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I. REPLY DISCUSSION

A. CR 78(e) PRECLUDES WSIPP'S UNTIMELY OBJECTIONS.

The crux of this review hinges upon WSIPP's untimely objections to Mitchell's cost bill. App. Brief at 6. Each of the several issues related to this point and discussed in Mitchell's opening brief at pages 5-12 are left uncontested by WSIPP. Resp. Brief at 15, footnote 3. Contrary to this statement, CR 78(e) clearly precludes any untimely objections for the following reasons.

First, CR 78(e) explicitly provides that "no motion to retax costs shall be considered unless the same be filed within 6 days." App Brief at 6-7. Here, WSIPP concedes it never timely objected. Resp. Brief at 4.

Second, the Federal courts have held that under their nearly identical court rule (FRCP 54(d)(1)), a party who fails to timely object to a cost bill waives any objections. see App. Brief at 11-12.

Third, under RAP 14.5, failing to object within the timeframe allotted results in waiver of any objections to a cost bill. App. Brief at 9.

Finally, under various situations where a party fails to object inside of prescribed deadlines, a waiver of any objections results. App. Brief at 8-11.

As this issue is one of first impression, the above authorities support Mitchell's waiver result in this case, which will

dispose of the majority of the issues presented herein.

Based upon the foregoing, the trial court abused its discretion when entertaining WSIPP's untimely cost bill objections contrary to the explicit prohibition of such contained in CR 78(e). See *State v. Rivers*, 129 Wn.2d 697, 706, 921 P.2d 495 (1996) (A failure to enforce the requirements of a court rule is an abuse of discretion).

B. APPLYING CR 60 HERE WAS AN ABUSE OF DISCRETION.

WSIPP contends the trial court acted properly when vacating Mitchell's costs under CR 60(b)(4). Resp. Brief at 15. As shown below, vacating under CR 60 was an error.

To begin, this court reviews the application of a court rule to the facts of this case as a question of law, reviewed de novo. App. Brief at 5. With the following reasons presented below in mind, we can easily see how CR 78(e) applies here and not CR 60(b)(4).

Irregardless of the precise 'term of art' used by WSIPP in the caption for its "Motion to Vacate Costs" (CP 58-71), the relief requested and argument contained in this motion was to revoke (i.e., retax) specific items of costs claimed in Mitchell's cost bill and contesting the amounts claimed. CP 67. As stated in *King Co. Water Dist. v. Renton*, 88 Wn.App 214, 231, 944 P.2d 1067 (1997), any objections to a cost bill may be deemed a motion to retax costs, even if by use of another name. Looking past WSIPP's smoke screen, we can

see the desired effect of the objections was to retax the costs claimed by Mitchell.

Further, WSIPP has never satisfied the requisite element by showing with clear and convincing evidence, that any alleged misconduct had prevented WSIPP from fully and fairly presenting its defense on the underlying judgment. See *Momah v. Bharti*, 144 Wn.App 731, 182 P.3d 455 (2008). Essentially this rule requires the party seeking to vacate to establish prejudice, yet WSIPP has continuously failed to satisfy this element, both here (Resp. Brief at 14-15) and below (CP 58-71). By simply re-phrasing the above element (CP 97), or by asserting that WSIPP "would have opposed the costs" (Resp. Brief at 15), or even repeating the term "clear and convincing evidence supports" (Resp. Brief at 18) each fail to establish the above element by showing factual evidence. Simply stated, WSIPP has failed to prove the above, therefore resulting in the vacation of Mitchell's costs under CR 60(b)(4) an abuse of discretion.

So as to fully dispose of the above issue, WSIPP cannot make the above showing as the alleged misconduct occurred after judgment was entered, and in correlation to this, WSIPP was in possession of ALL pertinent information necessary for a factual and timely objection to be preserved. Counsel for WSIPP admitted at CP 13-14 ¶'s 3-4, that it received the invoice and cost bill on November 24-25, 2008. CP 18-20; 10.

The letter from Mr. Matthews contained only a duplicate copy of the invoice faxed to counsel on November 24, 2008. CP 25-27. If WSIPP desired to object within the timeframe under CR 78(e), it could easily have done so with the information it retained. Instead, counsel slept on his rights and thus waived any objections, as no newly discovered evidence had been uncovered; it was merely duplicative and resulted in no prejudice to WSIPP. An attorney's ignorance of the law does not constitute excusable neglect under CR 60(b)(1). *Engleson v. Burlington Northern R.R.*, 972 F.2d 1038 (9th Cir. 1992).

Common law further prohibits WSIPP from employing CR 60 as a means of getting past the deadline of CR 78(e). App. Brief at 8. Basically, CR 78(e) provides an exclusive remedy for contesting a cost bill. WSIPP's contention that *Pybas v. Paolino*, 73 Wn.App 393, 896 P.2d 427 (1994) provides that "even if [WSIPP] waived the right to challenge the judgment under another rule" is utterly misrepresented. Resp. Brief at 17. Instead, *Pybas*, supra, plainly provides that "CR 60 cannot be used merely to circumvent the time constraints of other rules. *Id.* at 398. Yet, in *Pybas*, the facts surrounded a case where a party failed to timely file a request for trial *de novo*, and under MAR 6.3, can only be set aside by a motion under CR 60. *Id.* at 397. This court concluded that the trial court abused its discretion when vacating under

when no showing of excusable neglect justified vacation. Id. at 404. Similarly, WSIPP has still failed to show why it never timely preserved its objections even when all relevant information was before it. Just as in *Pybas*, the trial court here abused its discretion when vacating Mitchell's costs, as no showing of prejudice has ever been established by WSIPP and no justifiable excuse has ever been presented. Further, CR 78(e) provides the exclusive remedy and objecting outside of its timeframe is prohibited.

