintiff's
26 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

27 95. Defendants refuse to answer the allegations in Paragraph 95 of Plaintiff's
28 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

1 96. Defendants incorporate by reference and reallege each and every previous
2 response set forth above, as though fully set forth herein.

3 97. Defendants refuse to answer the allegations in Paragraph 97 of Plaintiff's
4 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

5 98. Defendants refuse to answer the allegations in Paragraph 98 of Plaintiff's
6 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

7 99. Defendants refuse to answer the allegations in Paragraph 99 of Plaintiff's
8 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

9 100. Defendants incorporate by reference and reallege each and every previous
10 response set forth above, as though fully set forth herein.

11 101. Defendants refuse to answer the allegations in Paragraph 101 of Plaintiff's
12 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

13 102. Defendants incorporate by reference and reallege each and every previous
14 response set forth above, as though fully set forth herein.

15 103. Defendants refuse to answer the allegations in Paragraph 103 of Plaintiff's
16 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

17 104. Defendants refuse to answer the allegations in Paragraph 104 of Plaintiff's
18 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

19 105. Defendants refuse to answer the allegations in Paragraph 105 of Plaintiff's
20 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

21 106. Defendants incorporate by reference and reallege each and every previous
22 response set forth above, as though fully set forth herein.

23 107. Defendants refuse to answer the allegations in Paragraph 107 of Plaintiff's
24 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

25 108. Defendants refuse to answer the allegations in Paragraph 108 of Plaintiff's
26 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

27 109. Defendants refuse to answer the allegations in Paragraph 109 of Plaintiff's
28 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

1 110. Defendants refuse to answer the allegations in Paragraph 110 of Plaintiff's
2 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

3 111. Defendants incorporate by reference and reallege each and every previous
4 response set forth above, as though fully set forth herein.

5 112. Defendants refuse to answer the allegations in Paragraph 112 of Plaintiff's
6 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

7 113. Defendants refuse to answer the allegations in Paragraph 113 of Plaintiff's
8 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

9 114. Defendants refuse to answer the allegations in Paragraph 114 of Plaintiff's
10 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

11 115. Defendants refuse to answer the allegations in Paragraph 115 of Plaintiff's
12 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

13 116. Defendants refuse to answer the allegations in Paragraph 116 of Plaintiff's
14 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

15 117. Defendants incorporate by reference and reallege each and every previous
16 response set forth above, as though fully set forth herein.

17 118. Defendants refuse to answer the allegations in Paragraph 118 of Plaintiff's
18 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

19 119. Defendants refuse to answer the allegations in Paragraph 119 of Plaintiff's
20 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

21 120. Defendants refuse to answer the allegations in Paragraph 120 of Plaintiff's
22 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

23 121. Defendants incorporate by reference and reallege each and every previous
24 response set forth above, as though fully set forth herein.

25 122. Defendants refuse to answer the allegations in Paragraph 122 of Plaintiff's
26 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

27 123. Defendants refuse to answer the allegations in Paragraph 123 of Plaintiff's
28 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

1 124. Defendants refuse to answer the allegations in Paragraph 124 of Plaintiff's
2 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

3 125. Defendants refuse to answer the allegations in Paragraph 125 of Plaintiff's
4 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

5 126. Defendants incorporate by reference and reallege each and every previous
6 response set forth above, as though fully set forth herein.

7 127. Defendants refuse to answer the allegations in Paragraph 127 of Plaintiff's
8 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

9 128. Defendants refuse to answer the allegations in Paragraph 128 of Plaintiff's
10 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

11 129. Defendants refuse to answer the allegations in Paragraph 129 of Plaintiff's
12 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

13 130. Defendants incorporate by reference and reallege each and every previous
14 response set forth above, as though fully set forth herein.

15 131. Defendants refuse to answer the allegations in Paragraph 131 of Plaintiff's
16 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

17 132. Defendants refuse to answer the allegations in Paragraph 132 of Plaintiff's
18 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

19 133. Defendants refuse to answer the allegations in Paragraph 133 of Plaintiff's
20 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

21 134. Defendants refuse to answer the allegations in Paragraph 134 of Plaintiff's
22 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

23 135. Defendants refuse to answer the allegations in Paragraph 135 of Plaintiff's
24 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

25 136. Defendants refuse to answer the allegations in Paragraph 136 of Plaintiff's
26 Complaint based on Phillips's rights under the Fifth Amendment to the U.S. Constitution.

27 137. Defendants deny all allegations herein which are not specifically admitted.
28

1 received all payments to which they are entitled, if any.

2 19. Plaintiff's claims are barred by release.

3 20. Plaintiff's claims are barred by ratification.

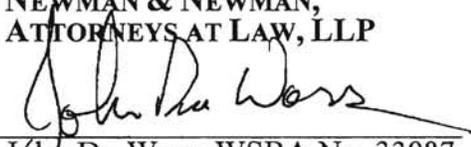
4 21. Defendants reserve the right to add more defenses as discovery proceeds.

5
6 **III. RELIEF REQUESTED**

7 Defendants respectfully request the Court dismiss Plaintiff's claims, deny
8 Plaintiff's requested relief, and award Defendants their reasonable attorneys' fees and
9 costs incurred in defending against Plaintiff's Complaint.

