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IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

FILED
MAY 31 2011

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

WILLIAM SCHEIDLER

Plaintiff/Appellant

v.

SCOTT ELLERBY,

Defendant/Respondent,

Opening Brief of Appellant

Case 09-2-00660-3

Judge Russell Hartman

William Scheidler
Pro Se
1515 Lidstrom Place E
Port Orchard, WA 98366
360-769-8531



ORIGINAL

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33. *“Arbitrary and capricious” government conduct raises “substantive due process” issues and is reviewed de novo. 21*

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This appeal is solely about statements made by attorneys and the consequent ~\$132,000 sanction and dismissal under CR 56, CR11, and CR 37 imposed by Judge Hartman in reliance upon those statements. This Court in 97 Wn.2d 289, IN RE STROH states the problem in these terms:..... 26
“In sum, the legal system is virtually defenseless against the united forces of a corrupt attorney and a perjured witness. Thus, “For an attorney at law to actively procure or knowingly 26
countenance the commission of perjury is utterly reprehensible.” IN RE ALLEN, 52 Cal. 2d 762, 768, 344 P.2d 609 (1959). 27
“Supreme Court Authority - Duty - In General. The Supreme Court has a duty to protect the public from dishonest, deceitful lawyering.” DISCIPLINE OF DANN 136 Wn.2d 67, 70. (Aug. 1998)..... 27

C) ISSUES PERTAINING TO ASSIGNMENT OF ERRORS AND ARGUMENT PER EACH ISSUE. 28

1) *Appellate Courts have held in a motion for summary judgment the court “resolves all reasonable inferences of witness credibility in favor of the nonmoving party” “accepts the truth of the nonmoving party’s allegations, claims, and offers of proof.” “A party seeking a summary judgment has the burden of 28*

1) *demonstrating the absence of a genuine dispute as to any material fact in the case” and Facts must be viewed in a light most favorable to the nonmoving party– that is most favorable to Scheidler..... 28*

- 2) *This court has held that “Lying to clients is an assault upon the most fundamental tenets of attorney-client relations.” This court has held when Plaintiff’s allegations are founded upon fraud and therefore preclude defendant’s defenses of laches, estoppel and statute of limitations..... 35*
- 3) *This court has held Factors tending to mitigate a presumptive sanction for an attorney’s [‘pro se’ in this case] misconduct include, inter alia, a physical disability” 36*
- 4) *This court has held “In order to maintain public confidence in legal institutions and to enhance respect for the law generally, RPC 8.4(c) - which defines professional misconduct by a lawyer as conduct involving dishonesty, fraud, deceit, or misrepresentation - is administered in a manner that holds attorneys accountable for the results of their conduct, even unintended results.” 39*
- 5) *Appellate courts have held “The general principle that a breach of ethical duties may result in denial or disgorgement of fees.” “An attorney’s professional misconduct may result in the denial or disgorgement of fees”..... 41*
- 6) *Court Rules 26-37 explicitly state that any party may obtain discovery regarding any matter not privileged..... 44*
- 7) *CR 11 states a signature upon a pleading, motion or memorandum constitutes the pleading, motion or memorandum is 1) well grounded in fact and 2) warranted by existing law. RCW 2.48.210 (Oath) states an attorney “will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;” 48*
- 8) *This court has held that an attorney’s negative answer under oath to an interrogatory even if part of the basis for his negative response was technically true that still he was deceiving the proponent of the interrogatory, was held to constitute a violation of Canons of Professional Ethics 15, 22, 29, and 32, since such answer was corruptly made and amounted to chicanery by a member of the Bar A boilerplate or general objection to an interrogatory or request for production may constitute an abuse of the discovery process warranting sanctions by the trial court..... 53*

9) *The Washington State Bar Association, a material witness in this case, is an agency of WA State created by RCW 2.48. The Supreme Court via RCW 2.48.060 is the only State Power to oversee the WSBA. Is Scheidler's private cause of action against Mr. Ellerby a consequence of the incomplete Washington State Bar Association's [WSBA] investigation of Mr. Ellerby?* 54

10) *This court has held that a litigant in a civil case is not entitled to a trial by jury, unless and except so far as there are issues of fact to be determined.* 55

11) *The court of appeals III has held A party has no right to conduct discovery in the absence of a disputed issue of fact. And held that a defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense. Lybbert v. Grant County, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). See also French v. Gabriel, 116 Wn.2d 584, 806 P.2d 1234 (1991). In Lybbert we explained, "the doctrine of waiver is sensible and consistent with . . . our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.'" And, Court rule 11 states that no pleading, motion, or legal memorandum (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.....* 56

12) *This court has held, "Should a court decide that the appropriate sanction under CR 11 is an award of attorney fees, it must limit those fees to the amounts reasonably expended in responding to the sanctionable filings. Generally, this award of reasonable fees should not exceed those fees which would have been incurred had notice of the violation been brought promptly. Cf. Fetzer, at 148-53 (discussing factors to be used in deciding on reasonable attorney fees under RCW 4.28.185(5)). It is clear from the record that the trial court's primary goal in entering these sanctions was to compensate Vail, whereas Bryant makes clear that CR 11 sanctions should be limited to the minimum necessary, and should not be used as a fee-shifting mechanism. Bryant, at 220, 225. ... Finally, in imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order. The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to*

make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose. CR 11. See also Bryant, at 219-20. In this case, there were no such findings.” The Appellate court has held, “Our supreme court has set out a test for the trial court to follow before awarding sanctions. In this case, the trial court neglected to follow appropriate procedure. Before a trial court chooses an allowable harsh remedy under CR 37(b), it must consider three elements: (1) Was there a willful violation of a discovery order? (2) Did the violation substantially prejudice the opponent's ability to prepare for trial? and (3) Did the court consider a lesser sanction. Burnet, 131 Wn.2d at 494. “If the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous; such sanctions must be quantifiable with some precision.”..... 57

13) This court has held when one party is entrusted with the wellbeing of the other it creates an affirmative duty to protect another from harm..... 62

14) This court has found RPC 4.1(a) prohibition against making knowingly false statements to third persons applies to out-of-court statements made to third parties. 63

15) This court has found that a judge's intemperate or rude remarks can constitute judicial misconduct in violation of Canons 2(A), 3(A)(1), and 3(A)(3) of the Code of Judicial Conduct. And an “abuse of judicial discretion exists where it has been exercised upon grounds, or to an extent, clearly untenable or manifestly unreasonable.”..... 63

16) The Court of Appeals has held the existence of probable cause for the initiation or continuation of a civil cause of action is a complete defense to the tort of malicious prosecution. 67

17) Appellate courts have held “An ordinance [statute/court rule] is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.” “The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcement of the law. STATE v. WHITE, SUPRA; GRANT CY. v. BOHNE, SUPRA. BURIEN BARK SUPPLY v. KING CY., 106 Wn.2d 868, 871, 725 P.2d 994 (1986).” “Deprivation of Constitutional Right is not a valid sanction for violation of a procedural requirement Test. Review of a government

restriction on political speech is conducted under the exacting scrutiny standard. Under the exacting scrutiny standard, a restriction on political speech is valid only if it is warranted by a compelling interest, narrowly tailored, and necessary to the achievement of the compelling interest. The government's burden of justifying a restriction under the exacting scrutiny standard is "well-nigh insurmountable."..... 68

18) RCW 9A.50.020 Interference with health care facility. It is unlawful for a person except as otherwise protected by state or federal law, alone or in concert with others, to willfully or recklessly interfere with access to or from a health care facility or willfully or recklessly disrupt the normal functioning of such facility by: (1) Physically obstructing or impeding the free passage of a person seeking to enter or depart from the facility or from the common areas of the real property upon which the facility is located;70 (2) Making noise that unreasonably disturbs the peace within the facility; (3) Trespassing on the facility or the common areas of the real property upon which the facility is located; (4) Telephoning the facility repeatedly, or knowingly permitting any telephone under his or her control to be used for such purpose; or (5) Threatening to inflict injury on the owners, agents, patients, employees, or property of the facility or knowingly permitting any telephone under his or her control to be used for such purpose..... 70

19) RCW 9.73.060 Violating right of privacy — Civil action — Liability for damages. Any person who, directly or by means of a detective agency or any other agent, violates the provisions of this chapter shall be subject to legal action for damages, to be brought by any other person claiming that a violation of this statute has injured his business, his person, or his reputation. A person so injured shall be entitled to actual damages, including mental pain and suffering endured by him on account of violation of the provisions of this chapter, oror liquidated damages computed at the rate of one hundred dollars a day for each day of violation, not to exceed one thousand dollars, and a reasonable attorney's fee and other costs of litigation. ...

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A) ASSIGNMENT OF ERRORS:

- 1) The lower court erred by applying the wrong legal standard in Summary Judgment dismissal of Scheidler's case against attorney Scott Ellerby and is reviewed de novo.¹

Questions:

Was Ellerby's Summary Judgment motion appropriately made given the posture of the case and the course of conduct taken by Ellerby in this case? In other words, Scheidler's appeal concerns, in part, unethical conduct by Ellerby that escaped any penalty occurring early and throughout this case. If Ellerby had been sanctioned early in this case to halt improper behavior, perhaps a "Summary Judgment" motion may not have been dared raised. Scheidler has a right to is Article 1, Section 21 trial.

- 2) The lower court erred in the CR 37 dismissal of Scheidler's case against attorney Scott Ellerby without providing any reasoning that can be reviewed by an appellate court.

Questions:

Will a sanction of this magnitude solicit a rigorous review of the record by the appellate court because the sanction involves the constitutional guarantee to a trial in a civil action? Violation of law

¹ **DISCIPLINE OF TURCO 137 Wn.2d 227, 228 standard of review is de novo for both findings of fact and conclusions of law under State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004)**

and deprivation of constitutional rights to property and to trial by jury are issues reviewed de novo.² Article 1, Section 21; Article 1, Section 3

- 3) The lower court erred by sanctioning Scheidler \$132,000 without addressing any of Scheidler's rebuttal arguments; without addressing what facts have been considered; what choice of law is being applied; and by conducting ex parte hearings when Scheidler's absence was due to disability.

Will a sanction of this magnitude solicit a rigorous review of the record by the appellate court because the sanction involves a constitutional right to property - \$132,000? Article 1, Section 3

Due process issues are implicated in the court's ~\$132,000 sanction imposed on Scheidler and reviewed de novo.³

- 4) The lower court erred in imposing a CR 37 sanction when the substantive issues centered upon privileged communication.

This error is material in perpetuating the litigation; increasing the cost of litigation; perverting the notion that litigation is a "truth-finding" process; fostering a view that "the game is rigged" against Scheidler; defeating the "spirit of cooperation" necessary for the proper functioning of trials;⁴ and naturally leading, because of this

² Id., DISCIPLINE OF TURCO 137 Wn.2d 227, 228

³ Id., DISCIPLINE OF TURCO 137 Wn.2d 227, 228

⁴ PHYSICIANS INS. EXCH. v. FISON'S CORP 122 Wn.2d 299, P.2d 1054 (1993)

error, to the court's ~\$132,000 sanction imposed on Scheidler under CR 37. Violation of law and deprivation of constitutional right to statutory protections are issues reviewed de novo.⁵ Id.,

- 5) The lower court erred by allowing defendant to violate RCW 5.60.060(9) and sanctioning Scheidler ~\$2600 for seeking a protective order based upon this statute that guarantees mental health provider privacy. Id.; Article 1, Section 3 and 7

Question:

Did defendant defraud the court with false statements of fact and law in those matters in the lower court that implicate RCW 5.60.060(9)?

