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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

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ELINOR JEAN TATHAM,

AUG 15 2011

Respondent,

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

v.

30085-4

JAMES CRAMPTON ROGERS,

Appellant.

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE PROPER STANDARD OF REVIEW IS *DE NOVO*.

Respondent Tatham attempts to convince this Court that an abuse of discretion standard of appellate review applies to the trial court's decision not to grant Rogers' motion to vacate the judgment. But Rogers' motion is based upon the contention that his procedural due process rights were violated because the judge presiding over his trial had numerous undisclosed associations with Tatham's counsel which would cause an objective person to have doubts about his ability to be impartial. Washington appellate courts have consistently given *de novo* review to due process claims of denial of a fair and impartial tribunal. *See, e.g., In re Discipline of King*, 168 Wn.2d 888, 899, 232 P.2d 1095 (2010) (*de novo* review of claim that hearing officer was not impartial); *In re Crace*, 157 Wn. App. 81, 98, 236 P.3d 914 (2010) (*de novo* review of claim that juror was not impartial). Here, as in *King* and *Crace*, the central due process question is subject to *de novo* review.

2. WHILE THE DUE PROCESS RIGHT TO A JUDGE WITH THE APPEARANCE OF IMPARTIALITY CAN BE WAIVED, IT CAN ONLY BE WAIVED KNOWINGLY, AND ONLY BY THE LITIGANT. AN ATTORNEY CANNOT WAIVE HIS CLIENT'S CONSTITUTIONAL RIGHTS.

Tatham argues that Rogers "waived" his due process right to a judge possessed of the appearance of impartiality. *Brief of Respondent* ("BOR"), at 16. This due process right, like any other constitutional right, can be waived; but it is well settled that "[w]aiver of a constitutional right must be 'knowing, intelligent, and voluntary.'" *State v. Robinson*, ___

Wn.2d ___, 2011 WL 1434607 (April 14, 2011), citing *State v. Stegall*, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). “[C]ourts indulge every reasonable presumption against the waiver of fundamental constitutional rights,” and they “do not presume acquiescence in the loss of such fundamental rights.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1939).¹

Tatham argues that Rogers’ due process right was waived by *his attorney*, Steven Olsen. She claims that Olsen knew all of the facts pertaining to the associations between the trial judge and her attorney. Building on this erroneous assumption, Tatham contends that Olsen’s knowledge is imputed to Rogers, and therefore through Olsen, Rogers made a “knowing” waiver of his due process right. BOR, at 16-17.

Tatham’s argument of “waiver by attorney” is at odds with several cases which explicitly hold that an attorney cannot waive his client’s constitutional rights. Even when the attorney expressly states in open court that he is waiving one of his client’s constitutional rights, the client’s silent acquiescence to his attorney’s statement does *not* suffice to establish a knowing, voluntary and intelligent waiver of the right. In *Stegall* the defendant’s attorney explicitly said “we will waive” the constitutional right to a 12 person jury and said his client had no objection to an eleven

¹ *Accord State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). The same waiver standard applies in civil cases: “In the civil, no less than the criminal area, we do not presume acquiescence in the loss of fundamental rights.” *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (rejecting purported waiver of due process right); *D.H. Overmeyer v. Frick*, 405 U.S. 174, 186 (1972)(same); *Ohio Bell Tel. v. PUC*, 301 U.S. 292, 307 (1937) (same); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (rejecting waiver of right to have jury decide facts).

person jury. *Stegall*, at 721. Despite these explicit statements, the Court held that the purported waiver was invalid because there was no “personal expression of waiver by the defendant.” *Id.* at 724.²

In the present case, Rogers never waived his due process right to a judge with the appearance of impartiality. Moreover, even if Rogers’ attorney had stood up in open court and said that Rogers was waiving this right, absent a personal expression of waiver by Rogers himself that *still* would not be sufficient to satisfy the constitutional waiver standard.

3. TATHAM’S RELIANCE ON DICTA IN THE *HILL* CASE IS MISPLACED. THIS COURT DISTINGUISHED *HILL* IN *MITCHELL*.

Tatham relies upon dicta in the case of *Hill v. Department of Labor & Industries*, 90 Wn.2d 276, 580 P.2d 636 (1978). In that case Hill, an injured worker, made an industrial insurance claim which was eventually closed by the Department of Labor and Industries. Hill appealed to the Board of Industrial Appeals. Phillip Bork, the former Department employee who had signed the closure order had, by that time, become the chair of the appeals board. The board rejected Hill’s appeal and Hill appealed further to the Superior Court. *Id.* at 277-78. There, for the first time, Hill complained that Bork should have been disqualified from sitting on the appeals board because he had been the Department employee who signed the closure order. Eventually, the case reached the Supreme Court,

² Similarly, although “Wicke’s counsel waived a jury trial by oral stipulation as Wicke stood beside him in open court,” the Court held that such silent acquiescence did not satisfy the constitutional standard for waiver of a constitutional right. *Wicke*, at 641, 644.

which ruled against Hill. Tatham cites to the following passage in *Hill*:

At all times before the Board and the Superior Court, she was represented by present counsel. Counsel has acknowledged that he was aware of Bork's dual capacity. Knowledge by the attorney is imputed to the client.

Hill, 90 Wn.2d at 278. Relying on this passage, Tatham claims that *Hill* stands for the proposition that "what Rogers may or may not have known at any stage of these proceedings is irrelevant as the knowledge of his attorneys is imputed to him." BOR, at 17.

But this passage that Tatham relies upon is obviously dicta since the Court went on to decide the *merits* of Hill's claim. Although Hill's attorney knew the facts pertaining to Bork and did not seek his recusal until after the Board had ruled, the Supreme Court nevertheless addressed the issue of whether Bork's participation violated the appearance of fairness doctrine, and found that he did not. *Hill*, 90 Wn.2d at 281. "Plaintiff, while asserting the doctrine of appearance of fairness, has failed to demonstrate it should be applied." *Id.* at 282.³ Thus, despite the fact

³ "In an uncontroverted affidavit Bork declared that (1) he did not personally participate in the adjudication of plaintiff's claim when it was before the Department; (2) he did not actually sign the order closing plaintiff's claim, but that the signature was preprinted on hundreds of thousands of blank forms, and the actual authenticating signature was that of a claims adjudicator responsible for the particular claim; (3) in 1973 the Department issued more than 150,000 final orders closing claims; (4) he was on vacation at the time the order was issued closing plaintiff's claim; and (5) at the time plaintiff's appeal came before the board he had no prior knowledge of or recollection of her claim before the Department. [¶] "In light of these uncontroverted facts, *was there a violation of the doctrine of the appearance of fairness?* In discussing the appearance of fairness we have enunciated the following test as a prerequisite to the application of the doctrine: Whether a disinterested person being apprised of the totality of a board member's personal interest in a matter being acted upon would be reasonably justified in thinking partiality may exist. [Citations]. [¶] "Given the uncontroverted affidavit of Bork and the facts in this case, can it fairly be said that, knowing the facts, a "disinterested person" could be "reasonably justified" in thinking partiality existed? *We do not believe so.*

that Hill's attorney admitted to having knowledge of the facts giving rise to the alleged appearance of unfairness, and the fact that he failed to challenge judge Bork on that basis until after the appeals Board had ruled, the Supreme Court still addressed the merits of the appearance of unfairness claim.