10 DATED this 29th day of June, 2010.

11
12 **NEWMAN & NEWMAN,
13 ATTORNEYS AT LAW, LLP**

14 By: 

15 John Du Wors, WSBA No. 33987
16 Derek Linke, WSBA No. 38314

17 Attorneys for Defendants
18 MARK PHILLIPS and
19 A DOT CORPORATION
20
21
22
23
24
25
26
27
28

1 HONORABLE CHRISTOPHER A. WASHINGTON

2
3 Summary Judgment Hearing: May 18, 2012
Time of Hearing: 10:30 a.m.

4
5
6
7 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

9 ROBERT ARNOLD, a single man, on behalf
10 of BANANA CORPORATION, a
Washington corporation, assignee,

11 Plaintiff,

12 v.

13 MARK PHILLIPS, KENNETH GORDON,
14 JANE DOE GORDON, and the marital
community composed thereof; DOUG
15 LOWER AND MAUREEN LOWER,
husband and wife and the marital community
16 composed thereof; A-DOT Corporation, a
Washington corporation,

17 Defendants.

NO. 10-2-10227-2 (SEA)

PLAINTIFF'S STATEMENT IN
RELATION TO PENDING MOTION
FOR PARTIAL SUMMARY
JUDGMENT

18
19 COMES NOW Plaintiff Robert Arnold on behalf of Banana Corporation and makes this
20 statement in relation to the pending Motion for Partial Summary Judgment Against Defendants A-
21 Dot Corporation and Mark Phillips ("Summary Judgment Motion"), which is noted for hearing on
22 May 18, 2012, at 10:30 a.m.

23 Plaintiff filed and served its Summary Judgment Motion on April 19, 2012, by serving
24 counsel for defendants Mark Phillips and A-Dot Corporation (John Du Wors and Derek Linke of
25 Newman Du Wors, LLP), and local counsel for defendants Lower (Mr. David E. Reed) by legal
26 messenger. Co-counsel for the Lowers (Harmeet K. Dhillon) was served via Federal Express –
27 Overnight delivery. Declaration of Service Re: Motion for Partial Summary Judgment Against A-
28 Dot Corporation and Mark Phillips (dated April 19, 2012).

STATEMENT IN RELATION TO PENDING MOTION
FOR PARTIAL SUMMARY JUDGMENT- 1

C:\Users\Linda\Documents\JAS Active\Arnold o-b-o Banana v. Phillips, et al\Pleadings\Statement in Relation to Pending Mtn for Partial SJ.wpd

LAW OFFICES
SMYTH & MASON, PLLC
7100 COLUMBIA CENTER
701 FIFTH AVENUE
SEATTLE, WASHINGTON 98104
(206) 621-7100

1 Responses by defendants were due no later than May 7, 2012. No responses were received
2 by plaintiff. Declaration of Shaunta Knibb (dated May 14, 2012)(“Knibb Decl.”).

3 Instead, on May 7, 2012, plaintiff was notified by letter that the Newman law firm claimed
4 it had withdrawn as counsel for record on January 11, 2012. **Exh. A, Knibb Decl.** But plaintiff
5 never received a notice of intent to withdraw. This is because counsel for Phillips did not serve its
6 **Notice of Intent to Withdraw on plaintiffs.** See Certificate of Service filed Jan 11, 2012, attached
7 as **Exhibit B** to Knibb Decl.

8 On May 8, 2012, plaintiff notified the Newman law firm that its withdrawal was not
9 effective. **Exh. C, Knibb Decl.** Plaintiff explained that it had sent several pleadings or
10 communications to the Newman firm during 2012 but was never informed about a withdrawal. See,
11 e.g., Exh. D (email communications to Phillips’ attorneys in February & April of 2012); **Exh. E**
12 (date stamp received copies of notice of deposition delivered on counsel for defendant by
13 messenger), Knibb Decl. Plaintiff was left entirely in the dark.

14 Plaintiff is concerned that Mr. Phillips, A-Dot, or their counsel may argue that service of
15 the Summary Judgment Motion was somehow ineffective because of the attempted withdrawal of
16 his counsel in January 2012. The law does not support this conclusion.

17 Civil Rule 71 governs the withdrawal of an attorney, and states in pertinent part as follows:

18 **“(a) Withdrawal by Attorney.** Service on an attorney who has
19 appeared for a party in civil proceeding shall be valid to the extent
20 permitted by statute and rule 5(b) only until the attorney has
21 withdrawn in the manner provided in sections (b), (c), and (d). . . .
22 * * * *

23 **(c) Withdrawal by Notice.** Except as provided in sections (b) and
24 (d), an attorney may withdraw by notice in the manner provided in
25 this section.

26 (1) Notice of Intent to Withdraw. The attorney shall file and serve
27 a Notice of Intent to Withdraw on all other parties in the
28 proceeding. [Emphasis added]

RCW 2.44.050, while applying to a withdraw and substitution of new counsel, mirrors CR
71's requirement of service on the opposing party. It states:

“When an attorney is changed, as provided in RCW 2.44.040,
written notice of the change, and of the substitution of a new
attorney, or of the appearance of the party in person, must be given