This error is material element in perpetuating the litigation; increasing the cost of litigation; perverting the notion that litigation is a "truth-finding" process; fostering a view that "the game is rigged" against Scheidler; defeating the "spirit of cooperation" necessary for the proper functioning of trials;⁶ and naturally leading, because of this error, to the court's ~\$132,000 sanction imposed on Scheidler. Violation of law and deprivation of constitutional right to privacy and to a hearing on the merits are issues reviewed de novo.⁷

⁵ Id., DISCIPLINE OF TURCO 137 Wn.2d 227, 228

⁶ PHYSICIANS INS. EXCH. v. FISIONS CORP 122 Wn.2d 299, P.2d 1054 (1993)

⁷Id., DISCIPLINE OF TURCO 137 Wn.2d 227, 228

- 6) The lower court erred by not holding defendant and his counsel to CR 11 that states no pleading shall be interposed that unnecessarily increases the cost of litigation.

This error is material in perpetuating the litigation; increasing the cost of litigation; fostering a view that “the game is rigged” against Scheidler; defeating the “spirit of cooperation” necessary for the proper functioning of trials; and naturally leading, because of this error, to the court’s Summary dismissal and the ~\$132,000 sanction imposed on Scheidler. The court by allowing defendant to violate the same CR for which it sanctioned Scheidler raises equal protection issues and is reviewed de novo. Scheidler has a fundamental right to have his case heard on the merits and to be treated fairly. For the court to disregard Ellerby’s violations of Court Rule 11, deprives Scheidler of his fundamental rights and such error is reviewed de novo.⁸

- 7) The lower court erred by not holding defendant and his counsel to their statutory oath – RCW 2.48.210. CP at 769 - 771

This error is material in perpetuating the litigation; increasing the cost of litigation; perverting the notion that litigation is a “truth-finding” process; fostering a view that “the game is rigged” against Scheidler; defeating the “spirit of cooperation” necessary for the

⁸ *Id.*, DISCIPLINE OF TURCO 137 Wn.2d 227, 228

proper functioning of trials;⁹ and naturally leading, because of this error, to the court's Summary Dismissal and the ~\$132,000 sanction imposed on Scheidler under CR 37 and CR 11. Violation of law and deprivation of constitutional right to a hearing on the merits and in fundamental fairness, are issues reviewed de novo.¹⁰ Id. Section 3 and 12.

8) The lower court erred by not holding defendant or his attorney to their code of conduct.

This error is material in perpetuating the litigation; increasing the cost of litigation; perverting the notion that litigation is a "truth-finding" process; fostering a view that "the game is rigged" against Scheidler; defeating the "spirit of cooperation" necessary for the proper functioning of trials;¹¹ and naturally leading, because of this error, to the court's Summary dismissal and the ~\$132,000 sanction imposed on Scheidler under CR 37 and CR 11. Violation of law and deprivation of constitutional right to a hearing on the

⁹ **PHYSICIANS INS. EXCH. v. FISIONS CORP 122 Wn.2d 299, P.2d 1054 (1993)**

¹⁰ **Id., DISCIPLINE OF TURCO 137 Wn.2d 227, 228**

¹¹ **PHYSICIANS INS. EXCH. v. FISIONS CORP 122 Wn.2d 299, P.2d 1054 (1993)**

merits and in fundamental fairness, are issues reviewed de novo.¹²

Article 1, Section 10 and Section 21.

- 9) The lower court erred in allowing Ellerby to engage in discovery and awarding 84.7% of the ~\$132,000 sanction imposed on Scheidler for Scheidler's discovery violations.

Ellerby, in 2009, counterclaimed the action against him as frivolous, without merit, and/or was barred by the statute of limitations. [CP 58-63] In other words, if Ellerby's counterclaims were well grounded in fact and law there is nothing to discover. Ellerby, under CR 11 and RPC Title 3, should have sought to dismiss Scheidler's case at the time his counterclaim was made as it would conserve the courts resources and reduce the cost of litigating a meritless action. To engage in 2-years of litigation and then claim attorney fees for discovery expenses is inconsistent with his counterclaims, and inconsistent with a motion for Summary Judgment – these claims cannot be both grounded in fact or law.

This error is material in perpetuating the litigation; increasing the cost of litigation; and naturally leading, because of this error, to the court's ~\$132,000 sanction imposed on Scheidler, and is reviewed de novo.¹³

¹² *Id.*, DISCIPLINE OF TURCO 137 Wn.2d 227, 228

¹³ *Id.*, DISCIPLINE OF TURCO 137 Wn.2d 227, 228

10)The lower court erred in breaching the court's own condition on attorney fees.

Judge Hartman stated "if Scheidler presses all the way through to trial with his lawsuit he may face paying attorney fees'. CP 1560. [RP December 18, 2009: pages 22-23, CP 1619-1620]. Judge Hartman did not allow this case to go to trial and it is error to award attorney fees when he stated those fees would only be considered after a trial. Substantive Due Process requires informing a person of what conduct is prohibited and what penalties may be imposed. It is error to punish if that punishment is based upon rewriting the past conditions subject to punishment. Due process violations are reviewed de novo. Article 1, Section 3

11)The lower court erred in its arbitrary and capricious administration of the disability accommodation – General Rule (GR) 33. "Arbitrary and capricious" government conduct raises "substantive due process" issues and is reviewed de novo.¹⁴

This error is material in perpetuating the litigation, increasing costs and precipitating the very behavior defendant alleges violates a court rule. The entire purpose for a GR 33 accommodation, if granted, would provide an alternative to the 'inaccessible' procedural requirements. The court's ~\$132,000 sanction imposed on Scheidler is a direct consequence how the lower court

administers the GR 33 accommodations. Depriving Scheidler of an accommodation so as to sanction him for a CR violation is a question of fact and law, and is reviewed de novo.

12) The lower court erred by exercising its discretionary powers in an arbitrary and capricious manner. "Arbitrary and capricious" government conduct raises "substantive due process" issues and is reviewed de novo.¹⁵

Are the lower court's sanctions solely upon Scheidler arbitrary and capricious? Did any of Scheidler's arguments have a good-faith basis in law and fact as provided by CR 11? Did Scheidler violate any court order? Did Ellerby engage in egregious conduct consisting of, in part, defamatory characterizations, the disregard of objections to subpoenas, the abuse of Dr. Holder's time, the abuse of Mary Scheidler's time, the filing of motions without a legal basis, offering false facts, half-truths and deceptive testimony, withholding material evidence? Did Ellerby escape all punishment, even for conduct Judge Hartman found improper?

The lower court's deprivation of a statutory or constitutional right to a fair hearing, the right to plead his case as he views the law, the

¹⁴ Id., DISCIPLINE OF TURCO 137 Wn.2d 227, 228

¹⁵ Id., DISCIPLINE OF TURCO 137 Wn.2d 227, 228

deprivation of a statutory or constitutional benefit –i.e., privacy, is reviewed de novo.¹⁶

B) STATEMENT OF THE CASE

1) NATURE OF CASE

Scheidler's complaint against Ellerby alleges defamation, false light defamation/invasion of privacy, breach of duty, breach of promise, conspiracy, fraud, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence [CP 1-22 and CP 64-115].

These claims are based upon, in pertinent part, the facts stated in C(1) below. The facts are solely statements by attorneys, who are:

Cassandra Noble, Esq., a material witness, was Kitsap County's prosecuting attorney. Depending on which 'withdrawal excuse' one chooses to believe, either raised a conflict of interest asking Ellerby to withdraw, or not. And if so whether Noble's allegation of conflict was grounded in fact and law?

Mr. Mills, Esq., a material witness, is Ellerby's superior and president of the firm Mills Meyers Swartling. In 2008, Mr. Mills emailed Scheidler, in response to Scheidler's email of July 28, 2008

¹⁶ Id., DISCIPLINE OF TURCO 137 Wn.2d 227, 228

seeking a refund [Scheidler's declaration at 8], writing that neither Ellerby nor his firm had any conflict of interest that caused Ellerby to withdraw his representation of Scheidler back in 1998. [CP 64-115, CP 414-415] Mr. Mills states Scheidler's finances were at fault, as Ellerby had said, and that Scheidler was the one who required Ellerby's withdrawal. Mr. Mills also stated that Scheidler's claim that Ellerby withdrew on the eve of the hearing due to conflict issues was baseless and "unfounded." [Scheidler's declaration at 9; CP 64-115]

Washington State Bar - a material witness, which is staffed by Mr. Ellerby as a hearing officer, member of the rules of professional conduct committee, member of the disciplinary board and legislation committee. Mr. Mills, too provides service to the WSBA as a hearing officer, and past service as Chair and Co-Chair of the dispute resolution section. Other attorneys of the firm Mills, Meyers Swartling either past or present offer similar services to the WSBA. [CP 1090-1096]. Elizabeth A. Turner, assistant general counsel for the WSBA, request Scheidler provide any judicial "findings of impropriety" to the WSBA because the WSBA had a "conflict of interest" investigating Ellerby and the evidence was "insufficient" for

their 2008 investigation into Ellerby's ethical violations. [Scheidler's declaration at 10] [CP 1650-1665]

2) Underlying facts:

Defendant Ellerby, an attorney, was to represent Scheidler at an administrative hearing alleging Kitsap County's unlawful manner of administering the property tax program available to disabled individuals. [Scheidler's declaration at 2; CP at 1-22] Ellerby withdrew his representation on the eve of that hearing claiming Kitsap County's attorney, Cassandra Noble, raised a conflict of interest that required his immediate withdrawal. This happened in 1998. [Scheidler's declaration at 3-5; CP at 1-22 and 64-115].

3) The Genesis of Scheidler's Cause of Action:

When Ellerby, in 2008, was asked to refund fees due to this withdrawal, Ellerby changed his excuse saying he withdrew at Scheidler's request – he was never disqualified by a conflict of interest. [CP 58-63] This he also told to Mr. Mills, the firm's President, so Mr. Mills would not deal with Scheidler on the issue of a refund. [Scheidler declaration at 8, 9; CP 64-115, CP 414-415].

Upon receiving Mr. Mills' email claiming Ellerby never had a conflict of interest that required his withdrawal, filed a WSBA

grievance. The WSBA dismissed Scheidler's complaint with these caveats.

"upon a judicial finding of impropriety the grievant may request that the grievance be reopened, "I am involved because the person against whom you have filed your grievance is affiliated with the Washington State Supreme Court or the Association itself...there should be no communication with me during the time of my investigation...this case has been hampered by a number of reasons... you have not provided documentary evidence in support of your claim...it is not clear whether this procedure was followed in the circumstances... it is not clear that these rules would be binding before a tax tribunal."

Scheidler, upon the WSBA's caveats to their "investigation" filed suit against Ellerby. [CP 1-22]

Thereafter, the record is documented by the Clerk's Papers and transcripts of all hearings, which are incorporated by reference.

4) NATURE OF APPEAL

This appeal is solely about statements made by attorneys and the consequent ~\$132,000 sanction and dismissal under CR 56, CR11, and CR 37 imposed by Judge Hartman in reliance upon those statements. This Court in 97 Wn.2d 289, IN RE STROH states the problem in these terms:

"In sum, the legal system is virtually defenseless against the united forces of a corrupt attorney and a perjured witness. Thus, "For an attorney at law to actively procure or knowingly

countenance the commission of perjury is utterly reprehensible." **IN RE ALLEN, 52 Cal. 2d 762, 768, 344 P.2d 609 (1959).**

Direct Review by the Supreme Court is warranted under RAP 4.2(a)(4)

"Supreme Court Authority - Duty - In General. The Supreme Court has a duty to protect the public from dishonest, deceitful lawyering." **DISCIPLINE OF DANN 136 Wn.2d 67, 70. (Aug. 1998)**

Appendix A contains a partial list of factual issues that need to be resolved by a jury.