Moreover, in *Mitchell v. Kitsap County*, 59 Wn. App. 177, 797 P.2d 516 (1990), this Court distinguished *Hill* and held that even if a party's lawyer consented to having a judge pro tem as a trial judge, that did *not* waive the litigant's right to raise an objection to the judge after the judge had ruled because he had a *constitutional right* to an elected trial judge.

In *Mitchell*, the plaintiffs complained that their attorney had failed to object when a pro tem judge was assigned to hear their case. Citing specifically to the *Hill* case, among others, the defendant argued that since plaintiffs' attorney knew that the judge was not a regular elected judge, his knowledge was imputed to his clients, and therefore they had waived any objection to the fact that an unelected pro tem judge had heard their case.

This Court *rejected* this argument and distinguished *Hill* and all the other cases cited by the defendant: "All of these cases are distinguishable. None of these cases deal with the constitutional and statutory right of a party to consent to the appointment of a judge pro tempore." *Id.* at 184.

"[A]n attorney is without authority to surrender a substantial right of a client unless the client grants specific authority to do so."

Other than the happenstance of a facsimile signature, there is literally nothing that points to partiality on the part of Bork and there is substantial and compelling evidence which points to impartiality.

[Citation]. Certainly consent to the appointment of a judge pro tempore is a substantial right. In our judgment, the Mitchells' attorney was without authority to waive that right.

59 Wn. App. at 184.⁴

Just as an attorney has no authority to give up the client's constitutional right to an elected superior court judge, he also has no authority to give up the client's 14th Amendment due process right to a judge possessed of the appearance of impartiality. Since this right is both a constitutional right and a "substantial right," it was not forfeited even if Rogers' attorneys really did have knowledge of all of the facts which give rise to the strong appearance of partiality which taints this case.⁵

4. IT IS NOT "UNDISPUTED" THAT ROGERS' ATTORNEYS KNEW ALL OF THE FACTS.

In her response brief, Tatham asserts that Rogers is relying upon "associations between the trial court and opposing counsel, *all of which were known to both of Rogers' trial counsel.*" BOR, at 1 (italics added).⁶

⁴ *Accord Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980) ("[I]n his capacity as attorney, he has no authority to waive any substantial right of his client.").

⁵ *Hill* is also distinguishable because there -- as in *State v. Carlson*, 66 Wn. App. 909, 833 P.2d 463 (1992) -- the claim that the judge should have recused himself was brought against an appellate judge, not a trial judge. As noted in *Carlson*, "First, in the appellate system no one judge controls the three judge panel" and "second . . . decisions in the Court of Appeals almost exclusively involve legal issues with very little room for the exercise of discretion . . . In contrast, there is vast discretion vested in a trial judge . . ." *Id.* at 919-20. Since Judge Verser is a single trial judge vested with "a vast discretion," the dicta in *Hill* is also inapplicable to this case for these reasons as well.

⁶ Tatham filed her petition on January 10, 2007. CP 1-3. Rogers' first attorney, Clifford Tassie, appeared on February 2, 2007 and withdrew seventeen months later on July 2, 2008. Supp. CP ___, ___ (Appendices A & B). So far as the court file discloses, attorney Tassie did not do anything during this period of time. For the next 6 months Rogers was without any attorney and represented himself. On January 6, 2009, just 3-1/2 months before the scheduled trial date, attorney Olsen appeared as Rogers' counsel of record. Supp. CP ___ (Appendix C). In the Superior Court Tatham's counsel asserted that a third attorney, James A. Doros, represented Rogers for a period of time. CP 113.

On the next page Tatham asserts, “*It is undisputed that both of the attorneys* who represented Rogers during the two and one-half years the matter was pending *had actual knowledge of the facts* upon which Rogers’ motion to vacate is based.” *Id.* at 2 (italics added). No supporting citation to the record is given in either instance.

In fact, these statements are untrue. Tatham appears to be relying on Judge Verser’s assertion that “there’s no question” that the attorneys who represented Rogers in this case “knew everything that you point to as being pertinent to a possible recusal, except possibly the power of attorney . . .” RP 6/18/10, at 40. Tatham seems to imply that since Judge Verser said these attorneys “knew everything,” Rogers must accept this assertion as true and cannot dispute it.

But even if Judge Verser had submitted a sworn declaration, or had testified under oath, such an assertion would clearly be inadmissible for several reasons. First, a judge is simply forbidden by ER 605 from testifying as a witness in a case that he is presiding over.⁷

She said that Doros filed a notice of appearance on behalf of Rogers on July 25, 2008. Tatham’s counsel did not cite to anything to substantiate the claim that attorney Doros ever represented Rogers in this case, and the Superior Court file for this case does not contain any notice of appearance from Doros, either on July 25, 2008, or on any other date. Indeed, the Superior Court Case Summary available online indicates that no one filed anything on July 25, 2008. It appears that Tatham’s counsel is confused and has forgotten that attorney Doros actually stood in for her and briefly represented Tatham in the related child custody dispute case between Tatham and Rogers. In that case, Cause No. 08-3-00069-1, the clerk’s minute entry for July 18, 2008 actually shows that attorney Bierbaum had Doros appear for her as counsel for Tatham. The clerk’s minute entry states: “Mr. Doros appearing for Ms. Bierbaum to apprise Court that the matter has been continued until 7/25/2008 by agreement.” (Appendix D).

⁷ “The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.”

Second, even if Judge Verser had given sworn testimony before a different judge, such testimony would not have been admissible because he has no personal knowledge of what another person knows. The admission of testimony from one witness that another person knew something violates the personal knowledge requirement of ER 602.⁸ “Under ER 602 a witness must testify concerning facts within his personal knowledge . . .” *State v. Vaughn*, 101 Wn.2d 604, 611, 682 P.2d 878 (1984). Judge Verser’s assertion that Rogers’ attorneys “knew everything” violates ER 602 because no one can be inside the mind of another person, and thus no one can have personal knowledge of what another person knows.⁹ Such an assertion, at best, is merely based upon hearsay, and at worst is simply speculation.¹⁰

Third, Judge Verser himself expressed doubt as to whether Rogers’ attorneys knew that he was attorney Bierbaum’s alternate attorney-in-fact under the recorded power of attorney. RP 6/18/10, at 40. Thus, in place of Tatham’s unsupported statement that it is “undisputed” that Rogers’ attorneys “knew everything,” this Court should recognize that it is

⁸ “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. . .”

⁹ *See, e.g., State v. Farr-Lenzini*, 93 Wn. App. 453, 458, 970 P.2d 313 (1999) (reversible error to admit testimony of pursuing police officer that the defendant driver “was attempting to get away from me and knew that I was back there. . .”)