C. NUMEROUS FINDINGS LACK SUBSTANTIAL EVIDENCE AS NO MISCONDUCT HAD EVER OCCURRED.

The trial court's order that added 21 findings of fact appears at CP 175-80. Mitchell contests only a few of these alleged findings due to either lack of substantial evidence or as they are contrary to law.

To begin, Finding No. 6 is in error as both the trial court and WSIPP refuse to acknowledge that under the statute, both an individual and a corporation cannot both possess the same license. Supp. Brief of App. at 4-5. King County simply erred when adding Mitchell's name as the first name on the license is MCS GLOBAL INC.--clearly denoting this license is for the corporation and not for Mitchell. Simply stated, this finding lacks substantial evidence as it is refusing to acknowledge the controlling law.

Finding No. 7 is contrary to law as again, WSIPP fails to refer to this feigned duty that Mitchell must disclose any ownership rights he may retain in his cost bill. It is simply inequitable to impose a pseudo duty and use such against Mitchell where none exists at law. As such, this finding is contrary to law.

Findings No. 9-16 each lack substantial evidence as no motion to strike nor rebuttal affidavit has been presented to discredit Mr. Matthews is simply not present in either the written nor verbatim records. Mr. Matthews' affidavit (CP 104-122) stands as uncontested. Mr. Matthews explained his religious name (which is not pronounced "f--k DOC" as misrepresented by WSIPP but instead as "Fook De-awchay" CP 108 ¶ 22; Mitchell **NEVER** requested any items to be sent via legal mail (CP 107-8 ¶ 21). Yet, the trial court abused its discretion by refusing to consider the above unrebutted evidence.

Finding No. 17 is misleading, as Mitchell drafted his cost bill with the amounts that were provided by NRGETX agents over the telephone. Supp. App. Brief at 8.

Finally, Findings No. 18-21 again fail to account for the unrebutted affidavits contained in the record and detailed to be unsupported by substantial evidence in App. Supp. Brief at 9-11.

Again, this court is reminded of its ability to review the documentary evidence and reach an independent decision.

D. IMPOSING CR 11 SANCTIONS WAS UNWARRANTED.

WSIPP argues for 6 pages about how sanctions are warranted, yet misinterprets the crux of Mitchell's discussion regarding Clipse (App. Brief at 13-14. A cost bill is clearly not a motion, pleading nor legal memorandum, and as such, CR 11 plainly does not apply to such. A party desiring to object to a cost bill on any ground may do so within the time frame contained in CR 78(e). Mitchell affirmed under the penalty of perjury that the costs claimed were in-fact incurred, and there being no perjury charges instituted to invalidate such cost bill, and sanctions under CR 11 simply being outside the scope of a cost bill, the trial court clearly abused its discretion when imposing the incorrect court rule.

E. STATUTORY ATTORNEY FEES ARE AVAILABLE TO A LITIGANT ACTING PRO PER.

The sole basis for the trial court denying Mitchell statutory attorney fees under RCW 4.84.080(1) was due to Mitchell not being an attorney nor employing an attorney. RP 12 (Dec. 19, 2008). The statute does not require a licensed attorney, and as such this was an abuse of discretion. App. Brief at 19.

F. DISHONORING ASSIGNMENT OF JUDGMENT WAS IN ERROR.

The trial court never explained its basis for refusing to allow Mitchell his right to assign the judgment. RP 13 (Dec. 19, 2008). Under 14A Wa. Prac. § 35.10, p. 428 (2003), a "judgment is a valuable asset that may be freely assigned like any other valuable right." The trial court simply refused

to honor this assignment, and WSIPP's argument in support of this is without merit. Regardless of RCW 72.09.480, the right to assign a judgment under RCW 4.56.090 is still in effect, which Mitchell had exercised. Under *State v. Williamson*, 100 Wn.App 248, 257, 996 P.2d 1097 (2000) a judge abuses their discretion when a decision is contrary to law. Here, denying Mitchell his right to assign his judgment was an abuse of discretion as it was contrary to RCW 4.56.090.

II. CONCLUSION

As explained in App. Brief at 15-16 in this case condensed to its core. If we were to simply adhere to the explicit prohibition of an untimely objection to a cost bill under CR 78(e), we would be giving effect to the court rule and following the law as we are required to do. Further, sanctioning Mitchell for an item of legal mail that was admitted to be sent by Mr. Matthews without Mitchell's knowledge, and producing no prejudice to WSIPP is a far cry from satisfying the purposes of CR 11. Finally, as Mitchell has fully explained the basis of each of the items of costs claimed (App. Brief at 17-19) thus leaves no justifiable reason for the actions of the trial court, all of which are clearly an abuse of discretion. This case should have been disposed of properly by the trial court yet here we are now consuming valuable energy on unnecessary matters. Mitchell respectfully asks this court to grant the relief requested in both his opening brief and

supplemental briefs of Appellant.

Respectfully submitted this 30th day of July, 2009.

~~UNDER PROTEST~~
~~KM 1-207/308~~

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DECLARATION OF SERVICE

The undersigned affirms under penalty of perjury that a copy of the foregoing document was sent via first-class legal mail, postage pre-paid, on this 30th day of July, 2009 and addressed precisely as follows, to each of the following:

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Dated this 30th day of July, 2009.

~~UNDER PROTEST~~
~~KM 1-207/308~~

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STATE OF WASHINGTON
DEPUTY
BY *MS*
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CLERK OF COURT