This appeal is also about Judge Hartman's findings, rulings and public statements. Judge Hartman in his memorandum and order February 8, 2011, resolved issues of fact and found Ellerby withdrew in 1998 because of a "conflict of interest," [Scheidler's declaration at 23] [CP 1278]. This factual finding implies Ellerby's 2008 version of the 1998 events told to Mr. Mills and the WSBA is false. And the Judge's ruling implies Mr. Mills' statements to Scheidler in 2008, were also false. Mr. Mills' said he "investigated" Scheidler's claims of a conflict of interest and found it **"unfounded"!**

"Plaintiff in an action for defamation is presumed to enjoy a good reputation" **MILTON EUGENE ROPER, v. LAWRENCE E. MABRY 15 Wn. App. 819 (1976)**

And the same goes for Mr. Downer's testimony that Ellerby's withdrawal was a scheme between Ellerby and Scheidler saying there was no conflict of interest causing Ellerby to withdraw. This is discussed below. Judge Hartman then, inexplicably, dismisses as Summary Judgement Scheidler's case against Ellerby in an ex-parte hearing – Scheidler was absent due to medical issues. Scheidler's cause of action was spurred on by the various 'withdrawal' excuses Ellerby and Mr. Mills made. The Judge then in a subsequent ex-parte hearing awards ~\$132,000 to Ellerby.

C) ISSUES PERTAINING TO ASSIGNMENT OF ERRORS AND ARGUMENT PER EACH ISSUE.

Scheidler incorporates by reference his "Statement of Grounds for Direct Review" and his "Declaration of William Scheidler in support of his Statement of Grounds for Direct review and in support of Scheidler's Appeal." Scheidler incorporates Clerks Papers, by reference, as it documents all that is stated herein.

- 1) Appellate Courts have held in a motion for summary judgment the court "resolves all reasonable inferences of witness credibility in favor of the nonmoving party"¹⁷ "accepts the truth of the nonmoving party's allegations, claims, and offers of proof."¹⁸ "A party seeking a summary judgment has the burden of demonstrating the absence of a genuine dispute as to any

¹⁷ BERRY v. CROWN CORK & SEAL 103 Wn. App. 312,

¹⁸ DICKINSON v. EDWARDS 37 Wn. App. 834, 682 P.2d 971 (1984)

material fact in the case”¹⁹ and Facts must be viewed in a light most favorable to the nonmoving party²⁰– that is most favorable to Scheidler.

And under Rules of Professional Conduct – Rules of Professional conduct 3.3 - Candor towards the tribunal. A lawyer shall not ... make a false statement of material fact or law; Fail to disclose a material fact...; Fail to disclose, inter alia, legal authority known to be directly adverse to the position of the client... inter alia, and 3.3(f) in an ex parte proceeding a lawyer shall inform the tribunal of all relevant facts... whether or not those facts are adverse. And Rules of Professional conduct 3.4 - fairness to opposing counsel, a lawyer shall not conceal a document having potential evidentiary value.

This Court engages in the same inquiry as the trial court.²¹

EVIDENCE: The following exhibits, referenced below, is a portion of those documents provided to Ellerby with Scheidler’s complaint, with his reply papers, CP at 1-22, 64-115, 253-269 et passim, and in response to Ellerby’s interrogatories and request for production CP 861-868 et passim.

- 1) Ellerby’s “Notice of Withdrawal”, plaintiff’s exhibit E-35A, citing “conflict of interest”. [CP at 19 et passim]
- 2) Ellerby’s letter to Cassandra Noble, plaintiff’s exhibit E-33-34, stating, “we ask that Kitsap County waive any arguable conflicts of interest to allow our continued representation of the Scheidlers.” [CP at 17-18 et passim]
- 3) Ellerby’s 1998 memo to Scheidler, plaintiff’s exhibit E-23, stating, “I am sensitive to your anxiety over the County’s attempt to force my withdrawal from the case....if the County does not respond to my letter or refuses to waive the conflict, I would be forced to withdrawal.” [CP at 86 et passim]

¹⁹ FOLSOM v. BURGER KING 135 Wn.2d 658

²⁰ Id., FOLSOM

²¹ KUHLMAN v. THOMAS 78 Wn. App. 115 (1995)

4) Ellerby's 2008 email, plaintiff's exhibit E-8, stating, "My recollection is that you and Mary concluded it was cost prohibitive to have me represent you at the hearing... the ultimate reason for my not physically attending the hearing was cost." [CP at 78 et passim]

5) Mr. Mills emails of July 30 and August 12, 2008, plaintiff's exhibits E-10B, E-11, E-12, stating the following respectively, "I have investigated your allegations of a breach of ethics or professional malpractice against our law firm, and specifically Scott Ellerby, and I find no factual basis for your contentions." "As Mr. Ellerby previously advised you by reply e-mail two weeks ago ... you and your wife decided not to have Mr. Ellerby represent you at the hearing... Mr. Ellerby never declined to represent you and was never disqualified from representing you because of Kitsap County's suggestion that Mr. Ellerby and our firm may have a conflict of interest..." [CP at 16, 111 et passim]

"My previous response to you is full and complete." ... "our firm stands behind Mr. Ellerby and does not intend to comply with your unfounded demand that we refund money you paid us nearly a decade ago." [CP at 15, 81 et passim]

6) Mr. Ellerby's 1998 "Appellants' Memorandum in support of appeal from Kitsap County Board of Equalization Decision", plaintiff's exhibit E-35B, E-51-E-60 in which Ellerby writes,

"A disability such as the neurological imbalance commonly referred to as "panic disorder" obviously affects the taxpayer's ability to operate in a complicated world. This is the reason why the disabled taxpayer, who is unable to hold employment, is entitled tot he property tax exemption." "Therefore, the Assessor's communications with such a disabled taxpayer, should, by law, conform to clearly articulated standards...What happened to Mr. Scheidler in his dealings with the Assessor and her ... [CP at 22 et passim]

7) Mr. Ellerby's full memorandum, plaintiff's exhibits E-51-E-60 [CP 100-109 included by reference]

Was Scheidler's complaint; his reply to Ellerby's counterclaims, interrogatories, request for production, and admissions, sufficient to provide notice to Ellerby of Scheidler's claims against him? [CP 1-22; 64-115, 253-269, 1008-1098]

"A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. **BARRIE v. HOSTS OF AM., INC.**, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). **WILSON v. STEINBACH** 98 Wn.2d 434, 656 P.2d 1030

Did Ellerby, in seeking Summary Judgment dismissal, withhold the 1998 memo to Scheidler?... discuss Ellerby's "notice of withdrawal"? ... discuss Ellerby's Letter to Cassandra Noble? ... withhold Ellerby's answers to Scheidler's complaint, interrogatories and admissions? ...withhold Scheidler's answer and affirmative defense to Ellerby's counterclaims ... withhold Scheidler's produced evidence... withhold the testimony of Dr. Holder ... withhold the testimony of Mary Scheidler? Did Ellerby withhold nor discuss these pleadings, depositions, facts and exhibits so as to plead "an absence of a genuine issue as to any material fact?" [CP at 1010].

Does Scheidler even need to respond to Defendant's Motion for Summary Judgment if defendant conceals rather than reveals all the entered "evidence" material to the case? ²² This Scheidler argues to the lower court, CP at 1008-1098. See CP 1014 - **RANGER INS. CO. v. PIERCE COUNTY** 138 Wn. App. 757. The law favors resolution on the merits.²³ Is Ellerby's argument for Summary Judgment based upon false statements of fact and law, unethical conduct, in violation of Court Rules and in violation of his Statutory Oath by withholding or failing to address all of the discovered evidence material to the case?

This court states in **PHYSICIANS INS. EXCH. v. FISIONS CORP** 122 Wn.2d 299, P.2d 1054 (1993) citing Taylor v. Cessna Aircraft Co., 39 Wn. App. 828, 836, 696 P.2d 28 "defendant and its counsel could not unilaterally decide what was relevant in a particular case,"

and;

"Fraudulent misrepresentation may be effected by half-truths calculated to deceive" **IKEDA v. CURTIS, 43 Wn.2d 449, (1953)**

²² **Id., RPC 3.3 and RPC 3.4**

²³ **BURNET v. SPOKANE AMBULANCE 131 Wn.2d 484 (1997)**

And why has Judge Hartman not addressed Ellerby's conduct? It was brought to the court's attention time and again! CP 357-411, 461-625, 763-944, 957-976, 1010, 1124-1258, 1558-1780.

If for argument there were no facts to be tried, and all Ellerby's counterclaims [CP 61-63] and arguments supporting Summary Judgment are based upon law, why didn't Ellerby make this case early in 2009 and not wait till late 2010? Why was Ellerby permitted to raise a Summary Judgement motion after two years in litigation and after permitting Ellerby to ...

1. Invade Scheidler's medical privacy, CP 140-355; 797
2. imposing upon third parties, CP 721-723, 845
3. invading the business of Scheidler's mental health practitioners CP 797
4. imposing upon Scheidler's expert witness time without payment, CP 721-723, 845
5. engaging the court in failed motions, CP 641-642, and
6. and why hasn't Ellerby provided the lower court with the "evidence" of his discovery efforts? 1008-1098

Waiver of Ellerby's counterclaims should be concluded.

"A wrongdoer should not profit from the wrong". **BURNET v. SPOKANE AMBULANCE 131 Wn.2d 484, (1997).**

How does Judge Hartman's finding of fact play into a Summary Judgment order? Judge Hartman found Ellerby withdrew his

representation of Scheidler due to a ***conflict of interest***. Re memorandum and order of Feb 8, 2011, CP 1277-1283. This ***must*** imply that all Ellerby's claims that his last minute withdrawal was at Scheidler's request are false assertions? [Scheidler declaration at 6, 7, 8, 12] [CP at 1-22, [CP 59, 78, 81-83, 118, 119, 123, 124, 125, 127, 130, 131, 134, 212, 295, 433... 64-115]. Shouldn't Scheidler, at the very least, prevail in his 'defamation/false light' claim because Ellerby lied to Mr. Mills about Scheidler?

"Plaintiff in an action for defamation is presumed to enjoy a good reputation." **MILTON EUGENE ROPER, v. LAWRENCE E. MABRY 15 Wn. App. 819 (1976)**

It is a viable claim based upon **EASTWOOD v. CASCADE BROADCASTING 106 Wn.2d 466, 722 P.2d 1295**

"The two torts overlap [re: false light and defamation]. In such a case the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity."

Finally, Scheidler was absent from the Summary Judgment hearing due to medical issues, therefore this hearing was conducted ex-parte. VRP January 28, 2011. Did Ellerby, in that ex parte hearing, abide by RPC 3.3(f) that states:

"in an ex parte proceeding a lawyer shall inform the tribunal of all relevant facts... whether or not those facts are adverse."

[This issue is germane to the Assignment of Error's 1-12]

2) This court has held that “Lying to clients is an assault upon the most fundamental tenets of attorney-client relations.”²⁴ This court has held when Plaintiff’s allegations are founded upon fraud and therefore preclude defendant’s defenses of laches, estoppel and statute of limitations²⁵

If one believes Mr. Mills’ claim that there was no conflict of interest that required Ellerby’s withdrawal, [CP at 16, 111 et passim] it means Ellerby lied to Scheidler in 1998 claiming that a conflict of interest required his withdrawal? [CP at 86 et passim] Ellerby also lied to the Board of Tax Appeals citing “conflict of interest” on his “notice of withdrawal?” [CP 9-14, 15, 16, 19] [Scheidler’s dec. at 3, 4, 5, 8, 9]. Due these various and conflicting statements by these attorneys’ revive a cause of action in fraud and breach of duty surrounding the events of 1998?

And because attorneys Mills, Downer and Locker implicate Scheidler as a ‘fraudulent actor’ in Ellerby’s 1998 withdrawal – Mills’ emphatically states he stands behind Ellerby’s 2008 excuse that Scheidler’s claim of conflict is “unfounded.” [CP at 16, 111 et passim] And Ellerby’s counsel states Ellerby’s withdrawal was a scheme between Scheidler and Ellerby. RP August 21, 2009, CP at 805. Has Scheidler’s reputation been harmed by Ellerby’s 2008

²⁴ **DISCIPLINE OF DANN** 136 Wn.2d 67 80 Aug. 1998

²⁵ **YOUNG v. CARAVAN CORPORATION** 99 Wn.2d 655,

rebuttal to Scheidler's claim Ellerby said a conflict of interest required his immediate withdrawal? ²⁶ CP at 86.