¹⁰ In the trial court Tatham’s attorney also asserted that attorney Tassie and attorney Olsen were “at all times aware of all of my prior associations with Judge Verser.” CP 112. But her assertion, like Judge Verser’s, is inadmissible pursuant to ER 602 since she cannot possibly have any personal knowledge of what either Tassie or Olsen knew about her associations with the judge.

undisputed that these attorneys did *not* know about the power of attorney.

Fourth, Tatham simply assumes that both of Rogers' attorneys must have read the newspaper articles which discussed Judge Verser's DUI arrest, and thus must have known that her attorney (1) was in the car with the judge, (2) asked if she could just drive the judge home, (3) was herself legally intoxicated, and (4) eventually posted his bail that night.

Tatham notes that the judge's arrest was "widely publicized" and she points to eight newspaper articles published in the *Port Townsend & Jefferson County Leader*¹¹ and to two articles published in the *Peninsula Daily News*.¹² Most of the articles were published in 2004.¹³

Although four of the eight articles published in the *Port Townsend & Jefferson County Leader* mention the judge's DUI arrest, *not one of these eight articles make any mention of the fact that Tatham's attorney was riding in the Judge's car with him that night*. Similarly, *none* of these articles make any mention of the fact that she was drinking and socializing with the judge that night, or that she told the arresting officer that she could drive the judge's car, or that she herself was legally intoxicated

¹¹ These articles were published on February 18, 2004 (CP 116-119), March 3, 2004 (CP 123-124); March 17, 2004 (CP 125-126); June 30, 2004 (129-131); undated (CP 132-133); December 15, 2004 (CP 134); and August 2, 2006 (CP 135-136).

¹² These two articles were published on February 29, 2004 (CP 120-122); and on March 21, 2004 (CP 127-128).

¹³ Clifford Tassie, Rogers' first attorney, has his office in Port Angeles, the county seat of Clallam County. Supp CP _____. Steven L. Olsen, Rogers' second attorney, has his office on Bainbridge Island in Kitsap County. Supp. CP _____. Thus, neither attorney has his office in Jefferson County. Nevertheless, Tatham simply assumes that both attorneys must have been regular readers of these papers, and must have read one of these articles.

according to a field sobriety test, or that she posted the judge's bail that night. One of the two articles published in the *Peninsula Daily News* does mention the fact that Tatham's attorney was with Judge Verser when he was arrested, and that she posted his bail that night. CP 128.

Therefore, out of the ten newspaper articles produced by Tatham, there is only one newspaper article that makes any mention of Tatham's attorney having been present. Unless Rogers' attorneys happened to read the one article published in the March 21, 2004 edition of the *Peninsula Daily News*, they would *not* have been exposed to any publicity that would have alerted them to the fact that Tatham's attorney had anything at all do with Judge Verser's DUI arrest. Moreover, even if they had read this article in 2004, it is doubtful they would have remembered everything the article said 3 to 6 years later. The record contains absolutely nothing which would substantiate Tatham's assertion that Rogers' attorneys "must have known" from widespread newspaper publicity that attorney Bierbaum had been drinking and driving with the trial judge on the night that he was arrested, or that she bailed him out of jail.

5. CAPERTON ACTUALLY SUPPORTS ROGERS' POSITION AND REJECTS TATHAM'S POSITION THAT ONLY CERTAIN KINDS OF BIAS CAN QUALIFY AS A DUE PROCESS GROUND FOR DISQUALIFICATION.

Purporting to rely on *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009), Tatham argues that only certain kinds of apparent judicial bias can rise to the level of a constitutional due process violation. She contends that such a violation can occur only in two circumstances: (1)

where the judge has a direct pecuniary interest in the outcome of a case, or (2) where the litigant personally reviled the judge in the criminal contempt context. Tatham claims that “[t]he [*Caperton*] Court acknowledged, moreover, that most matters involving judicial disqualification are unlikely to implicate constitutional concerns, including those involving, for example, bias or personal prejudice.” BOR, at 27, citing *Caperton* at 2259. Citing to the holding of *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) that a judge must recuse himself when he has a “direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] in his case,” Tatham argues that there cannot possibly be any due process violation in this case because Judge Verser had nothing to gain by ruling in favor of Tatham. BOR, at 28.

In fact, Tatham misrepresents the *Caperton* decision. When the *Caperton* Court said that most matters involving personal bias or prejudice are unlikely to implicate constitutional concerns it was discussing “the common-law rule” for judicial disqualification. *Caperton*, 129 S.Ct. at 2259 (emphasis added).¹⁴ After this discussion of the scope of “the common-law rule” the Court noted that it had recognized additional

¹⁴ “The *Tumey* Court concluded that the Due Process Clause incorporated *the common-law rule* that a judge must recuse himself when he has “a direct, personal, substantial, pecuniary interest” in a case. *Ibid.* *This rule* reflects the maxim that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” [Citations]. *Under this rule* “disqualification for bias or prejudice was not permitted,” those matters were left to statutes and judicial codes.” [Citations]. Personal bias or prejudice “alone would not be sufficient basis for imposing a constitutional requirement under the due process clause. [Citation].” (Emphasis added).

circumstances *beyond* those recognized by the common law, which trigger a *constitutional* requirement that a judge be disqualified:

As new problems have emerged that were not discussed at common law, however, the Court has identified *additional circumstances which, as an objective matter, require recusal*. These are circumstances “in which experience teaches that the possibility of actual bias is too high to be constitutionally tolerable.”

Caperton, 129 S.Ct. at 2259 (emphasis added), quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).¹⁵

Caperton acknowledges that “[t]he second instance requiring recusal that was not discussed at common law emerged in the criminal contempt context,” citing to *In re Murchison*, 349 U.S. 133 (1955), and notes that *Murchison* specifically declined to limit the categories of relationships that might compel the conclusion that a recusal was constitutionally required:

No man can be a judge in his own case and no one is permitted to try cases where he has an interest in the outcome. *That interest cannot be defined with precision*. Circumstances and relationships must be considered.

Id. at 136 (emphasis added).¹⁶ The *Caperton* Court recognized a new type

¹⁵ *Withrow* states that “among these cases” where the risk of bias is too high to be constitutional are the situations where the judge has a pecuniary interest, and where the judge has been the target of personal abuse from a party appearing before him. *Withrow*, at 47. But neither *Withrow* nor *Caperton* holds that these are the only two situations which give rise to a constitutional violation. In fact, *Caperton* reviewed the Court’s past cases and noted that they were *not* limited to these two situations. Starting with the *Tumey* decision, the *Caperton* Court said that in that case: “The Court was thus concerned with more than the traditional common-law prohibition on direct pecuniary interest. It was also concerned with a more general concept of interests that tempt adjudicators to disregard neutrality.” *Caperton*, 129 S.Ct. at 2260.

¹⁶ The case of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) does not fit easily into either of the two categories discussed in *Caperton* and yet there an arbitration award was vacated because after the arbitration hearing, one of the parties discovered that even though there had been no dealings between them for about a year prior to the arbitration, the prime contractor whom the petitioner had sued had been

of constitutionally disqualifying interest that it had never previously considered: “This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.” *Caperton*, 129 S.Ct. at 2262.

Recognizing that a campaign contribution was not a bribe, the *Caperton* Court held that “Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.” *Id.* Although the common-law rule did not recognize this type of election interest as one requiring disqualification, and despite the fact that no prior Supreme Court case had done so either, the Court rejected as irrelevant Justice Benjamin’s self-assessment that he could be impartial. Instead, applying an objective test, the Court held that Justice Benjamin’s refusal to disqualify himself violated due process:

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge’s own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge’s determination respecting actual bias, *the Due Process Clause has been implemented by objective standards that do not require*

a customer of one of the three arbitrators. Although the case was governed by a statute, the United States Arbitration Act, the Court applied the constitutional due process principle recognized in the *Tumey* case: “[N]either this arbitrator nor the prime contractor gave to petitioner even an intimation of the close financial relations that had existed between them for a period of years. *We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge.*” *Commonwealth Coatings*, 393 U.S. at 147-48 (emphasis added).

proof of actual bias. [Citations]. In defining these standards the Court has asked whether, “under a realistic appraisal of psychological tendencies and human weaknesses,” the interest “poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”

Caperton, at 2263, quoting *Withrow*, 421 U.S. at 47 (emphasis added).

The Court then held that Justice Benjamin’s “failure to consider objective standards requiring recusal is not consistent with the imperatives of due process.” *Caperton*, at 2265.

Tatham claims that Rogers is not using the correct test:

[The preceding] facts, Rogers argues, would lead a reasonable person to have doubts about the trial court’s impartiality. That however is not the standard applicable to a constitutional challenge.

BOR, at 32. But notwithstanding what Tatham says, in fact, that *is* the constitutional standard. The Supreme Court has said:

Under our precedents there are objective standards that require recusal when “the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.”

Caperton, 129 S.Ct. at 2257, quoting *Withrow*, 421 U.S. at 47.¹⁷

Caperton explicitly recognizes that the objective standard it applies -- requiring no reasonable doubt as to a judge’s impartiality -- was virtually identical to the objective standard set forth in the ABA Model Code of Judicial Conduct, and that it had been adopted in almost every state. *Id.* at 2266. The Court noted that the objective nature of the constitutional

¹⁷ Tatham says the test is whether the facts show there is “a serious, objective risk of actual bias.” BOR, at 31. If by using the word “serious” Tatham means that the perceived probability of actual bias has to be significant, Rogers certainly agrees. That is why the risk must be one that an objectively reasonable person would find present.

inquiry was identical to that called for by the West Virginia Code of Judicial Conduct.¹⁸ This is also exactly the same kind of objective standard which Washington State courts have always used.¹⁹

Tatham's dislike of an objective constitutional test is shared by the *dissenters* in *Caperton*. They thought that there should be only "two situations in which the Federal Due Process Clause requires disqualification of a judge" and decried the approval of a "vague" objective standard. *Id.*, at 2267 (Roberts, J., dissenting), but their position was rejected and the objective test adopted by the majority is the law.

6. A CR 60(b) MOTION IS AN APPROPRIATE MECHANISM FOR RAISING THIS TYPE OF DUE PROCESS CLAIM.

Tatham complains that Rogers has not cited any case in which a CR 60(b)(5) motion was used to raise a post-judgment claim that the trial judge should not have heard the case and that the judgment was therefore void. BOR, at 35. But *Mitchell v. Kitsap County*, *supra*, is such a case. In that case, after judgment was entered against them, the Mitchells

¹⁸ "The West Virginia Code of Judicial Conduct also requires a judge to 'disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.' Canon 3E(1) . . . Under Canon 3E(1), 'the question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly.'" *Caperton*, 129 S.Ct. at 2266.

¹⁹ *See, e.g., State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) ("judicial proceeding is valid only if a reasonably prudent disinterested observer would conclude that the parties received a fair, impartial and neutral hearing"); *In re Discipline of Sanders*, 159 Wn.2d 517, 524-25, 145 P.3d 1208 (2006) ("it was clearly reasonable to question the impartiality of the justice . . ."); *State v. Romano*, 34 Wn. App. 567, 569, 662 P.2d 406 (1983) ("no reasonable question as to impartiality or fairness can be raised"); *Cf. State ex rel. Barnard v. Bd. of Education*, 19 Wash. 8, 17-18, 52 P. 317 (1898) ("Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers.").

changed attorneys and the new attorney filed a motion for relief from judgment pursuant to CR 60(b)(5). *Mitchell*, 59 Wn. App. at 180. After the trial judge denied the 60(b)(5) motion the Mitchells appealed to this Court. *Id.* This Court agreed with the Mitchells that the judgment was void and set it aside. *Id.* at 181. Rogers has followed exactly the same procedure that was employed in *Mitchell*. The plaintiffs filed a 60(b)(5) motion, and when it was denied they appealed to this Court.²⁰

Similarly, in *Liljeberg v. Health Services Corp.*, 486 U.S. 847 (1988), the Court expressly approved of the use of Fed.R.Civ.P. 60(b) as the mechanism for bringing a post-judgment claim that the trial judge should have recused himself because he was a trustee of a university which had a financial interest in the outcome of the litigation. “[Rule] 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment,” and “provides courts with authority ‘adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice,’ . . .” *Id.* at 863. In determining whether to vacate a judgment the Court expressly approved of consideration of “the risk of undermining the public’s confidence in the judicial process.” *Id.* at 864.²¹

²⁰ In *Bellevue v. King County*, 90 Wn.2d 856, 864, 586 P.2d 470 (1978), the Court also explicitly recognized that “CR 60(b) specifically provides a means for vacation of judgments . . . based on the later discovery of facts which call into question the impartiality or fairness of the action.”

²¹ The Court accepted as fact the representation that the trial judge had not known about the financial transaction between the university and Liljeberg until after his decision had been rendered, and thus he could not possibly have been influenced by it. Nevertheless it affirmed the granting of the 60(b) motion because of the impact the judge’s participation had on the appearance of justice: “The problem, however, is that people who have not

Tatham also contends that the 60(b)(5) motion was properly denied because it was not timely filed, noting that “Rogers waited nine months before raising the issue of recusal and denial of due process.” BOR, at 9. She asserts that this was an unreasonable amount of time. But *Mitchell* rejected this same argument. The *Mitchell* opinion does not disclose exactly how much time passed from entry of judgment to the filing of the 60(b) motion, but it is clear that it was at least five months and the contention that the motion was not filed promptly was rejected:

The Mitchells are not precluded from bringing their CR 60 motion simply because of this delay. Although the rule requires that such motions be made within a reasonable time after the judgment, our Supreme Court has held that a motion to vacate under CR 60(b)(5) may be brought at any time.