On the other hand, based upon Judge Hartman's Feb 8, 2011 memorandum, CP at 1278, Ellerby lied to Mr. Mills concerning the legitimacy of Scheidler's claim for a refund? And in turn Mr. Mills must have lied to Scheidler claiming he "investigated" Scheidler's claim and called it "unfounded". [Scheidler's declaration at 22] [CP 15-16] Whichever way one views the statements by these attorneys, judge Hartman's finding means there are lies being told, by these attorneys, to, or about, Scheidler.

[This issue is germane to the Assignment of Errors 1-12].

3) This court has held Factors tending to mitigate a presumptive sanction for an attorney's ['pro se' in this case] misconduct include, inter alia, a physical disability" ²⁷

Did Scheidler's disability play any mitigating role in any of his alleged and sanctioned 'conduct'? [~\$132,000 and dismissal of his case] And did defendant 'engineer' arguments by playing with Scheidler's disabilities? Did the lower court in its discretion apply Court Rules in a manner that run right into Scheidler's medical difficulties rather than "modify Court Rules" to accommodate these

²⁶ *Id.*, MILTON EUGENE ROPER, v. LAWRENCE E. MABRY 15 Wn. App. 819 (1976).

medical issues as permitted by GR 33 and the Americans with Disabilities Act? [Scheidler's declaration at 14] [CP 49-57, 662-665, 679-681, 682-754, 755-759, 1008-1098, 1124-1258, 1290-1557] Scheidler was unable to attend hearings and was unable to attend his deposition due to a health disability. Scheidler always notified Ellerby in advance, CP at 463, 1012, and always requested a GR 33 accommodation asking for needed recuperative time or the appointment of counsel to substitute for his personal appearance. Scheidler, on November 20, 2010,²⁸ December 6, 2010,²⁹ February 2, 2011³⁰, February 15, 2011³¹ requested a GR 33 accommodation for more time to plead his reply to Summary Judgment, but the "Presiding Judge", who at the time was Judge Haberly acting as presiding judge, postponed the matter until Judge Hartman returned to his role as 'presiding judge'. Judge Hartman upon his return about one week later did not respond to Scheidler's GR 33 accommodation.³² As a consequence, Scheidler, squeezed by the procedural calendar, filed only a partial answer November 29, 2010, and was absent from the Summary Judgment hearing, and

²⁷ DISCIPLINE OF CURRAN 115 Wn.2d 747,

²⁸ EX. __ Email exchange with the court, Nov. 20, 2010 seeking a GR 33 accommodation.

²⁹ CP 1120-1123

³⁰ CP 1277-1283

absent from the hearing of defendant's motion for sanctions and the hearing on defendant's motion for attorney fees and expense due to medical issues. [EP January 28, 2011 at 3]. Scheidler's GR 33 accommodation was to mitigate his absence if provided 'substitute counsel' to stand in for him in his absence. [CP 1008-1285] [CP - Sealed Medical Records] Judge Hartman was arbitrary in granting the accommodation, or did not take up the GR 33 request until the scheduled event had run out the calendar or denied the GR 33 requests in full or in part causing a clash between a court scheduled event and a health problem -- the evidence is in the pleadings and oral arguments. Scheidler is an educated man who was a director of an environmental laboratory with a staff of 50 chemists, from technicians to PhD credentials. His medical diagnosis is explained in 100's of pages produced through discovery. But also upon examination of the transcript, it is obvious his thought process is choppy, clearly coping with memory issues. His writings are much better but take an inordinate amount of time and effort to clean-up due to these memory issues. To put this latter statement into context, Scheidler requires medication to help him with the energy needed to get through the day and then medication

³¹ CP 1286-1289

to help him relax and get through the night. Scheidler's 24-hour regime is unlike anything one would consider 'normal.' The lower court's arbitrary and capricious administration of GR 33 is in a way that would naturally invite a procedural violation; it would naturally increase the cost of litigation with unnecessary hearings; would prejudice Scheidler in his right to justice by denying his GR 33 requests; and inflict emotional distress by this arbitrary administration and in publicizing confidential medical facts. CP at 1142-1158. Such arbitrary and capricious administration by the lower court exacerbates an already disabled Scheidler that then leads to increased difficulties participating in court proceedings. Even Ellerby remarks of such arbitrary conduct by state agents,

"communications with such a disabled taxpayer, should, by law, conform to clearly articulated standards, and, most importantly, be predictable and consistent." CP at 107.

[This issue is germane to the Assignment of errors 1-12]

- 4) This court has held "In order to maintain public confidence in legal institutions and to enhance respect for the law generally, RPC 8.4(c) - which defines professional misconduct by a lawyer as conduct involving dishonesty, fraud, deceit, or misrepresentation - is administered in a manner that holds attorneys accountable for the results of their conduct, even unintended results."³³

³² EP December 10, 2010, page 2-4

³³ DISCIPLINE OF DANN 136 Wn.2d 67, 69 Aug. 1998

In 2008, when Ellerby denies a conflict of interest required his 1998 withdrawal [Scheidler's declaration at 6, 7, 8, 12] [CP at 1-22, [CP 59, 78, 81-83, 118, 119, 123, 124, 125, 127, 130, 131, 134, 212, 295, 433... 64-115, et passim] and Ellerby's superior Mr. Mills supports Ellerby's 2008 excuse that there was no conflict of interest that required Ellerby's withdrawal, [Scheidler's declaration at 9] [CP at 64-115, 1008-1098, et passim], does it raise questions of fact as to what occurred in 1998 given the letters, memos and "Notice of Withdrawal" that cite "conflict of interest" as the cause? [CP at 1-22; 64-115, 1008-1098] If there was no conflict of interest as both Ellerby and Mills state in 2008, [Scheidler's declaration at 8-9] why did Ellerby withdraw using the excuse of "conflict of interest"? And why did he tell Scheidler he had to withdraw due to a conflict of interest? [CP 86 et passim]. And why did Judge Hartman find in fact that defendant, Ellerby, withdrew his representation of Scheidler on the eve of a hearing due to a conflict of interest? [Scheidler's declaration at 3, 4, 5] [CP at 1278].

Are Ellerby's shifting statements about his withdrawal in 1998 v 2008, deceptive answers to interrogatories [Scheidler's dec at 11;], objections and denials to requests for admissions [Scheidler's dec at 12; CP at 1677-1680] and factual denials in pleadings

[Scheidler's dec at 6-7], invoke **DANN**. In other words is Ellerby's cost of litigation (~\$132,000 attorney fee award) a consequence of Ellerby's fraud, deceit, dishonesty or misrepresentations perpetrated upon Scheidler, the WSBA, and the lower court? [This issue is germane to the Assignment of Errors 1- 12]

- 5) Appellate courts have held "The general principle that a breach of ethical duties may result in denial or disgorgement of fees."³⁴ "An attorney's professional misconduct may result in the denial or disgorgement of fees"³⁵

Scheidler incorporates all the preceding as if set forth in full.

Scheidler presents many instances of alleged misconduct in his pleadings. CP 763-944; 957-976; 1008-1098; 1124-1258; 1558-1780. Why didn't the court address any of Scheidler's allegations!

Did defendant's counsel Mr. Downer breach the rules of professional conduct and CR 11, by withholding material evidence in his Motion for Summary Judgement? How do you explain the delaying tactic in pleading summary dismissal, where, if true, were so basic, should have been acted upon early in the litigation? Are Downer's relentless mischaracterization of Scheidler as ...

'willfully refused, willfully violated, blatantly refused, repeatedly violated, intentionally violated, ongoing patter of litigious behavior, ongoing patter of abuse and groundless

³⁴ ERIKS v. DENVER 118 Wn.2d 451, P.2d 1207, (1992)

³⁵ Holmes v. Loveless 122 Wn. App. 470,

harassment, persistent pattern of harassment and blatant disregard behavior',

... an effort to label Scheidler as the “vexatious pro se” and prejudice the Judge against Scheidler? ³⁶ [All Ellerby’s motions repeat these defamatory and malicious characterizations. Why didn’t Judge Hartman sanction Ellerby – he found many of Ellerby’s arguments unsound? For instance Ellerby’s motion to dismiss for discovery CP 412-432. Motion denied CP 641-642; CP at 463-465] An attorney’s oath demands an attorney use means consistent with “truth and honor” and to “never” seek to mislead a judge. Mr. Downer breaches that oath in his use of derogatory and false labels.³⁷ Then too, Mr. Downer was well aware of the true reasons behind his defamatory statements made to Judge Hartman about Scheidler:

- ◆ Scheidler is not a “litigious pro se” he is forced to carry on where Ellerby left off when Ellerby abruptly withdrew from Scheidler’s case. [CP at 463, 464 et seq]
- ◆ If for argument misconduct occurred ... Scheidler’s medical disability is behind all Downer’s allegations of “willful, blatantly refused, intentionally violated ... misconduct – [Scheidler’s response to Ellerby’s motion CP 461-625]

³⁶ **RPC RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL.**
“A lawyer shall not: (e) *inter alia*, state personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant...”

³⁷ **RCW 2.48.210**

Mr. Downer, in his objection to Scheidler's GR 33 accommodation stated to Judge Hartman,

- ◆ Mr. Scheidler has repeatedly attempted to bar defendant's statutory right to access his medical records; and he has refused to participate in basic discovery. CP 674.

Scheidler argued to Judge Hartman that Mr. Downer lies about "basic discovery". Scheidler produced over 500 pages and permitted defendant obtain another nearly 300 pages from the Social Security Administration. CP 786-787; 860-868; 929-938. Judge Hartman didn't address these lies!

Scheidler argued the records being subpoenaed fell under RCW 5.60.060(9), neither Downer nor Judge Hartman addressed this statutory subsection and how it affects the witness statute RCW 5.60.060 as a whole and whether the subpoenas issued by Downer were lawful. CP at 347-348, 349-350, 461-625. The VRP of that hearing can be found at CP 585-611.

Should Ellerby disgorge all fees he was paid in 1998, as well as disgorge the attorney fees (~\$132,000) imposed by the lower court, because his conduct falls well below "truth and honor"? And why didn't the lower court sanction Downer? Judge Hartman recognized Mr. Downer's December 18, 2009 motion as inappropriate and

DENIED it stating the motion was presented inappropriately! [RP December 18, 2009, page 30; CP 1622] [Assignment of Error #1-12]

6) Court Rules 26-37 explicitly state that any party may obtain discovery regarding any matter not privileged.

First and foremost, CR 37 applies to non-privileged discovery issues. Sanctions imposed by the court under CR 37 for Scheidler's motion for a protective order, and Defendant's allegations of interference with the depositions of Dr. Holder and Mary Scheidler are outside the gambit of CR 37 issues and governed by statutory privileges under RCW 5.60.060.

Did the lower court, and Ellerby, disregard Scheidler's RCW 5.60.060 privacy in abrogation of RCW 4.04.010 to arrive at a CR 37 sanction? Why is it that Ellerby, as Scheidler's attorney in 1998, sought to protect Scheidler's sensitive privacy [CP 100-109] and now Ellerby, as defendant, is seeking to invade that sensitive **AND** protected privacy? RCW 5.60.060 specifies the method by which the statutory privileges may be waived.

"The scope of statutory privileges is a legislative determination.
STATE v. BUSS 76 Wn. App. 780 (1996)
<http://www.mrsc.org/mc/appellate/archive/076wnapp/076wnapp0780.htm>

The legislative enactment of RCW 5.60.060(9) is their statement on behalf of the citizens that the courts are no longer free to find for themselves that an “implied waiver,” or an “accelerated waiver” of the mental health privilege occurred. Certainly Ellerby cannot unilaterally determine for himself, as he has [CP 764-944], what he can discover and by what means he can use to that end.