Mitchell, 59 Wn. App. at 184, citing *Marriage of Leslie*, 112 Wn.2d 612, 619, 772 P.2d 1013 (1989).²²

Tatham cites several cases which hold that a litigant who is aware of the basis for a challenge to a judge’s qualifications may not gamble on obtaining a favorable ruling from a judge and then, after losing, raise the argument that the trial judge should have recused himself. But in all of

served on the bench are all too willing to indulge suspicions and doubts about the integrity of judges.” 486 U.S. at 864-65.

²² “Petitioner Leslie has not waived his right to challenge the default dissolution decree merely because of time lapse. . . [¶] Respondent Hartman’s laches claim is without merit in this case because the void portion of the original decree can be attacked at any time.” *Accord Marriage of Markowski*, 50 Wn. App. 633, 635, 749 P.2d 754 (1988) (rejecting timeliness objection to motion brought one year after judgment: “Motions to vacate judgment under CR 60(b)(5) may be brought at any time after judgment.”); *Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985) (“Void judgments may be vacated irrespective of the passage of time.”). The Supreme Court specifically approved of the decision in *Hardt* “despite a five year lapse of time between entry of the dissolution decree and the husband’s [CR 60(b)(5)] motion to vacate it.” *Leslie*, 112 Wn.2d at 619.

these cases, the litigant *knew* about the facts which provided a basis for a recusal motion and nevertheless failed to make a recusal motion and went ahead and gambled on obtaining a favorable ruling; only after losing his gamble did the litigant make a recusal motion.²³

Conversely, in *City of Bellevue v. King County*, 90 Wn.2d 856, 586 P.2d 470 (1978) the Supreme Court recognized that when a litigant does *not* know about the potentially disqualifying facts and does not learn about them until *after* the trial or hearing has concluded, the litigant is *not* barred from raising a claim of denial of the appearance of fairness: “Bellevue did not discover facts suggesting violation of the appearance of fairness until after the board completed its action. This fact is essential to Bellevue’s ability to raise the issue at this time. . .” *Id.* at 863. In the present case, Rogers, like the City of Bellevue, did *not* know about any of the facts providing grounds for refusal until *after* his trial had ended and a judgment had been entered. CP 33, ¶¶ 6-7, 12-13. Thus Rogers, like the City, is

²³ *State v. Martin*, 154 Wn.2d 252, 262, 223 P.3d 1221 (2009) (“a litigant who proceeds to trial or hearing *knowing* of a reason for potential disqualification of the judge waives the objection and cannot challenge the court’s qualifications on appeal”); *State v. Bolton*, 23 Wn. App. 708, 711, 714, 598 P.2d 734 (1979) (facts about judge were learned “within 24 hours after the sentencing on February 6”; defendant then filed two more motions which were “argued and denied on February 14”; and appellate court refused to address judicial recusal issue “because it is raised for the first time on appeal” after the defendant “sought an additional ruling from the very judge he now seeks to disqualify”); *Brauhn v. Brauhn*, 10 Wn. App. 592, 597, 518 P.2d 1089 (1974) (“notwithstanding petitioner’s *knowledge* of the [judge’s] statement contained in the oral opinion on which petitioner makes a claim of bias, petitioner proceeded nevertheless to move for reconsideration on the merits of the case without mention of the bias now claimed for the first time on appeal”); *Buckley v. Snapper Power Equipment Co.*, 61 Wn. App. 932, 939, 813 P.2d 125 (1991) (same).

not precluded from raising his due process claim.²⁴

7. TATHAM'S MISCHARACTERIZATIONS OF THE RECORD.

Tatham claims that nothing in the police reports supports the assertion that the officers who arrested Verser got the impression that Bierbaum was acting as Verser's attorney and that he was her client. *BOR*, at 46. But there clearly is. As stated in Rose Winqvist's declaration: "In deputy sheriff Anglin's report he states that Bierbaum referred to the judge as her 'client.'" ER 38, ¶ 9. Winqvist attached Anglin's report which contains this passage: "Later that night I spoke with Mrs. Bierbaum regarding her 'client' Mr. Verser." CP 52 (attached as Appendix E). So Anglin clearly *did* get the impression that Bierbaum was saying Verser was her client.²⁵

Tatham also claims it is not true that Winqvist obtained any of the DUI arrest records. *BOR*, at 47. But Winqvist's declaration clearly states that

²⁴ Tatham also complains that Rogers did not raise his due process claim in his direct appeal from the judgment entered in the property division case. *BOR*, at 21. But Tatham misperceives the nature of an appeal. An appellate court may not consider facts outside the record. *Weems v. North Franklin Sch. Dist.*, 109 Wn. App. 767, 779, 47 P.3d 581 (2002). Here Rogers did not learn the facts about the judge's association with Tatham's counsel until after judgment had been entered. If the judge had disclosed these facts on the record at the outset of the trial, the facts would have been in the record, and Rogers would have had an opportunity to make a motion for recusal. Because the trial judge made no such disclosure, Rogers was deprived of both any opportunity to object and the ability to raise the issue in the direct appeal. The Supreme Court made the same observation in *Liljeberg*. There the trial judge learned the facts giving rise to the appearance of partiality 8 days after he had entered judgment, but he *did not* inform the parties of what he had discovered: "[B]y his silence, Judge Collins deprived respondent of a basis for making a timely motion for a new trial and also deprived it of an issue on direct appeal." *Liljeberg*, 486 U.S. at 867.

²⁵ This is the *second* time that Tatham has argued that there is no reference in Anglin's report to Bierbaum calling Verser her client. CP 99 ("There is no such reference in Deputy Anglin's report . . ."). Rogers' counsel first pointed out her error and directed her to the pertinent place in Anglin's report in his letter of June 8, 2010 on page 2. CP 183.

she is the one who located Anglin's report: "I located the police report of Deputy Sheriff Brett Anglin who assisted Trooper Kinder." CP 38, ¶ 8.

Tatham states that records show the "patent falsity" of Rogers' assertion "that he was unaware of the facts" that Investigator Winqvist discovered. BOR, at 46. In support of this accusation she cites to CP 92, Ex. E, but CP 92 is the tenth page of a brief filed by Tatham's counsel and there is no Exhibit E to that brief.²⁶

Rogers' property division trial took place on April 20, 2009. Judgment was entered on July 15 and Rogers filed his notice of appeal on August 11. CP 121-123, 153-158 (No. 39672-6-II). After Rogers had filed his notice of appeal, an attorney referred him to Winqvist. CP 37, ¶ 2. Rogers requested a copy of the DUI police reports on August 24, 2009 and he hired Winqvist the next day on August 25, 2009. CP 37, ¶ 2. Winqvist states that she is the one who actually obtained the DUI reports. CP 38, ¶ 10 ("I obtained court records for the DUI case . . ."). In his 60(b) motion Rogers set forth the facts that he learned from Winqvist after his trial. CP 33, ¶¶ 10-11. Nothing on CP 92 – or anywhere else – demonstrates the "patent falsity" of Rogers' assertion. On the contrary, the record, which contains Winqvist's declaration, fully supports Rogers' assertion that he learned these facts from Winqvist.