This court states in ***PHYSICIANS INS. EXCH. v. FISIONS CORP*** 122 Wn.2d 299, P.2d 1054 (1993) citing Taylor v. Cessna Aircraft Co., 39 Wn. App. 828, 836, 696 P.2d 28 (***defendant and its counsel could not unilaterally decide what was relevant in a particular case, defendant’s remedy was to seek a protective order, not to withhold discoverable material***), review denied, 103 Wn.2d 1040 (1985).

The statute states explicitly, only by ***written waiver*** may the mental health provider privilege be surrendered. In this way Scheidler’s most sensitive privacy issues are protected until he willingly allows for the intrusion.

“The Legislature is presumed to be familiar with past judicial interpretations of statutes. New legislation is presumed to conform to past judicial *decisions absent a clear legislative intent to overrule the common law.* **CLARK v. PAYNE 61 Wn. App. 189, 810 P.2d 931 May 1991**

Furthermore RCW 5.60.060 – the witness statute, is of substantial public importance; and Subsection 5.60.060(9) is a

matter of first Impression and not sanctionable under CR 11.³⁸ Statutes trump court rules regarding substantive issues – privacy is a substantive issue³⁹ and Scheidler basis his argument on the plain reading of statute RCW 5.60.060(9). Ref: VRP, Transcript of August 21, 2009, CP 461-625:

Scheidler: “Mental health records are privileged. They are under RCW 5.60.060(9). He (Downer) wants to pretend they are under (4)(b).” [RP at 588]

Downer: “the waiver of the physician patient privilege is cut and dried 90-days after filing a suit like this one.” [RP at 593]

The Court: “Now with respect to your protection order for your medical records, Civil Rule 26 defines what’s the appropriate scope of discovery in a civil lawsuit..” “you waive those protections when you file a complaint for these kinds of damages based on the claim you submitted.” [RP at 603-604].

Scheidler consulted attorney David Zuckerman re this issue and Mr. Zuckerman supports Scheidler’s legal position. [RP at 1700]. Scheidler consulted with Senator Delvin, who sponsored the passage of RCW 5.60.060(9), and he supports Scheidler’s legal position [RP at 1702-1707]. Scheidler filed a Motion for Discretionary Review to the Court of Appeals II, but the COAll

³⁸ **MOORMAN V. WALKER 54 Wn. App. 461, 773 P.2d 887 (1989)**

³⁹ If the right is substantive, the statute prevails; if the right is procedural, the court rule prevails. *City of Spokane v. Ward* 122 Wn. App. 40, 41 June 2004

chose to sit idly by and let the issue fester. Clearly, whoever argues the correct legal basis, it is a debatable issue... therefore not sanctionable under CR 11 nor sanctionable under CR 37(b)(e) – resistance was substantially justified or that other circumstances make the sanction unjust.

Is there a Court Order to provide and permit discovery – I cannot find one? For argument, assuming a court order exists, is a sanction appropriate if the substantive issues underlying the sanction are issues of “privilege” – specifically RCW 5.60.060(1) and (9), and a medical disability –GR 33? Did Judge Hartman provide a record for review so the ‘sanctioned’ behavior is identified and the court’s order being violated is identified and that defendant has been prejudiced by the conduct complained of?

A trial court's reasons for imposing a sanction on a party for noncompliance with a discovery order should be stated on the record so as to permit meaningful appellate review.
RIVERS v. CONF. OF MASON CONTRACTORS 145 Wn.2d 674, (2002)

Chambers, J. (concurring) with the majority in *Rivers*.
“Further, while the trial court stated that it had considered lesser sanctions and found them inadequate, our record is bare of reasoning that would allow us to review the trial court's reasoning. Because the case was summarily dismissed, we do not know if the trial court considered the reasons for the delay. We do not know if the trial court considered the logistical difficulties inherent in complying with an order requiring actions in the past. We have no reason to believe the failure to comply

was willful. Nor do we know if the Defendant was actually prejudiced. And we do not know why lesser sanctions were deemed inadequate.” Sanders, J., concurs with Chambers, J.

Judge Hartman’s propensity to “throw the book at Scheidler” is an arbitrary administration of justice. He knowingly permitted, by re-writing the past and refusing to address Scheidler’s allegations of misconduct that involved Ellerby’s invasion into Scheidler’s mental health counselor communication and invasion via subpoenas, phone calls, threats of legal action, and in person into Scheidler’s mental health counselor’s place of business ***without a written waiver, without court order, in breach of written objections?***⁴⁰

[Scheidler’s dec at 16] [CP at 347-350, **529-541**, 763-944, 957-976; 1008-1098; 1124-1258; 1558-1780]

[This issue is germane to the Assignment of Errors 2-12]

- 7) CR 11 states a signature upon a pleading, motion or memorandum constitutes the pleading, motion or memorandum is 1) well grounded in fact and 2) warranted by existing law. RCW 2.48.210 (Oath) states an attorney “will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;”

⁴⁰ Id., RCW 9A.50.020 Interference with health care facility.

Regarding Ellerby's pleadings, replies, declarations and answers to admissions and interrogatories... the same arguments presented above are at play here too.

Judge Hartman found, as a matter of fact, CP at 1278, that Ellerby withdrew his representation of Scheidler on the eve of a hearing due to a conflict of interest. Ellerby's other excuses are a violation of CR 11 and his Oath. Ellerby's denial in his Answer to Scheidler's complaint, CP at 59, is a violation of CR 11 and his Oath? Ellerby's claims to Mr. Mills, and to the WSBA entered as evidence rebutting his withdrawal was due to conflict of interest – is a violation of CR 11 and his Oath. [These issues are discussed in CP 59, 78, 81-83, 118, 119, 123, 124, 125, 127, 130, 131, 134, 212, 295, 433, 803 et passim).

Ellerby's counsel, Mr. Downer, presents his own version of Ellerby's withdrawal as a strategic scheme between Ellerby and Scheidler perpetrated on the Board of Tax Appeals. [RP August 21, 2009, page 17-18; CP at 601-602] This unique argument of Downer, rejected by Judge Hartman, is a violation and, therefore, Downer should have been sanctioned under CR 11 and his Oath, at the least. Keep in mind this "unique excuse" by Downer was made in the same motion hearing of August 21, 2009 in which Judge

Hartman determined that Downer's other claims -- that his fees of \$6000 "is large, but it is real" was false. CP at 596. Judge Hartman, on his own initiative stated,

"I think it's inappropriate to award terms beyond what's actually billed to the client" [CP 597 and 606].

And Judge Hartman further determined that Downer's claim Scheidler refused to conduct a CR 26(i) conference was false. Judge Hartman at CP at 606, stated,

"It's right in Ms. Locker's deposition, I mean declaration, on August the 11th, that said there was a telephonic conference with him about the discovery issue."

Scheidler asked the court, RP of August 21, 2009, CP at 598, "Are you going to let Ellerby lie, lie and lie?" Why were Scheidler's motion for reconsideration [CP 338-344, 345-346] and Scheidler's later motions to disqualify Ellerby's counsel for their false statements of fact and law disregarded by Judge Hartman? Why wasn't Ellerby **ever** sanctioned!

Questions for this Court ... Was Ellerby's argument opposing Scheidler's motion for protection, [CP at 230-248] for which Scheidler was sanctioned approx. \$2500, [CP 335-337], based upon false statements of fact and law? CP 299-326; CP 338-344; and CP 585-611 is the VRP for August 21, 2009. In other words,

the legislature passed RCW 5.60.060(9) in June of 2009, which protects mental health practitioner-patient communication. Yet, Ellerby, August 21, 2009, did not recite that new legislation in any of his pleadings. It is well established law that the interpretation of a statute must harmonize all its elements so that no part of the statute is rendered 'superfluous' or 'irrelevant'. By editorializing the statute, Ellerby defeated Scheidler's motion for protection and was awarded \$1000's in attorney fees as sanctions.

Then too, Ellerby's answer to interrogatory # 2, CP 1164, in which he states he has no present knowledge to support his counterclaims that Scheidler's cause of action is meritless, frivolous, barred, or instituted for an improper purpose. [Scheidler's declaration at 11 and 18] Does this "non-answer", mean Ellerby's counterclaims, CP at 58-63, are not based upon any fact or existing law and improperly pleaded at the time it was signed? Is Ellerby's declarations and answers to admissions denying that his 1998 withdrawal was due to conflict mean his 1998 excuse told to Scheidler claiming a conflict of interest requires his withdrawal is a misrepresentation in that it perpetuates a fraud upon Scheidler? [Scheidler's declaration at 12] [CP 59, 78, 81-83, 118, 119, 123, 124, 125, 127, 130, 131, 134, 140-156, 212, 295, 433...].

Is Ellerby's testimony seeking an order to compel discovery of Scheidler's mental health counselor privileged communication based upon any fact or existing law justifying discovery? {NEED ELLERBY'S MEMORANDUM} [CP 977-980] [Scheidler's declaration at 13 and 18].

Scheidler in his reply to Ellerby's motions for Summary Judgment, motion for discovery sanctions and motion for attorney fees, apprised the court that Ellerby withheld material evidence that would defeat his motions. [CP 299-326, 338-344, 763-790, 1008-1098, 1124-1258, 1274-1276, 1558-1780]. Judge Hartman wasn't interested!

Why didn't the Court impose sanctions after determining Ellerby's "motion to dismiss for discovery sanctions' was improper? [CP at 412-432; 461-472] [VRP December 18, 2010, page 30, CP 1622; CP at 641-642]. Why didn't the Court sanction Ellerby, as it sanctioned Scheidler over \$1500, [VRP August 21, 2009, page 21; CP at 609] for bringing a baseless motion to compel an answer to an interrogatory. [Pertinent part of the Order at CP 978-979 was deleted]

Sanctions are mandatory once a court determines that CR 11 has been violated. PHYSICIANS INS. EXCH. v. FISON'S CORP 122 Wn.2d 299, P.2d 1054 (1993)

[Assignment of Error #1 - 12]

- 8) This court has held that an attorney's negative answer under oath to an interrogatory even if part of the basis for his negative response was technically true that still he was deceiving the proponent of the interrogatory, was held to constitute a violation of Canons of Professional Ethics 15, 22, 29, and 32, since such answer was corruptly made and amounted to chicanery by a member of the Bar⁴¹ A boilerplate or general objection to an interrogatory or request for production may constitute an abuse of the discovery process warranting sanctions by the trial court.⁴²

Are Ellerby's pleadings and responses to Scheidler's complaint, [CP at 58-63] interrogatories [et passim] and admissions [CP at 116-132, 1124-1258 et passim] nothing but "boilerplate" responses and/or are corruptly made and amount to chicanery by a member of the Bar and are therefore an impropriety? [Scheidler's declaration at 3-9, 11 and 12] [This issue is germane to Assignment of Errors 1 - 12]

Is Judge Hartman's Memorandum and Order of February 8, 2011, that resolved factual issues finding Ellerby "withdrew because of a conflict of interest" [Scheidler's dec at 23] [CP 1277-1283], the court's implied finding that Mr. Ellerby lied about the events of 1998 in his pleadings, interrogatories and admissions?

⁴¹ In re WILLIAM R. EDDLEMAN 63 Wn.2d 775

⁴² JOHNSON v. MERMIS 91 Wn. App. 127 May 1998

And does this lower court finding imply Mr. Ellerby and Mr. Mills lied in emails the summer of 2008, in which they said there was no such conflict that required Ellerby's withdrawal. [CP 15, 18, 78, 81, 111]

Given Judge Hartman's February 8 finding, Ellerby, for every claim inconsistent with Judge Hartman's finding, is Ellerby's attempt to abuse the discovery process, violated his oath, violate the rules of professional conduct and deprive Scheidler of a hearing on the merits! Sanctions should have been imposed! Removal of Ellerby's counsel should have been order!

[Scheidler's declaration at 9] [Assignment of Error # 1- 12]

- 9) The Washington State Bar Association, a material witness in this case, is an agency of WA State created by RCW 2.48. The Supreme Court via RCW 2.48.060 is the only State Power to oversee the WSBA. Is Scheidler's private cause of action against Mr. Ellerby a consequence of the incomplete Washington State Bar Association's [WSBA] investigation of Mr. Ellerby?

The WSBA stated they have a "conflict of interest" in investigating Ellerby (Ellerby and many members of Ellerby's firm, including the firm's president Mr. Mills – a material witness, provide service to the Bar). Then the WSBA stated there was "insufficient evidence", and that the WSBA will reopen the grievance upon a "judicial finding of impropriety?" [Scheidler's declaration at 10]

What position has the WSBA placed Scheidler by these 'caveats' to their investigation? Is Scheidler to investigate on behalf of the WSBA via his Judicial Avenue so as to obtain "findings of impropriety?" And has Scheidler found "improprieties?"

[Assignment of Error #6]

10) This court has held that a litigant in a civil case is not entitled to a trial by jury, unless and except so far as there are issues of fact to be determined.⁴³

Does defendant's jury request [Scheidler's declaration at 17; CP at 135] in conjunction with defendant's counterclaim that Scheidler's case is frivolous, meritless, barred... [Scheidler's declaration at 18] [CP at 58-63] constitute two incompatible legal positions in that one or the other legal argument was pleaded without being well grounded in fact or law and an impropriety under CR 11 and RCW 2.48.210? In light of Ellerby's incompatible legal arguments and conduct are the lower court's findings and award of attorney fees [some indeterminate amount of the ~\$132,000] as a CR 11 sanction solely against Scheidler show Judge Hartman is prejudice in his rulings? [Assignment of Error 1-12]

⁴³ NIELSON v. SPANAWAY GEN. MED. CLINIC 135 Wn.2d 255 268
May 1998

11) The court of appeals III has held A party has no right to conduct discovery in the absence of a disputed issue of fact.⁴⁴ And held that a defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense. *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). See also *French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234 (1991). In *Lybbert* we explained, "the doctrine of waiver is sensible and consistent with . . . our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.'⁴⁵ And, Court rule 11 states that no pleading, motion, or legal memorandum (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation⁴⁶

Are Ellerby's attorney fees associated with his discovery efforts a legitimate expense? [84.7% of the approximate \$132,000 sanction, per Downer's declaration 'in support of defendant's motion for attorney fees at 10]. Or was Ellerby's discovery efforts simply to increase the cost of litigation when Ellerby's legal

⁴⁴ *HERN v. LOONEY* 90 Wn. App. 519, 520 959 P.2d 1116 (Mar. 1998)

⁴⁵ *King v. Snohomish County* 146 Wn.2d 420, 424, 47 P.3d 563 (2002).

⁴⁶ *King v. Snohomish County* 146 Wn.2d 420, 424, 47 P.3d 563 (2002).. We have held that a defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense. *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). See also *French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234 (1991). In *Lybbert* we explained, "the doctrine of waiver is sensible and consistent with . . . our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.'" *Lybbert*, 141 Wn.2d at 39 (quoting CR 1). The doctrine is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage. *Lybbert*, 141 Wn.2d at 40.

arguments were Scheidler's case is frivolous, meritless and barred? [Scheidler's declaration at 6, 7, 18, 26]. Has Ellerby justified his discovery effort with a discussion of what facts are in dispute? Should defendant's jury request and his conduct related to discovery **waive** defendant's later claim, some two years later, for CR 57/CR 37 dismissal?" Is there a waiver, based upon **KING**, of defendant's defenses because of his subsequent course of conduct that **ONLY** served to increase the cost of litigation? Did Ellerby discuss what facts were discovered after Scheidler's reply to Ellerby's counterclaims to make his motion for Summary Judgment, 2 years later, a motion based upon fact and law? [This issue is germane to Assignment of Errors 1-12]

12) This court has held, "Should a court decide that the appropriate sanction under CR 11 is an award of attorney fees, it must limit those fees to the amounts reasonably expended in responding to the sanctionable filings. Generally, this award of reasonable fees should not exceed those fees which would have been incurred had notice of the violation been brought promptly. Cf. Fetzer, at 148-53 (discussing factors to be used in deciding on reasonable attorney fees under RCW 4.28.185(5)). It is clear from the record that the trial court's primary goal in entering these sanctions was to compensate Vail, whereas Bryant makes clear that CR 11 sanctions should be limited to the minimum necessary, and should not be used as a fee-shifting mechanism. Bryant, at 220, 225. ... Finally, in imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order. The court must make a finding

that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose. CR 11. See also Bryant, at 219-20. In this case, there were no such findings.”⁴⁷ The Appellate court has held, “Our supreme court has set out a test for the trial court to follow before awarding sanctions. In this case, the trial court neglected to follow appropriate procedure. Before a trial court chooses an allowable harsh remedy under CR 37(b), it must consider three elements: (1) Was there a willful violation of a discovery order? (2) Did the violation substantially prejudice the opponent’s ability to prepare for trial? and (3) Did the court consider a lesser sanction. Burnet, 131 Wn.2d at 494.”⁴⁸ “If the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous; such sanctions must be quantifiable with some precision.”⁴⁹

Was there an actual violation of any court order by Scheidler?

For argument, can Ellerby’s allegation of discovery violation by Scheidler ever meet prong 2 of the test that requires him to plead he was ‘substantially prejudiced in his ability to prepare for trial?’ Ellerby’s counterclaims to Scheidler’s complaint are premised upon Scheidler’s meritless, frivolous, and barred complaint? In fact Summary Judgement dismissal, as granted in this case, is a legal declaration there are **NO TRIABLE** issues! So where is Ellerby’s

⁴⁷ BIGGS v. VAIL 124 Wn.2d 193,

⁴⁸ IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II KURTIS AND PAMELA MAYER, No. 29549-1-II Respondents, v.
STO INDUSTRIES, INC., PUBLISHED OPINION Appellant.

⁴⁹ MacDONALD v. KORUM FORD 892 80 Wn. App. 877, 912 P.2d
1052 Mar. 1996

injury related to discovery? [Scheidler declaration at 18][CP at 58-63] [Id., *Rivers*]

For argument, can Ellerby's allegations of discovery violations by Scheidler regarding the deposition of Dr. Holder and Mary Scheidler be taken seriously if Ellerby caused the delay in their deposition? Ellerby asked Dr. Holder to set aside three dates, 2 hours each, for his deposition. Dr. Holder complied with Ellerby's request, and Scheidler also complied, but Ellerby never followed through with his depositions. Scheidler was subsequently billed for Dr. Holders time that was set aside per Ellerby's request. CP at 779; 845-846. The same can be said regarding Mary Scheidler's deposition. [CP 1249-1250] Downer cancelled a scheduled deposition two days before it was to occur. Mary had previously arranged her work schedule to accommodate Mr. Ellerby. After Ellerby's engages in this abuse of both Dr. Holder's time and Mary Scheidler's time, he files a motion to dismiss citing William Scheidler's **FAILED** to attend his deposition without good reason! Order of the lower court CP at 1270. Scheidler's reason was medical and he forewarned Ellerby 4 days before the scheduled deposition. CP 1124. Is it appropriate for the lower court to award a substantial amount of attorney fees, approximately \$132,000,

without taking into account Ellerby's disrespect of Dr. Holder's time and the disrespect of Mary Scheidler's time? Did the lower court discuss the facts and law at issue? What conduct is being sanctioned, and why Scheidler and not Ellerby, and what are the reasonable expenses related to Ellerby's alleged injury? [Id., **Rivers**]

Is the Court's Summary Dismissal/discovery sanctions to compensate Ellerby for his two years and ~\$132,000 of expenses and attorney fees to engage in litigation against a pro se –non attorney 'reasonable' when he pleaded Scheidler's case is frivolous, without merit, should never have been filed? [Id., CP and Scheidler's dec. at 6, 7, 18 and 26]. Did the court address each and every instance that was alleged so as to provide a "record" for review showing Defendant's costs were necessary to defeat a claim they say time and again is frivolous, without merit, should never have been filed? [Id., **Rivers**]

Did the lower court in imposing \$132,000 in penalties for attorney fees preempt it's own notice to Scheidler when it stated,

"But all the way through a trial I can see the legal fees – they filed counterclaims that this is not a meritorious action. I'm not ready to rule on that issue yet because we have not had a trial."
[EXHIBIT 5, motion hearing December 18, 2009 **pages 22-23**]

And what was the court's explanation in reversing its previous position on attorney fees? [Id., *Rivers*]

Ellerby's answer to interrogatory #2 [Scheidler's declaration at 11 and CP 1125 et passim to 1164] asking Ellerby to state the bases for his defenses and counterclaims [CP at 58-63] to which he responded.

"defendant states that this interrogatory is premature given the status of discovery in this matter. Defendant pleaded this affirmative defense to prevent defendant's unknowing waiver of same for failure to plead under CR 8. Defendant may supplement this answer as discovery progresses and in accordance with the applicable court rules and case schedule." [CP 1164]

The logical conclusion then is Scheidler's complaint met the test of probable cause and could not be sanctioned under CR 11 or CR 56 as defendant was unable to rebut Scheidler's causes of action at the time Ellerby was asked to do just that via interrogatory #2. Did Ellerby ever "supplement" his answer prior to seeking 'summary dismissal' under CR 56/CR 11 grounds?

Was Ellerby's argument opposing Scheidler's motion for protection, for which Scheidler was sanctioned approx. \$2500, [CP 335-337], based upon false statements of fact and law? CP 299-326; CP 338-344; and CP 585-611 is the VRP for August 21, 2009. [Assignment of Error 1-12]

13) This court has held when one party is entrusted with the wellbeing of the other it creates an affirmative duty to protect another from harm.⁵⁰

When Ellerby agreed to take Scheidler's case in 1998 because he saw that Kitsap county was administering the disability program "unlawfully" was he under a duty to protect Scheidler from the unlawful conduct of Kitsap County as alleged in Ellerby's memorandum in support of appeal in the Kitsap case? [Scheidler's declaration at 2] If so, did Ellerby breach that duty when he purported to have a conflict of interest and withdrew from representing Scheidler on the eve of a hearing to address this 'unlawful conduct'? [id dec. at 3-5]. Should Ellerby have known that in the natural course of events, Ellerby's abrupt and last minute withdrawal would have an adverse consequence to Scheidler both in property and in health given his special understanding of the facts in that case?

This court in LEWIS v JENSEN 39 Wn.2d 301, DAMAGES - NATURAL AND PROBABLE CONSEQUENCES OF BREACH OF CONTRACT - CIRCUMSTANCES WITHIN CONTEMPLATION OF PARTIES - PRESUMPTIONS. "A defendant is conclusively presumed to have contemplated the damages which result directly or naturally from his breach of contract."

"The consequences may have been foreseeable because they would occur in the natural course of events, or because, though unusual, the defendant knew special facts making them probable.

⁵⁰ FOLSOM v. BURGER KING 135 Wn.2d 658,

For all such consequences the defendant is liable whether they were actually foreseen or not, or whether even the criminal act of a third person intervenes.” Id., **Lewis v Jensen at 307.**

14) This court has found RPC 4.1(a) prohibition against making knowingly false statements to third persons applies to out-of-court statements made to third parties.⁵¹

Does Judge Hartman’s February 8, 2011 finding that Ellerby withdrew due to a conflict of interest mean Ellerby lied to Mr. Mills stating there was no conflict of interest? Did Ellerby lie to Mr. Mills about Scheidler? and did Ellerby lie to the WSBA in answer to Scheidler’s WSBA complaint? Have Ellerby’s lies led to this litigation, led to the costs of litigation, led to the court’s prejudiced view of Scheidler in this litigation? [id., dec. at [id., dec. at 3, 4, 5, 8, 9, 22, 23] [Assignment of Error #2-12]

15) This court has found that a judge’s intemperate or rude remarks can constitute judicial misconduct in violation of Canons 2(A), 3(A)(1), and 3(A)(3) of the Code of Judicial Conduct.⁵² And an “abuse of judicial discretion exists where it has been exercised upon grounds, or to an extent, clearly untenable or manifestly unreasonable.”⁵³

Scheidler incorporates all the preceding as if set forth in full.