8. THE "NO DENIAL DENIAL" OF AN INTIMATE RELATIONSHIP.

When he brought his 60(b) motion in Superior Court, Rogers

²⁶ There is an Exhibit E to a declaration of Tatham's counsel, CP 148-150, but it has nothing to do with any records that either Rogers or Winqvist discovered.

explained that one of the reasons he had hired an investigator was that he had heard a rumor that the judge and Bierbaum had had an intimate relationship. CP 34, ¶ 14. He acknowledged he did not have proof of that, and did not base his motion on that rumor, but mentioned it to explain why he had hired the investigator. CP 184. Tatham's counsel responded by threatening to seek sanctions if he did not remove the statement as to what Rogers had heard, and citing to *Bartel v. Zuckriegel*, 112 Wn. App. 55, 47 P.3d 681 (2002). CP 100.²⁷

Rogers' counsel responded that he had discussed opposing counsel's letter with law professor John Strait, an expert in the field of professional responsibility, and that he had opined that Rogers' counsel had not violated CR 11, because he had "not accused the judge of being biased in fact," but had instead stated "that a reasonable person could look at the conduct of the judge and question whether the judge was impartial." CP 184. As to the rumor that the judge and counsel had an intimate relationship, Rogers' counsel noted that if it wasn't true, Bierbaum could simply say so, and if she did that he would accept that as the truth. CP 184. Bierbaum, however, refused to say that the rumor was false. And more significantly, Judge Verser never said that the rumor was false.

²⁷ In *Bartel* an attorney made the statement that the judge was "intentionally biased" against his client and that "the trial judge intentionally favored his former partner despite all the facts and evidence to the contrary." *Id.* at 61. Although the court found this comment unprofessional, no sanctions against the attorney were ever entered. In the present case no accusation of actual bias was ever made. Instead Rogers asserted a serious *appearance* of partiality problem: "I have not accused him of intentionally favoring your client. Instead, I have said that a reasonable person could look at the conduct of the judge and question whether the judge was impartial." CP 184.

If the rumor is true, it is simply yet another very powerful reason why the trial judge should have recused himself and declined to preside over Rogers' trial. There is plenty of case law to support the contention that a judge who allows a former romantic partner to appear before him without disclosing this fact to the opposing party acts improperly, and that in order to avoid an appearance of partiality problem when the relationship is later discovered, he must recuse himself. *See, e.g., In re Bogutz & Gordon, Inc.*, 2002 WL 33966260 (Ariz. Super. 2002) (motion for new trial granted because twenty years earlier trial judge had brief intimate relationship with an attorney and neither disclosed it nor recused himself); *United States v. Berman*, 28 M.J. 615 (AFCMR 1989) (judgment vacated, judge who had intimate relationship with prosecutor should have disqualified himself).²⁸

But even if the rumor is false, so long as the judge is aware that such a rumor is circulating in some parts of the legal community it is still incumbent upon the judge to take action. Rogers submits that in such a situation a judge has a constitutional obligation to do one of two things: (1) He can address the suspicion and put it to rest by informing lawyers

²⁸ *See also In re Adams*, 932 So.2d 1025 (Fla. 2006) (judge reprimanded because allowing attorney with whom he had romantic affair to appear before him without disclosing relationship was conduct which "necessarily depletes the single most important source of his or her authority – the perception of the legal community and public that the judge is absolutely impartial in deciding cases"); *People v. Biddle*, 180 P.3d 461 (Colo. 2007)(judge who engaged in affair with county attorney who appeared before him suspended for three years); *In re Gerard*, 631 N.W.2d 271 (2001)(sixty day suspension for judge who had secret affair with assistant district attorney "was neither prudent nor forthcoming about his relationship with a lawyer who appeared before him daily. As such, this secret relationship, upon discovery, did contribute to diminished public confidence in our judicial system.").

and litigants that there is not and never was any such relationship, or (2) he can recuse himself. If he does the former at the outset of the case, he ensures that the litigant standing before him, in this case Rogers, is aware of the rumor and learns about it at a time when he can exercise an affidavit of prejudice if he wants to do that. If he does the latter and recuses himself, he ensures that even if the false rumor later reaches the litigant's ears, he will never judge the litigant's case and thus the litigant will never have any occasion to wonder whether the rumor was true and whether he lost his case because such a relationship did exist.

But the one thing the judge cannot do is to do nothing; and yet that is exactly what he did in this case. If the allegation is mere false rumor, it costs the judge nothing to state on the record that the rumor is false. But if the rumor is true, the judge must either disclose that it is true, or keep his own secrets by recusing himself.²⁹ If he fails to do anything, as he did here, he simply compounds the appearance of partiality problem.

9. TATHAM ABANDONED HER CR 11 MOTION. THERE NEVER WAS ANY SANCTIONS HEARING, AND THUS THERE IS NO RULING TO REVIEW.

In Tatham's response to the 60(b) motion, attorney Bierbaum stated that she was going to bring a motion for CR 11 sanctions. CP 96.³⁰ She

²⁹ As the Court said in *Gerard*, 631 N.W. 2d at 278, in this situation, failure to disclose or recuse is inexcusable: "Rather than disclose this relationship, Judge Gerard allowed it to remain hidden from all who appeared before him against the assistant county attorney. Judge Gerard decided that he was the best judge of what information defendants were entitled to know and withheld this information potentially to their detriment. Such a supercilious response is an offense to our rules of disclosure and recusal."

³⁰ To impose sanctions for a baseless filing, the trial court must find that the claim was without a factual or legal basis. *Bryant v. Joseph Tree*, 119 Wn.2d 210, 220, 829 P.2d

also asserted that pursuant to *Jones v. Halvorsen-Borg*, 69 Wn. App. 117, 129, 847 P.2d 945 (1993), she would note her CR 11 motion for a hearing before a visiting judge so that it would not be decided by Judge Verser. CP 97; RP 6/2/10, at 4.

Despite making this threat, she never did bring any CR 11 motion, and no hearing was ever held on any such motion. An appellate court normally reviews the imposition of CR 11 sanctions for abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). Here, however, there is nothing to review because no judge below ever made any determination as to whether CR 11 sanctions were warranted.

Had such a motion been noted and heard by a visiting judge, Rogers would have had the opportunity to call witnesses who could have provided testimony of their own observations which supported Rogers' belief that there was an intimate relationship between Tatham's counsel and the judge. (See accompanying RAP 9.11 motion for leave to present additional evidence.) But because Tatham never noted the motion for a hearing, Rogers never had any opportunity to present this evidence. Tatham would now have this Court make a ruling as to whether Rogers

1099 (1992). In the present case, Rogers' motion clearly is well grounded in both law and fact. The objective test for when due process requires a recusal has clearly been met. Rogers' legal contentions are well supported by cases such as *Caperton*, *Commonwealth Coatings*, and *Sanders*. In the trial court Tatham's counsel argued that Rogers' counsel was motivated by sexism and that the only reason for bringing a motion based on her "social relationship" with the trial judge was that she was a woman. RP 6/18 /10, at 31. But gender has nothing to do with it. In this case, as in many others, the attorney is a woman and the judge is a male. Were the gender roles reversed, it would make no difference.

had a good faith basis in fact for making his comment. This, of course, would be completely unconstitutional. If Rogers is to be sanctioned for allegedly making a statement without a good faith basis, he must be given notice and an opportunity to be heard so that he can present the evidence to show that he did have a good faith basis for his comment. CR 11 procedures “obviously must comport with” the due process requirements of notice and an opportunity to be heard. *Joseph Tree*, 119 Wn.2d at 224.

Had Tatham noted her motion for sanctions and lost, she could have filed a cross-appeal, and could have argued to this court that the trial court judge erred in denying her motion. But having failed to note her motion, she had no ruling below to appeal, and thus no cross-appeal was taken.

In order to seek relief beyond that which was granted below, Tatham is required to file a cross-appeal. RAP 2.4(a); *In re Doyle*, 93 Wn. App. 120, 127, 666 P.2d 1279 (1998) (cross appeal “essential” if seeking affirmative relief). By seeking sanctions from this Court, Tatham is seeking “affirmative relief,” and thus her failure to file a cross-appeal is fatal.³¹

B. CONCLUSION

For these reasons, Rogers asks this Court to reverse the denial of his CR 60(b) motion, to vacate the judgment in this case, and to remand for retrial before a different judge.

³¹ Significantly, Tatham is seeking sanctions for representations made to this appellate court about the existence of an intimate relationship. But in his opening brief filed in this Court Rogers never referred to this subject. It is Tatham’s attorney who chose to raise this subject in this Court, not Rogers. *BOR*, at 14-16 & 47-48.

DATED this 28th day of June, 2011.

CARNEY BADLEY SPELLMAN, P.S.

KURT M. BULMER

By James E. Lobsenz
James E. Lobsenz, WSBA #8787

By James E. Lobsenz for
KURT M. BULMER
Kurt M. Bulmer, #5359

By Michael B. King
Michael B. King, WSBA #14405

By Gregory M. Miller
Gregory M. Miller, WSBA #14459

By Kenneth S. Kagan
Kenneth S. Kagan, WSBA #12983

Attorneys for Appellant

APPENDIX A

02/02/07

I certify under penalty of perjury under the laws of the State of Washington, that I faxed/delivered/mailed a copy of this document to Peggy Ann Bierbaum
300 B Pink Street, Port Angeles, WA 98362
 SIGNED at Port Angeles, WA on: Feb 2, 2007
 Signature: [Signature]
 Print Name: H Renee Naputi

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 IN AND FOR THE COUNTY OF JEFFERSON

IN RE

ELINOR JEAN TATHAM,

Plaintiff,

and

JAMES CRAMPTON ROGERS,

Defendant.

No. 07-2-00008-8

NOTICE OF APPEARANCE

TO: ELINOR JEAN TATHAM, PLAINTIFF
 PEGGY ANN BIERBAUM, ATTORNEY FOR PLAINTIFF
 TO: THE CLERK OF THE ABOVE-ENTITLED COURT

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the Defendant, James Crampton Rogers, without waiving objections to proper service, jurisdiction, or venue, does hereby enter an appearance through the undersigned attorney.

You are hereby directed to serve all further pleadings or papers, except original process, upon said attorney at his address stated below.

NOTE: You are not authorized to serve pleadings or papers by use of facsimile unless specifically negotiated with an attorney in the firm. Where authorized, service by facsimile will only be accepted Monday through Friday, 9:00 a.m. through 4:30 p.m., Pacific time.

DATED: February 2, 2007.

JOHNSON RUTZ & TASSIE
 Attorneys for Respondent

By [Signature]
 H. Clifford Tassie
 WSBA #20119

Johnson Rutz & Tassie
 804 South Oak
 Port Angeles, WA 98362
 Phone: (360) 457-1139
 Fax: (360) 457-1176

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APPENDIX B

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IN SUPERIOR COURT
2008 JUL -2 A 10:36
Jefferson County
Clerk's Office

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF JEFFERSON

IN RE THE MERETRICIOUS
RELATIONSHIP OF:

ELINOR JEAN TATHAM,

Plaintiff,

and

JAMES CRAMPTON ROGERS,

Defendant.

No. 07-2-00008-8

NOTICE OF ATTORNEY'S
WITHDRAWAL

TO: THE CLERK OF THE ABOVE-ENTITLED COURT; and
TO: ALL PARTIES AND COUNSEL OF RECORD

PLEASE TAKE NOTICE as follows:

1. **Withdrawal of attorney.** H. Clifford Tassie and Johnson Rutz & Tassie, attorneys of record for JAMES C. ROGERS, Respondent in the above-entitled action, hereby give notice they withdraw as attorneys of record for said party.

2. **Effective date.** The attorney undersigned has been discharged by the Respondent, James C. Rogers; therefore, this withdrawal is effective as of date of the

NOTICE OF ATTORNEY'S
WITHDRAWAL - 1

Johnson Rutz & Tassie
804 South Col
Port Angeles, WA 98362
Phone: (360) 457-1139
Fax: (360) 457-1176

ORIGINAL

1 date hereof.

2 3. **Trial date.** No trial date is currently scheduled.

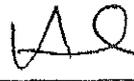
3 4. **Name and address of party.** The name and last known address of the
4 person represented by the withdrawing attorney is as follows:

5 James C. Rogers
6 3357 Pettygrove St.
7 Port Townsend, WA 98368

8 5. **Service on client.** The undersigned certifies under penalty of perjury under
9 the laws of the State of Washington that the within NOTICE OF ATTORNEY'S
10 WITHDRAWAL has been mailed to the afore-named client, James C. Rogers, by certified
11 mail *and* by regular mail, postage prepaid, to client's address, prior to service of this
12 notice on all other parties.

13 DATED June 30, 2008.

14 JOHNSON RUTZ & TASSIE

15 By: 
16 H. CLIFFORD TASSIE
17 WSBA #20119

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24 NOTICE OF ATTORNEY'S
WITHDRAWAL - 2

Johnson Rutz & Tassie
804 South Oak
Port Angeles, WA 98362
Phone: (360) 457-1139
Fax: (360) 457-1176

APPENDIX C

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SUPERIOR COURT OF WASHINGTON
COUNTY OF JEFFERSON

ELINOR JEAN TATHAM

Plaintiff,

vs.

JAMES CRAMPTON ROGERS

Defendant.

NO. 07-2-00008-8

NOTICE OF APPEARANCE

TO THE ABOVE ENTITLED COURT

AND TO: PEGGY ANN BIERBAUM, Attorney for Plaintiff

YOU ARE HEREBY NOTIFIED that **STEVEN L. OLSEN**, the undersigned attorney, hereby appears as attorney for JAMES ROGERS. Further pleadings and correspondence should be directed to said attorney at the address below.

Dated this 6th day of January, 2009.