Are the public comments made by Judge Hartman about Scheidler defamatory, insulting, a breach of Scheidler’s GR 33

⁵¹ **In re Discipline of Carmick** 146 Wn.2d 582 583 (2002)

⁵² **DISCIPLINE OF HAMMERMASTER** 139 Wn.2d 211,

⁵³ **STATE v. SILER** 79 Wn.2d 789, 790 489 P.2d 921 [Oct. 1971]

privacy and uncivilized? [Scheidler dec at 24, 25] Throughout CP 1124-1258; 1266-1267; 1558-1780. And whether the Superior Court is committing an abuse of power by: 1) assuming Jurisdiction of Statutorily Privileged Communication, RCW 5.60.060(9), without the requisite "written waiver"? 2) Modifying a Court Order that was well beyond the window to modify simply to 'rescue' Ellerby from his intruding into Scheidler's,

- protected communication, under RCW 5.60.060(9); and
- healthcare provider's place of business under RCW 9A.50; and
- privacy under RCW 9.73?

3) Dismissing Scheidler's allegations of attorney misconduct as factually unacceptable? CP at 1558-1573, 1631-1634. 4) Doesn't Judge Hartman render words of Statutes, Court rules and Rules of Professional Conduct meaningless when Judge Hartman states, August 6, 2010, CP at 1633

"I do not accept opposing counsel is lying".

Judge Hartman's denial that opposing counsel has lied runs in the face of the evidence. Evidence Judge Hartman recognized for himself re Downer's earlier claims for \$6000 in attorney fees, which were false, and Downer's claims re the CR 26(i) conference that were false. Then there are the multiple excuses

Ellerby, Mr. Mills and Ellerby's counsel offer for Ellerby's 1998 withdrawal --- they cannot all be true! Opposing counsel is lying and Ellerby is lying, it is a logical certainty! Furthermore, Judge Hartman's Feb 8 finding of fact that "Ellerby withdrew due to a conflict of interest" is a factual conclusion Ellerby lies, and Mr. Mills lies by saying Ellerby's withdrawal was at Scheidler's request! 5) Was Judge Hartman's conduct towards Scheidler simply malicious? Isn't calling Scheidler a fool, telling him he doesn't know the law, doesn't address any of his complaint's re Downer's conduct toward Dr. Holder, Downer's conduct with respect to Scheidler's privacy, etc intended to inflict emotional harm?" [CP 1008 et seq] Did Judge Hartman even read Scheidler's pleadings? CP 1644.

The Court: "See, I didn't go back through. He gave me a pile of stuff that he said he did send you."

Mr. Downer: "Right"

The Court: "What is that stuff?"

Mr. Downer: "I didn't bring it with me."

The Court: "Ok. I think I'm going to reserve."... CP at 1643-1644

Did Judge Hartman read the law?

The Court: “I think ,I may be wrong, that you can subpoena these records directly from the providers.” CP 1639

The Court: “I just think I would need to look at the law on that issue.” CP at 1646

6) Has the Superior Court exercised its discretionary powers so unevenly against Scheidler as to administer fear and intimidation rather than justice? [Scheidler’s declaration at 24, 25]. CP at 1 et seq..

6) Can the court use its “judicial immunity” and “broad discretionary authority” as a shield protecting Ellerby from his misconduct, false statements of fact, and false statements of law? Isn’t a Judge suppose to take the exact opposite position per Canon 3(c), and report a lawyer who has committed a violation of the Rules of Professional Conduct.

Without repeating all the preceding argument it is incorporated as if set forth in full.

In addition, Appendix B details two events in which Judge Hartman displays arbitrary standards (uneven treatment) so as to obtain the result desired. [Assignment of Error # 1-12]

- 16) The Court of Appeals has held the existence of probable cause for the initiation or continuation of a civil cause of action is a complete defense to the tort of malicious prosecution.⁵⁴

Did the lower court error by dismissing Scheidler's case under CR 56 and awarding \$132,000 in attorney fees under some proportion to CR 11, CR 37 and RCW 4.84.185, when Scheidler pleaded the affirmative defense of "probable cause [Scheidler's declaration at 22]. [CP 64-115] ... and Ellerby was actively engaged in discovery... and having Ellerby fail in a motion to dismiss based upon a CR 11 claim Scheidler's case was frivolous? [CP 412-432; 433-460; 461-625; Court's order denying Ellerby's motion, CP 641-642] Ellerby's December 11, 2009, memorandum in support of motion to dismiss for discovery violations [CP 412-432] in which he raised CR 11 claims that Scheidler's case is frivolous, without merit. And as stated above the Judge was not persuaded by Ellerby's argument and denied Ellerby's motion. [CP 641-642]. In fact the court stated Ellerby's December 18, 2009 motion was "improper". [VRP December 18, 2009 pages 29-30]. Are the Courts January 28, 2011, CR 11, CR 37, CR 57 and RCW 4.84.185 sanctions on Scheidler an "undisclosed" reversal by Judge Hartman that now

⁵⁴ **BRIN v. STUTZMAN** 89 Wn. App. 809, (1998)

says Scheidler violated some order, and that his claims are “frivolous, meritless and barred”?

[Assignment of Error #1-12]

17) Appellate courts have held “An ordinance [statute/court rule] is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.” “The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcement of the law. STATE v. WHITE, SUPRA; GRANT CY. v. BOHNE, SUPRA. BURIEN BARK SUPPLY v. KING CY., 106 Wn.2d 868, 871, 725 P.2d 994 (1986).”⁵⁵ “Deprivation of Constitutional Right is not a valid sanction for violation of a procedural requirement⁵⁶ Test. Review of a government restriction on political speech is conducted under the exacting scrutiny standard. Under the exacting scrutiny standard, a restriction on political speech is valid only if it is warranted by a compelling interest, narrowly tailored, and necessary to the achievement of the compelling interest. The government's burden of justifying a restriction under the exacting scrutiny standard is “well-nigh insurmountable.”⁵⁷

Scheidler incorporates all the preceding as if set forth in full.

Is Judge Hartman's imposing approximately \$133,000 sanction on Scheidler claiming Scheidler violated some rule or court order without any discussion of what Scheidler did to merit the sanction a denial of due process? Are Judge Hartman's public comments about Scheidler in not knowing the law, without any discussion

⁵⁵ CLYDE HILL v. ROISEN 48 Wn. App. 769 740 P.2d 378 (1987)

⁵⁶ STATE v. FLEMING 41 Wn. App. 33

⁵⁷ STATE v. 119 VOTE NO! COMM 135 Wn.2d 618,

about Scheidler's position on the law or a discussion of what law is at issue a denial of due process? Why is Scheidler wrong in his position on the law? Is he not entitled to plead a CR 11 good faith argument about what the law means to him? Doesn't Scheidler have a constitutional free speech right on public policy – isn't the administration of justice; the conduct by attorneys; RCW 5.60.060(9); the court's administration of GR 33; the court's blind-eye to attorneys who are in clear violation of RPC's, CR's and the law - public issues? Is Judge Hartman's impost of ~\$132,000 sanction for alleged violations of a court order based upon some court order that is unrecognizable to persons of common intelligence and therefore a deprivation of constitutional rights of due process? Did Judge Hartman violate Scheidler's due process rights by conducting defendant's motion for Summary Judgment, Motion for Discovery Sanctions and Motion for Attorney Fees ex-parte? [Assignment of Error 12]. Did Judge Hartman, in the hearing on August 6, 2010 [CP 1626-1648] impose a warning on Scheidler in abstentia? [RP August 6, 2010, page 21; CP 1646] Judge Hartman states,

“and I would warn him again if he were here”.

And when was the first time Judge Hartman ‘warned’ Scheidler and to what did the warning pertain? Does Judge Hartman’s finding of fact, [re memorandum and order February 8, 2011, CP at 1278], that Ellerby withdrew his representation of Scheidler on the eve of a hearing due to a conflict of interest imply that all Ellerby’s claims made to the court, made to Mr. Mills, made to the WSBA, that his last minute withdrawal was at Scheidler’s request perjured and a fraud upon the court? [CP 59, 78, 81-83, 118, 119, 123, 124, 125, 127, 130, 131, 134, 212, 295, 433...] And what about Ellerby’s counsel, Mr. Downer, making a unique claim that both Ellerby and Scheidler would use the issue of ‘conflict of interest’ in a ‘strategic scheme. This issue is germane to the Assignment of error’s 1-12.

- 18)RCW 9A.50.020 Interference with health care facility. It is unlawful for a person except as otherwise protected by state or federal law, alone or in concert with others, to willfully or recklessly interfere with access to or from a health care facility or willfully or recklessly disrupt the normal functioning of such facility by:
- (1) Physically obstructing or impeding the free passage of a person seeking to enter or depart from the facility or from the common areas of the real property upon which the facility is located;
 - (2) Making noise that unreasonably disturbs the peace within the facility;
 - (3) Trespassing on the facility or the common areas of the real property upon which the facility is located;
 - (4) Telephoning the facility repeatedly, or knowingly permitting any telephone under his or her control to be used for such

purpose; or

(5) Threatening to inflict injury on the owners, agents, patients, employees, or property of the facility or knowingly permitting any telephone under his or her control to be used for such purpose.

And,

19)RCW 9.73.060 Violating right of privacy — Civil action — Liability for damages. Any person who, directly or by means of a detective agency or any other agent, violates the provisions of this chapter shall be subject to legal action for damages, to be brought by any other person claiming that a violation of this statute has injured his business, his person, or his reputation. A person so injured shall be entitled to actual damages, including mental pain and suffering endured by him on account of violation of the provisions of this chapter, or liquidated damages computed at the rate of one hundred dollars a day for each day of violation, not to exceed one thousand dollars, and a reasonable attorney's fee and other costs of litigation.

All the preceding is incorporated by reference. Ellerby, by and through his counsel, Downer and Locker, by offering false testimony in front of Judge Hartman, in using threats of legal action against Scheidler's mental health providers, in their personal invasion into Scheidler's mental health practitioners office, obtained privileged records without waiver, without court order in violation of objections. CP 764-944 et passim.

D) CONCLUSION

The lower court displayed its prejudice early in this case when it sanctioned Scheidler over \$2300 under CR 11 for bringing

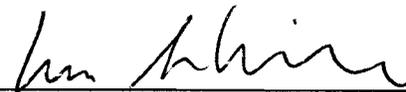
a motion for protective order grounded in RCW 5.60.060(9). In the same hearing Judge Hartman found Downer had lied about his claimed attorney fees. And Downer lied about a CR 26(i) conference. But Judge Hartman imposed no sanctions on Downer. This uneven treatment continued throughout this case as discussed herein. Such behavior by Judge Hartman and attorneys Ellerby, Mills, Downer, Locker needs to be addressed for the common good.

E) RELIEF SOUGHT

Accept Direct Review of Scheidler's appeal. Reverse all the sanctions imposed by the lower court. Reverse summary judgment or grant Summary Judgment for Scheidler. Strike all of Ellerby's pleadings as they are corruptly made. Disqualify attorneys Downer and Locker and Judge Hartman because their conduct is reckless and uncivilized. Declare Ellerby, Downer and Locker violated RCW 5.60.060(9), RCW 9A.50.020, RCW 9.73.060 and RCW 2.48.210. Award Scheidler his costs, per RAP 18.1, plus an amount justice demands as the court may do per RAP 18.8.

May 25, 2011

Respectfully submitted,



William Scheidler, Appellant pro se.

APPENDIXES

F) APPENDIX A

This appeal is about the truth or falsity of...

1. What Ellerby told to Scheidler in 1998.
 - ◆ Ellerby's claim he had to withdraw from representing Scheidler due to a conflict of interest.
2. What Ellerby told to Mills in 2008.
 - ◆ Ellerby tells Mr. Mills there was no conflict of interest that required his withdrawal, but rather it was Scheidler who request that he withdraw because Scheidler didn't want to pay to have Ellerby represent him at a hearing for which Scheidler hired him to attend.
3. What Ellerby told to the WSBA
 - ◆ Ellerby tells the WSBA there was no conflict of interest that required his withdrawal, Ellerby says Scheidler made him withdraw.
4. What Ellerby tells the Court in his 'Answer' to Scheidler's complaint, interrogatories and admissions.
 - ◆ Ellerby denies a conflict required his withdrawal. [CP 59].
 - ◆ Ellerby says he withdrew at Scheidler's request. [CP 59, 78, 81-83, 118, 119, 123, 124, 125, 127, 130, 131, 134, 212, 295, 433...]
 - ◆ Ellerby answers Scheidler's 'complaint, interrogatories, admissions with 'boilerplate' and evasive responses.
 - ◆ Ellerby says Scheidler's complaint is "frivolous, without merit, barred by statute". [CP 63]

- ◆ Ellerby files motions claiming he is prevented from preparing for trial against Scheidler's "frivolous, without merit, barred by statute" complaint.

5. What Ellerby's counsel, Mr. Downer, tells Judge Hartman

- ◆ Downer tells Judge Hartman Scheidler listed all his health care providers as witnesses who will testify.
- ◆ Downer tells Judge Hartman that RCW 5.60.060(4) is the authority he needs to obtain Scheidler's medical records, including Scheidler's mental health records.
- ◆ Downer tells Judge Hartman, repeatedly, that Scheidler refused to conduct a CR 26(i) conference.
- ◆ Downer tells Judge Hartman that his legal fees of \$6000 opposing Scheidler's motion for protection is large but real.
- ◆ Downer repeatedly tells Judge Hartman that Scheidler blatantly refused to pay a court order sanction.
- ◆ Downer repeatedly tells Judge Hartman that Scheidler blatantly violated a discovery order.
- ◆ Downer tells Judge Hartman that Ellerby and Scheidler devised a strategic legal scheme based on 'conflict of interest'.
- ◆ Downer tells Judge Hartman that Ellerby, "voluntarily withdrew from representation at the plaintiff's request [CP 413]
- ◆ Downer tells Judge Hartman that Mr. Mills, "responded to an e-mail message sent by Mr. Scheidler through a link on the Mills Meyers Swartling law firm's web site." "Mr. Mills noted that he had investigated Mr. Scheidler's allegations of a breach of ethics and professional malpractice but found no factual basis for Mr. Scheidler's contentions." [CP 414]

- ◆ Downer tells Judge Hartman that Scheidler admitted his request for a return of fees was not justified. [CP 415]
 - ◆ Downer tells Judge Hartman that Scheidler is an obstructionist and willfully interfered with Dr. Holder's deposition.
 - ◆ Downer tells Judge Hartman that Scheidler refused to attend his scheduled deposition without good cause.
 - ◆ Downer tells Judge Hartman that Scheidler is an obstructionist and willfully obstructed the deposition of Mary Scheidler
 - ◆ Downer tells Judge Hartman Scheidler's case is frivolous, without merit, should never have been filed.
 - ◆ Downer tells Judge Hartman that Scheidler's willful violations of this court's order prejudiced Ellerby in his ability to prepare for trial.
 - ◆ Downer tells Judge Hartman that Ellerby did not defame Scheidler by Ellerby's statement to Mr. Mills that Scheidler lied about a conflict of interest.
 - ◆ Downer tells Judge Hartman that Scheidler is "lashing out" against everyone with whom he disagrees
 - ◆ Downer withholds from the court, exhibits, letters, emails, admissions and answers to interrogatories, that would defeat every claim, derogatory allegation and fact Downer presents in defaming or mischaracterizing Scheidler's cause of action.
1. Defendant and defendant's counsel, Downer, know of Scheidler's medical disability and the difficulty "court procedures" place on Scheidler – Scheidler never "blatantly refused, willfully obstructed any recognizable court order nor any court procedure that wasn't a consequence of his medical disability. And always provided advance notice of any medical difficulties and its impact on upcoming court proceedings.

2. Scheidler's request for a refund of attorney fees were first made under the belief Ellerby was forced to withdraw legitimately when a conflict of interest is raised – as he portrayed in a 1998 memo to Scheidler, Exhibit E-23. But when Scheidler learned, via Mr. Mills' email of June 2008, [Exhibit EM-2] that Ellerby never had a conflict of interest and was never required to withdraw only then demanded attorney fees be returned. Mr. Mills replied that he and his firm stands behind Mr. Ellerby's version of events and told Scheidler his claims are "unfounded." [Exhibit EM-5; CP 413-414]
3. Scheidler's request that communication be via email due to Scheidler's disability and medication taken that disrupts memory and concentration. Downer refused and then made defamatory statements about Scheidler to Judge Hartman saying Scheidler "deliberately, willfully, blatantly obstructed..."
4. Scheidler's request that phone conferences be held on "his good" days when he was more competent to discuss his case. Downer refused and then made defamatory statements about Scheidler to Judge Hartman saying Scheidler "deliberately, willfully, blatantly obstructed..."
5. Downer says Scheidler is "lashing out against anyone with whom he disagrees." [CP 412-432] It is because Ellerby withdrew his representation under the excuse he had a conflict of interest with the very people with whom he left Scheidler to continue without Ellerby's help! It was Ellerby who "began the lashing out" against the people who were harming Scheidler, but then withdrew. Downer's half-truth is meant to deceive and paint Scheidler as the "vexatious pro se."
6. Downer conducted the deposition of Dr. Holder on the date they both agreed to. And Dr. Holder was never instructed to not answer any question Downer propounded. There was no obstruction of Dr. Holder's deposition as claimed by Downer.

7. Downer, in contrast to his claims that Scheidler interfered with Dr. Holder's deposition, abused Dr. Holder's time. Downer demanded Dr. Holder set aside three dates for a *second deposition*, which he did. But Downer never followed through with his request. Dr. Holder's time was abused by Downer. CP _____

8. Ms. Gauri S Locker, on the date scheduled, conducted an 8.3-hour deposition of Mary Scheidler. Mary Scheidler was never instructed to not answer. Nor was there a Court Order beyond producing Mary Scheidler for her deposition that indicated any conduct that would be subject to sanctions if violated. It was Ms. Locker, who violated RPC 4.4 in conducting a belabored 8.3 hr. deposition without regard to Mary Scheidler's work schedule. Mary works 'graveyard' and was being deprived of her sleep. William Scheidler (pro se) requires medication at specified intervals and was not informed that the deposition of Mary would exceed 8.3 hours with no end in sight. Ms. Locker never justified, per RPC 4.3, why a belabored 8.3-hour deposition with no end in sight was under her sole prerogative.

6. Judge Hartman's derogatory comments directed at Scheidler

- ◆ Scheidler is pro se ... Judge Hartman says 'lawyers who represent themselves have fools for a client.'
- ◆ He says, Scheidler, in one instance now shows he doesn't know the law – to what law Judge Hartman refers to is not clear or what it is Scheidler doesn't know.
- ◆ He says, Scheidler, in two instances now shows he doesn't know the law. To what laws Judge Hartman refers to is not clear.
- ◆ He says Scheidler's claims of Downers misconduct and that he be disqualified are unacceptable. Curious because Judge Hartman himself found Downer's claim that Scheidler refused to conduct a CR 26(i) discovery conference was

false, and that Downer's claim that the \$6000 in attorney fees requested was "large but real" was also false. Judge Hartman also found Downer's motion to dismiss for discovery sanctions December 18, 2009 was "improper." Downer escaped all CR 11 violations.

7. Judge Hartman's denial of 'disability accommodations'.

- ◆ Scheidler's GR 33 request that communication be via email due to Scheidler's disability and medication taken that disrupts memory and concentration. Email would help offset these issues, as it would provide time to organize his thoughts. Judge Hartman failed to address this request
- ◆ Scheidler's GR 33 request that phone conferences be held on "his good days" when he was more competent to discuss his case. Judge Hartman failed to address this request
- ◆ Scheidler requested more time to plead in response to defendant's motion for Summary Judgment; sanctions; attorney fees. Judge Hartman denied Scheidler's GR 33 request
- ◆ Scheidler requested time to recover from acute medical issues or the assignment of counsel while Scheidler recovers. Judge Hartman denied Scheidler's GR 33 request

8. Judge Hartman conducts ex-parte hearings with Downer when Scheidler is unable to attend those hearings due to acute medical issues. Judge Hartman, after denying Scheidler's GR33 request for added time to plead, finds that Scheidler's absence isn't justifiable and rules in favor of Downer's motion for Summary Judgment, motion for discovery sanctions, motion to extend discovery and motion for attorney fees (fees to be determined).

- ◆ Judge Hartman in an ex parte hearing with Downer, December 10, 2010, discusses medical issues that were previously provided to Judge Hartman under "seal" per GR 33. Judge Hartman publicly states,

“Mr. Scheidler has previously submitted documentation to the Court asserting that he suffers from disabilities related to anxiety and agoraphobia...”⁵⁸

“Mr. Scheidler has documented that the Social Security Administration recognizes him as suffering from agoraphobia, which is an anxiety disorder...”⁵⁹

9. Judge Hartman conducts ex-parte hearings re Downer’s fee tabulation. Scheidler was absent for the same reasons – the denial of his GR 33 request for more time to plead or the assignment of counsel.

⁵⁸ RP Dec. 10, 2010 pg. 4

⁵⁹ RP Dec. 10, 2010 pg. 7

G) APPENDIX B: TWO EXAMPLES OF JUDGE HARTMANS ARBITRARY CONDUCT.

Did the lower court send mix signals in dismissing Defendant's December 18, 2009 motion to dismiss for discovery violations and under CR 11, signifying the court's disagreement in defendant's allegation that Scheidler violated a discovery order? Isn't the lower court's denial of defendant's December 2009 motion to dismiss tacit approval that Scheidler's case meets CR 11 and RCW 4.84.185 threshold elements?

For example: Comparing Ellerby's December 11, 2009, memorandum in support of motion to dismiss for discovery violations [CP at 412-432; **Motion Denied** CP 641-642] with his December 3, 2010 motion to dismiss for discovery sanctions [CP 1099-1119; **Motion Granted** CP 1268-1271] did the court flip-flop on stale issues?

In other words, if the court declined to comment on all the issues raised by Ellerby when it denied Ellerby's December 11, 2009 motion to dismiss, then isn't granting Ellerby's December 3, 2010 motion to dismiss on the same issues trickery. What notice was given to Scheidler that the court now reversed it's position on those issues? Is the lower court's sanction [some indeterminate

amount of the ~\$132,000 total] a reversal of its December 11, 2009 position on those stale issues?

Another EXAMPLE: In August 2009, Scheidler filed a motion to compel an answer to an interrogatory that Scheidler felt was answered in an 'evasive' manner. Judge Hartman scolded Scheidler saying "no attorney would have brought this motion" [CP at 607], and sanctioned Scheidler approximately \$1500. On August 6, 2010, Ellerby filed a motion to compel an answer to an interrogatory that Ellerby felt was not answered as he would like. While Judge Hartman said that Scheidler 'answered' the interrogatory no 'scolding nor sanctions' were imposed upon Ellerby! Judge Hartman's order CP at 978-979

Another example: Judge Hartman, EP December 10, 2010 page 3, said,

"Then on December the 3rd, Mr. Ellerby filed with the court and served on Mr. Scheidler an additional motion, and this was that, in effect, that the matter be dismissed for discovery violations as opposed to on the merits under the summary judgment motion and scheduled that for hearing today as well."

Review of the order signed January 28, 2011, is an order for Summary Judgment – which, according to Judge Hartman was supposedly supplanted by a CR 37-dismissal motion for sanctions.

Clearly Judge Hartman changes his position for the convenience of Defendant.