STEVEN L. OLSEN, WBSA# 9601
Attorney at Law

NOTICE OF APPEARANCE

OLSEN & McFADDEN, INC., P. S.
Attorneys at Law
216 Ericksen Avenue, NE
Bainbridge Island, WA 98110
(206) 780-0240
(206) 780-0318

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**In The Superior Court of Washington
In And For The County of Jefferson**

ELINOR JEAN TATHAM

Petitioner

No. 07-2-00008-8

vs.

**FACSIMILE AFFIDAVIT
(AF)**

JAMES CRAMPTON ROGERS

Respondent

I, Theresa Petraszak, Legal Assistant, with Olsen & McFadden, Inc. P.S., declare and state the following:

The attached is a facsimile transmission of:

Notice of Appearance, Declaration of Faxing

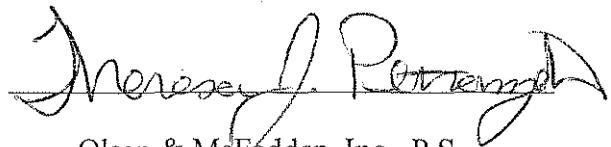
submitted by Steven L. Olsen, Attorney, in the above-entitled matter.

The attached document(s), prepared for filing on the 6th day of January, 2009, and consisting of 3 pages, including this affidavit page, has been examined and determined by me to be complete and legible.

DATED:

01/06/09

SIGNED:



Address:

Olsen & McFadden, Inc., P.S.
Attorneys at Law
216 Ericksen Avenue NE
Bainbridge Island, WA 98110

Phone:

206-780-0240

OLSEN & McFADDEN, INC., P. S.

Attorneys at Law
216 Ericksen Avenue, NE
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(206) 780-0240
(206) 780-0318

APPENDIX D

JEFFERSON COUNTY SUPERIOR COURT

* PARED **
7-18-08 14:06

MOTION CALENDAR - DOMESTIC

FILED

FRIDAY, JULY 18, 2008

IN SUPERIOR COURT

COMMISSIONER JAMES BENDELL

90 DAYS PRIOR DATE APRIL 19, 2008 JUL 18 P 3:59

CD # 132-08

Jefferson County

2:50:43 - 2:52:00
Bierbaum, Peggy Ann

07-3-00163-1

COLE, JEFF (2:00)

OLSEN, STEVEN L.

VS

THETFORD, DEBORAH L

✓ BIERBAUM, PEGGY ANN
(Doros, James)

MOTION TO CONTINUE TRIAL

Mr. Doros indicates matter should have been struck (according to Ms. Bierbaum)

2:50:43 - 2:52:00

3-3-00069-1

TATHAM, ELINOR JEAN

✓ BIERBAUM, PEGGY ANN
(Doros, James)

VS

ROGERS, JAMES CRAMPTON (not present)

MOTION FOR AMENDED TEMP ORDER (Clerk notes Resp phoned and is unable to appear but requests continuance in order to secure counsel)

Mr. Doros appearing for Ms. Bierbaum to apprise Court that the matter has been continued until 7/25/2008 by agreement.

* cont. to 7/25/2008 @ 2:00

2:50:43 - 2:25:00

08-3-00097-7

EDWARDS, COREY AUSTIN

✓ (Doros, James)
BIERBAUM, PEGGY ANN

AND

EDWARDS, SHARON RENE LEE

} not appearing

OLSEN, STEVEN

MOTION FOR TEMPORARY ORDER
LCR 7.5 MOTION TO CONTINUE

No one appearing except Mr. Doros, on behalf of Ms. Bierbaum, who indicates matter has been struck. Clerk notes matter has actually been continued to 7/25/2008 pursuant to LCR 7.5 motion to continue which was granted

APPENDIX E

Jefferson County Sheriff's Department
81 Elkins Road Port Hadlock, Wa 98339

Supplemental Narrative:

On 02-02-03 at about 0053 I was in the area of Highway 101 Mile Post 282 performing stationary traffic control with WSP Trooper Kinder. I initiated a vehicle stop on a non-related vehicle and upon my return I noticed that Trooper Kinder had two vehicles stopped at the Fat Smitty's Restaurant. As a customary measure I pulled in behind the Trooper's vehicle to render assistance. I approached the passenger side of the vehicle and as I proceeded closer I recognized the passenger as Mrs. Bierbaum (a local attorney). I then recognized the vehicle as belonging to Craddock Verser (a present public defender). I stood behind the vehicle and observed the occupants. Due to the vehicle running, and the distance that I was away from the vehicle, I was unable to hear most of the conversation. I noticed that both Mr. Verser and Mrs. Bierbaum were smoking.

After a few minutes Trooper Kinder walked back towards me and informed me that he smelled the odor of intoxicants about the vehicle. He also stated that the driver would not submit to SFST's and that they were smoking to possibly mask the odor. I informed Trooper Kinder who the occupants were of the vehicle and he returned to the vehicle to talk with Mr. Verser. During this contact I spoke with Mrs. Bierbaum at the passenger window. I then noticed the odor of intoxicants about the vehicle and Mrs. Bierbaum's eyes were red and watery. During our conversation Mrs. Bierbaum stated that she had consumed a few drinks at the Seven Cedars Casino.

Trooper Kinder asked that I PBT Mrs. Bierbaum. Mrs. Bierbaum stepped from the vehicle and indicated that she voluntarily wished to submit to a PBT. After inspecting the unit I administered the test to Mrs. Bierbaum with a result of .119. After speaking with Mrs. Bierbaum at the rear of the vehicle I heard Trooper Kinder inform Mr. Verser to step from the vehicle and that he was under arrest for DUI. Mr. Verser stepped from the vehicle and walked to the rear of the vehicle. Mr. Verser had a very slow, lethargic gait (slower than his usual gait). I also noted that his eyes were red (I could not tell if they were watery due to the distance that I was away from him). When Trooper Kinder was searching Mr. Verser's person I noticed the odor of intoxicants about his breath. I then heard Trooper Kinder advise Mr. Verser that he had a right of an attorney.

I followed Trooper Kinder back to the SO. Later that night I spoke with Mrs. Bierbaum regarding her "Client" Mr. Verser. I informed her that she would be allowed to speak with Mr. Verser after the booking process (at that time the Trooper was finished with the BAC and was involved with the booking process).

I certify under penalty of perjury under the Laws of the State of Washington that the foregoing statement(s) are true and correct.

Date : 02-05-03 City : Port Hadlock, WA

Officers Signature : 
Brett Ambler

COURT OF APPEALS
DIVISION II

11 JUN 30 PM 4:32

STATE OF WASHINGTON
BY _____
DEPUTY

NO. 39672-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

ELINOR JEAN TATHAM,

Respondent,

vs.

JAMES CRAMPTON ROGERS,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On June 30, 2011, I served the following documents:

REPLY BRIEF OF APPELLANT

**APPELLANT'S MOTION FOR LEAVE TO PRESENT
ADDITIONAL EVIDENCE ON APPEAL**

on the following attorney VIA US MAIL:

Peggy Ann Bierbaum
800 Polk Street Suite B
Port Townsend, WA 98368-6557


Deborah A. Groth

ORIGINAL